

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4532

Appeal MA22-00116

Hamilton Police Services Board

June 17, 2024

Summary: The appellant submitted a request under the *Act* for records related to all motor vehicle collisions involving him in 2020 and 2021 and the police located responsive records for two incidents. Portions of records for the first incident were withheld under sections 38(a) (discretion to refuse requester's own information) read with section 8(1)(l) (facilitate commission of an unlawful act) and 38(b) (personal privacy), while records for the second were excluded from the *Act* under section 52(2.1) (ongoing prosecution), and in the alternative were withheld under sections 38(b) and 38(a) read with sections 8(1)(l) and 15(a) (information published or available to the public). The appellant also claimed that the police did not conduct a reasonable search for records.

In this order, the adjudicator upholds the decision of the police for the first incident and upholds the search of the police as reasonable. For the second incident, he finds that that the section 52(2.1) exclusion does not apply because the prosecution had been completed during the inquiry. He finds that the records are not exempt from disclosure under section 15(a) because, while they are available to the appellant through an alternative disclosure process, they are not available to the general public. He finds that the section 38(b) exemption applies to the withheld records, with the exception of a witness statement provided by the appellant. He orders the police to disclose this witness statement to the appellant.

Statutes 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"), 8(1)(l), 14(2)(f), 14(3)(b), 15(a), 17, 38(a), 38(b), and 52(2.1).

Order Considered: Order MO-3216.

OVERVIEW:

[1] The Hamilton Police Services Board (the police) received an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for all information related to motor vehicle collisions involving the requester in 2020 and 2021.

[2] The police identified records related to a motor vehicle accident (Incident 2) as responsive to the request and issued a decision, advising that the responsive records were excluded from the application of the *Act* under section 52(2.1), the exclusion for records relating to an ongoing prosecution.

[3] After discovering another incident that occurred earlier (Incident 1), the police issued a second access decision. In the second decision, the police granted partial access to an occurrence report and officer's notes related to Incident 1, with access to the remaining information denied under section 38(a) (discretion to refuse requester's own information), read with sections 8(1)(e) (endanger life and safety) and 8(1)(l) (facilitate commission of an unlawful act) of the *Act*. They also claimed section 14(1) (personal privacy) of the *Act* to withhold information.¹ The police withheld some information from the officer's notebook entries as it was deemed non-responsive to the request. The police advised that they were maintaining their decision in relation to the responsive records for Incident 2.

[4] In its second decision, the police indicated that a search was conducted for photos regarding Incident 1 and none were found. The police also indicated that, as motor vehicle reports and statements can be purchased through their traffic office, this information was exempt from disclosure under section 15(a) (information published or available to the public) of the *Act*.

[5] The requester (now appellant) appealed the police's decision to the Information and Privacy Commissioner of Ontario (IPC). During mediation, the police confirmed that Incident 2 was still before the courts and maintained that the records for that incident are excluded under section 52(2.1). The appellant confirmed that he is pursuing access to those records.

[6] The police attempted to obtain consent from the affected party identified in Incident 1 and were unsuccessful. The appellant confirmed that he is still seeking this withheld information and disputed that the records for Incident 1 were publicly available. The police raised the application of section 38(a) read with section 15(a) of the *Act*, as the withheld information related to the appellant. The appellant confirmed that he is not seeking access to non-responsive information and information of this nature is

¹ While the police's decision cited section 14(2)(f) and 14(3)(b) as the basis for refusing to disclose information in the records, section 14(2)(f) is a factor and section 14(3)(b) is a presumption used to determine whether the personal privacy exemption in section 14(1) applies. Accordingly, the appropriate exemption is section 14(1) of the *Act*.

accordingly not at issue in this appeal.

[7] The appellant further stated that he believes additional records responsive to his request exist, particularly information that the police provided to the appellant's insurance company. The police confirmed that the insurance company can access the Motor Vehicle Accident Report through alternative disclosure processes but stated that no further responsive records exist. The appellant confirmed that he believes that additional records documenting the nature and extent of the interactions between the police and his insurance company exist.

[8] No further mediation was possible and this appeal was transferred to the adjudication stage of the appeals process. The adjudicator initially assigned to the appeal decided to conduct an inquiry and sought and received representations from the police. The appeal was then assigned to me to complete the inquiry. I sought representations from the appellant. He did not provide substantive representations, but confirmed that he continued to seek the records at issue in the appeal. I additionally sought confirmation from the police that they were relying on the section 52(2.1) exclusion. Representations were shared in accordance with the IPC's *Code of Procedure*.

[9] For the reasons that follow, I partially uphold the police's decision. I uphold the police's decision for records related to Incident 1 and uphold the police's search as reasonable. I find that records related to Incident 2 are not excluded under section 52(2.1), nor are they exempt from disclosure under section 15(a). I find that the section 38(b) exemption applies to the withheld records, with the exception of a witness statement provided by the appellant. I order the police to disclose this witness statement to the appellant.

RECORDS:

[10] The records at issue are outlined in the following table, along with the exemptions and exclusions initially claimed by the police. The page numbers are those assigned by the police, but "page" 4 in Incident 1 and "page" 14 in Incident 2 are audio recordings.

Incident 1 (7 pages)²	Report – pages 1-2	Section 38(a) read with sections 8(1)(e) and 8(1)(l)
	911 call chronology – page 3	Section 14(1)
	911 call recording – page 4	Section 14(1)

² Pages 8-9 are not at issue in this appeal.

	Officer's notes – pages 5-7	Section 38(a) read with Sections 8(1)(e) and 8(1)(l)
Incident 2 (13 pages)	Report – page 10	Section 52(2.1) In the alternative – sections 8(1)(e) and 8(1)(l); and section 14(1)
	911 call chronology – pages 11-13	Section 52(2.1) In the alternative – section 14(1)
	911 call recording – page 14	Section 52(2.1) In the alternative – section 14(1)
	Officer's notes – pages 15-17	Section 52(2.1) In the alternative – section 14(1)
	Officer's notes – pages 18-19	Section 52(2.1) In the alternative – section 14(1)
	Witness statement – pages 20-21	Section 52(2.1) In the alternative – section 14(1); and section 15(a) ³
	Witness statement – page 22	Section 52(2.1) In the alternative – section 15(a) ⁴

ISSUES:

- A. Does the section 52(2.1) exclusion for records relating to an ongoing prosecution apply to the records for Incident 2?
- B. Do the records at issue contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

³ During mediation, the police advised that this record would be accessed through the traffic office, not through the freedom of information process.

⁴ The police made the same comment as above for this record.

- C. Does the discretionary exemption at section 38(a), allowing an institution to refuse access to a requester's own personal information, read with section 15(a) for published information or information available to the public apply to the occurrence report and witness statements for Incident 2?
- D. Does the discretionary exemption at section 38(a), allowing an institution to refuse access to a requester's own personal information, read with the section 8(1)(l) exemption for law enforcement, apply to the police codes in the report, 911 call chronology, and officers' notes in Incident 1 and similar information in Incident 2?
- E. Does the discretionary personal privacy exemption at section 38(b) apply to the 911 calls and chronologies for Incident 1 and Incident 2, and officers' notes and witness statement for Incident 2?
- F. Did the police exercise their discretion under sections 38(a) and 38(b)? If so, should the IPC uphold the exercise of discretion?
- G. Did the police conduct a reasonable search for records?

DISCUSSION:

Issue A: Does the section 52(2.1) exclusion for records relating to an ongoing prosecution apply to the records for Incident 2?

[11] Section 52(2.1) of the *Act* excludes records relating to an ongoing prosecution from the *Act*. If it applies, the *Act's* access scheme does not apply to them. The police have claimed this exclusion for all records relating to Incident 2.

[12] The purposes of section 52(2.1) include maintaining the integrity of the criminal justice system, ensuring that the accused and the Crown's right to a fair trial is not infringed, protecting solicitor-client privilege and litigation privilege, and controlling the sharing and publication of records relating to an ongoing prosecution.⁵

Section 52(2.1) states:

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

[13] The term "prosecution" in section 52(2.1) means proceedings in respect of a criminal or quasi-criminal charge brought under an Act of Ontario or Canada. A "prosecution" may include prosecuting a regulatory offence that carries "true penal

⁵ *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991, March 26, 2010, Tor. Doc. 34/91 (Div. Ct.).

consequences” such as imprisonment or a significant fine.⁶

[14] The section 52(2.1) exclusion is generally claimed by an institution that is the prosecuting authority. The exclusion has not been limited to the Crown/prosecution brief, and has been found to apply to records in the control of investigating authorities and third parties. For the exclusion to apply, there must be “some connection” between the records and the case to be made by the prosecuting authority.⁷

[15] The phrase “in respect of” requires some connection between “a proceeding” and “a prosecution.”⁸ All proceedings in respect of the prosecution have been completed only after any relevant appeal periods have expired. Whether a prosecution has been “completed” depends on the facts of each specific case.⁹

Representations, analysis, and finding

[16] As noted above, the appellant did not provide substantive representations in this appeal. The police submit that Incident 2 was before the courts at the time that the request was received and at the time the decision was issued. They also provided evidence from a search of their database showing that the matters were before the courts. They state that any of the records at issue related to Incident 2 would have a direct connection to the case being presented before the courts.

[17] The police submit that, at the time of their representations, they learned that the proceedings related to Incident 2 had been completed, and state that the appellant could submit a new access request for the information for which they had claimed the exclusion. They also state that the appellant can purchase the motor vehicle collision report and witness statements through an alternative disclosure process.

[18] After receiving the representations of both parties, I sought confirmation that the police were continuing to rely on the section 52(2.1) exclusion, despite the prosecution having been completed. The police confirmed that they continue to rely on it, stating that the appellant could submit another access request, and the response would not rely on the exclusion.

[19] Considering the circumstances of the appeal, I find that the police are incorrectly relying on the exclusion if the prosecution they are referencing has been completed. Previous IPC orders regularly and routinely address whether the prosecution is ongoing during the inquiry, rather than at the time of the access decision, and consider this when

⁶ Order PO-2703.

⁷ *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, cited above; see also *Canada (Information Commissioner) v. Canada (Commissioner, RCMP)*, 2003 SCC 8, [2003] 1 S.C.R. 66 at para. 25, and Order MO-3919-I.

⁸ *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, cited above; see also *Canada (Information Commissioner) v. Canada (Commissioner, RCMP)*, 2003 SCC 8, [2003] 1 S.C.R. 66 at para. 25.

⁹ Order PO-2703.

determining if the exclusion applies.¹⁰

[20] While I appreciate that it is open to the appellant to submit another access request, I do not agree that it is appropriate to require that he do so if the present one is being appealed to the IPC and the circumstances of the request change, in this case the ongoing prosecution being completed. I find that, with the prosecution already having been completed at the time of the police's representations, they cannot rely on the prosecution exclusion, and I will determine if any exemptions apply to the records, below.

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

[21] Before I consider the exemptions claimed by the police for the records at issue, I must first determine if the records contain "personal information." If they do, I must determine if the personal information belongs to the appellant, other identifiable individuals, or both. "Personal information" is defined in section 2(1) of the *Act* as "recorded information about an identifiable individual."

[22] 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. Information is about an "identifiable individual" if it is reasonable to expect that an individual can be identified from the information either by itself or if combined with other information.¹¹ Section 2(1) of the *Act* gives a list of examples of personal information.

[23] There is no dispute among the parties that the records contain information that qualifies as the personal information of the appellant and other individuals.

[24] I have reviewed the records and I find that they all contain information about the appellant and other drivers involved in the two incidents, such as the names of the appellant and other drivers and witnesses, their license plate numbers, and descriptions of their involvement in the incidents, all of which constitute personal information under the *Act*.

[25] Having found that the records contain the personal information of the appellant and other individuals, I will consider the application of the personal privacy exemptions at section 38(b) and section 38(a).

Issue C: Does the discretionary exemption at section 38(a), allowing an institution to refuse access to a requester's own personal information, read

¹⁰ See, for example, Orders MO-4274 and MO-4197, where the adjudicators considered whether the proceedings being referenced were ongoing at the time that the order was written.

¹¹ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

with section 15(a) for published information or information available to the public apply to the occurrence report and witness statements for Incident 2?

[26] 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 general right of access to one's own personal information.

[27] Section 38(a) of the *Act* reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

if section 6, 7, 8, 8.1, 8.2, 9, 9.1, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

[28] The discretionary nature of section 38(a) recognizes the special nature of requests for one's own personal information and the desire of the Legislature to give institutions the power to grant requesters access to their own personal information.¹²

[29] In this case, the police claimed that the witness statements for Incident 2 were available for purchase through their traffic office, and therefore exempt under section 15(a). As I have found that the records contain the appellant's personal information, the correct exemption to claim is section 38(a), read with section 15(a).

[30] Although the police did not claim section 15(a) for the Incident 2 occurrence report, instead claiming section 14(1) to withhold it (and 52(2.1), discussed above, to exclude it from the application of the *Act*), in their representations they submit that the report is also available for purchase through the traffic office. As such, I will also consider if the report and witness statements for Incident 2 are exempt from disclosure under section 38(a), read with section 15(a).

[31] Section 15 of the *Act* allows an institution to withhold records if the information in the records has been published or is already available to the public, or if it is soon to be published. This exemption is intended to allow an institution to refer a requester to a publicly available source of information, and to protect information that has not yet been published.

[32] Section 15(a) states:

A head may refuse to disclose a record if,

the record or the information contained in the record has been published or is currently available to the public;

¹² Order M-352.

[33] Section 15(a) is intended to provide an institution with the option of referring a requester to a publicly available source of information where this is a more convenient way to access the information. It is not intended to be used in order to avoid an institution's obligations under the *Act*.¹³ In order to rely on the section 15(a) exemption, the institution must take adequate steps to ensure that the record that they allege is publicly available is the same record that was requested.¹⁴

[34] The institution must establish that the record is available to the public generally, through a "regularized system of access," such as a public library or a government publications centre.¹⁵

[35] To establish that a regularized system of access exists, the institution must show that:

- a system exists,
- the record is available to everyone, and
- there is a pricing structure applied to all who wish to obtain the information.¹⁶

Representations, analysis, and finding

[36] The police submit that the occurrence report and witness statements are available for the appellant to purchase through their traffic office, and therefore are exempt under section 15(a). In support of their position, they provided information from their database showing that the appellant had not attempted to purchase the records, and they submit that he is currently able to do so. The appellant did not provide specific representations on this exemption.

[37] I agree that, based on the information provided by the police, the appellant is able to purchase the records through an alternative disclosure process. However, as discussed above, this is not sufficient to engage the section 15(a) exemption: the records must be available to everyone, not just the appellant or other parties involved in the incidents.

[38] A similar situation was considered in Order MO-3216, where records available to the appellant were found to not be exempt from disclosure under section 15(a) because they were not available to the public generally. Here, the police have not provided evidence or otherwise claimed that the records are available to the general public. Indeed, their website, referring to the process for obtaining a copy of a collision report or witness statement, specifically states the following:

¹³ Orders P-327, P-1114 and MO-2280.

¹⁴ Order MO-2263.

¹⁵ Orders P-327, P-1387 and MO-1881.

¹⁶ Order MO-1881.

Information on an accident report will only be released to:

- The person or company directly involved
- The law firm whose client is directly involved
- The insurance company whose insured is directly involved¹⁷

[39] Considering this, although the appellant does appear to have the option of purchasing the records through alternative disclosure mechanisms, I find that the section 15(a) exemption does not apply. Having found that the records are not publicly available within the meaning of section 15(a), I will consider the other exemptions claimed by the police.

Issue D: Does the discretionary exemption at section 38(a), allowing an institution to refuse access to a requester's own personal information, read with the section 8(1)(l) exemption for law enforcement, apply to the police codes in the report, 911 call chronology, and officers' notes in Incident 1 and similar information in Incident 2?

[40] As outlined above, 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 general right of access to one's own personal information.

[41] The police claimed section 38(a), read with sections 8(1)(e) and 8(1)(l) for the police codes in the report and officers' notes for Incident 1 that were previously disclosed to the appellant, as well as in the report for Incident 2. Although they did not claim the exemption for the 911 call chronology in Incident 1, or the 911 call chronology and officers' notes in Incident 2 (instead withholding them in their entirety under other exemptions), based on their overall representations I find that they are also claiming the exemption for these portions of the records.

[42] Section 8 contains several exemptions from a requester's right of access, mostly related to the law enforcement context.

[43] 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.¹⁸

[44] However, 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

¹⁷ The polices' website's instructions for obtaining a collision report can be found here: <https://hamiltonpolice.on.ca/about/sections-units/records-department/obtaining-motor-vehicle-collision-report> (accessed June 17, 2024).

¹⁸ *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

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*.¹⁹

[45] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.²⁰ 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.²¹

[46] The police rely on section 38(a), read with section 8(1)(l). Section 8(1)(l) states:

A head may refuse to disclose a record if the disclosure could reasonably be expected to, facilitate the commission of an unlawful act or hamper the control of crime[.]

[47] The police submit that police codes are used to convey specific messages between police colleagues in a covert way, and if individuals understand these codes there is a reasonable risk that the life or physical safety of law enforcement officers will be endangered.

[48] The appellant did not provide representations on this exemption.

[49] It has been determined in previous IPC decisions that the use of operational codes by law enforcement is an effective and efficient means of conveying a specific message without publicly identifying its true meaning, and that if the public were to learn these codes and their meanings, the effectiveness of the codes would be compromised. This could result in the risk of harm to police personnel and members of the public with whom the police engage, such as victims and witnesses.²² I find that these considerations remain relevant here, and there is no reason to vary the approach taken to the operational codes withheld in this appeal.

[50] Therefore, I uphold the police's decision to withhold certain information in the records under section 38(a), read with section 8(1)(l), subject to my review of the police's exercise of discretion.

[51] Having found that the police codes withheld under section 38(a) read with section 8(1)(l), are exempt from disclosure, it is not necessary to also consider the police's reliance on section 38(a), read with section 8(1)(e).

¹⁹ Orders MO-2363 and PO-2435.

²⁰ *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

²¹ *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.

²² See, for example, Orders MO-3622, MO-3815, MO-3977, and MO-4439.

Issue E: Does the discretionary personal privacy exemption at section 38(b) apply to the 911 calls and chronologies for Incident 1 and Incident 2, and officers' notes and witness statement for Incident 2?

[52] In their index of records, the police claimed section 14 for pages 10-21 for Incident 2, and pages 3 and 4 for Incident 1. Having found that the records contain the appellant's personal information, the correct personal privacy exemption is section 38(b).

[53] Under section 38(b), where a record contains personal information of both the appellant and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the appellant. Determining this involves a weighing of the appellant's right of access to their own personal information against the other individual's right to privacy protection.

[54] 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.

[55] 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). Additionally, 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.²³

[56] Sections 14(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy under section 38(b). If any of the five exceptions in sections 14(1)(a) to (e) apply, the section 38(b) exemption does not apply to the report.

[57] Section 14(4) sets out certain types of information whose disclosure is not an unjustified invasion of personal privacy. The appellant did not provide representations on the section 14(1) exceptions and the police submit that they do not apply. Based on my review of the records they are not relevant to the appeal. Neither party provided representations on the section 14(4) situations, and based on my review of the records they are also not relevant to the appeal.

[58] Section 14(2) provides a list of factors for the police to consider in making this determination, while section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. In their representations, the police have relied on the presumption in section 14(3)(b) and the factor in section 14(2)(f):

²³ Order PO-2560.

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

(b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation

(2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

(f) the personal information is highly sensitive

[59] In determining whether the disclosure of the names of other individuals would be an unjustified invasion of personal privacy under section 38(b), therefore, I will consider and weigh the relevant factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.²⁴

Representations

[60] The police submit that any personal information in the records other than the appellant's should be withheld, stating that police officers often act as mediators and document the information they receive when responding to incidents. They state that parties should be able to freely express their views and concerns without fear of reprisal or retribution, and that information collected by police must be safeguarded.

[61] The police submit that the information in the records was compiled as part of an investigation into a possible violation of law, specifically relating to motor vehicle collisions involving the appellant and other parties. They state that the records were created in the course of an investigation into possible *Highway Traffic Act* violations. Referencing Order PO-1849, they submit that section 14(3)(b) only requires that there be an investigation. Referencing the section 14(2)(f) factor, the police also submit it applies, stating that "all personal information is regarded as highly sensitive" and section 14 generally balances the public's right to access records with the individual's right to privacy.

[62] The police acknowledge that the records contain information provided by the appellant to the police, but state that withholding this information would not lead to an absurd result because the information is available for purchase through alternative means, referring to the alternative disclosure processes that the police maintain.

[63] The appellant did not provide representations on whether section 38(b) applies to the records, but generally stated he was seeking any information related to the officers' notes in reviewing surveillance videos and allegedly identifying him.

²⁴ Order MO-2954.

Analysis and finding

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

[64] Under section 14(3)(b), the disclosure of an individual's personal information to another individual is presumed to be an unjustified invasion of personal privacy if the personal information:

... was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation of law or to continue the investigation.

[65] Even if no criminal proceedings were commenced against any individual, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of the law.²⁵ Based on my review of the records, the information in all of the records was compiled as part of investigations into two motor vehicle collisions, engaging the presumption against disclosure in section 14(3)(b).

[66] In the circumstances of this appeal, where the record at issue contains the personal information of the appellant and other parties, this presumption is not determinative, but instead a rebuttable presumption that can be weighed against the other relevant factors in section 14(2) below.²⁶

14(2)(f): Highly sensitive information

[67] The police submit that the information at issue is highly sensitive, engaging the factor weighing against disclosure in section 14(2)(f). While I agree that it is generally the case that information provided to the police by individuals involved in the context of a law enforcement investigation is highly sensitive, I do not find that this is the case in all situations. Previous IPC orders have found that whether the name and address of an individual is highly sensitive information should be decided on the facts of the particular case.²⁷

[68] In this particular appeal, considering that the police have stated that much of the records are available through alternative disclosure processes, and that they have disclosed the report for Incident 1 that they claim is highly sensitive for Incident 2 (with no reasons provided for this distinction) and the very limited submissions on why the specific information is highly sensitive, I find that the police have not established that this factor applies to weigh in favour of withholding the information.

²⁵ Orders P-242 and MO-2235.

²⁶ Order MO-2954.

²⁷ See, for example, MO-2980.

Balancing the presumption and the interests of the parties, and absurd result

[69] Although I have found that the section 14(2)(f) factor does not apply to the withheld information, I have found that the section 14(3)(b) presumption against disclosure applies. Without any submissions from the appellant on the factors favouring disclosure or generally on why the information should be disclosed, I find that the section 14(3)(b) presumption applying to the information means that the disclosure of the information at issue would be an unjustified invasion of personal privacy. I have reached this conclusion in consideration of the nature of the information at issue and the access and privacy rights of the parties involved in the incidents.

[70] However, I also find that withholding one record, specifically a witness statement that was provided by the appellant, would lead to an absurd result. An institution might not be able to rely on the section 38(b) exemption in cases where the requester originally supplied the information in the record, or is otherwise aware of the information contained in the record. In this situation, withholding the information might be absurd and inconsistent with the purpose of the exemption.²⁸ However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply.²⁹

[71] Previous IPC decisions have consistently applied the absurd result principle when a requester is seeking access to their own witness statement.³⁰ I adopt and apply this reasoning here. The entirety of the witness statement was provided to the police by the appellant, and as such, I find that withholding it would be inconsistent with the purpose of the personal privacy exemption. I order that the witness statement provided by the appellant for Incident 2 be disclosed in its entirety.³¹

Issue F: Did the police exercise their discretion under sections 38(a) and 38(b)? If so, should the IPC uphold the exercise of discretion?

[72] The sections 38(a) and 38(b) exemptions are discretionary and permit an institution to disclose information, despite the fact that it could withhold it. Having found that the records in this appeal are exempt under sections 38(a) and 38(b), I must next determine if the police properly exercised their discretion in withholding the information. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[73] The IPC may find that an institution erred in exercising its discretion where, for example,

²⁸ Orders M-444 and MO-1323.

²⁹ Orders M-757, MO-1323 and MO-1378.

³⁰ See, for example, Orders M-444 and M-451.

³¹ The police did not initially claim section 38(b) to withhold this statement, relying solely on the section 52(2.1) exclusion and section 15(a). However, during the inquiry they provided general representations on the application of the 38(b) exemption for all records in Incident 2 and it is for this reason that I have considered this argument.

- 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.

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

Representations, analysis and finding

[75] The police submit that they exercised their discretion properly, stating that decisions are always arrived at in good faith, taking into account all relevant considerations and the importance of protecting the privacy of affected parties. They state that discretion was exercised to provide access to some records that were available through alternative disclosure, and that they were willing to disclose access to additional information if consent was obtained. They state that they considered various factors in exercising their discretion, including that individuals should have access to their own information, that exemptions from this right should be limited and specific, that the privacy of individuals should be protected, that police coding should be protected for officers' safety, and that the records at issue are available through alternative disclosure processes.

[76] The appellant did not provide representations on the police's exercise of discretion.

[77] I have reviewed the considerations relied upon by the police and I find that they properly exercised their discretion in deciding to apply the relevant exemptions. Based on the police's representations, they considered the purposes of the *Act* and generally sought to balance the appellant's interest in accessing the records with the protection of the privacy of other parties when making their access decision.

[78] I find that the police did not exercise their discretion for any improper purpose or in bad faith, and that there is no evidence that they failed to take relevant factors into account or that they considered irrelevant factors. I uphold the police's exercise of discretion in denying access to the records at issue.

Issue G: Did the police conduct a reasonable search for records?

[79] The appellant also claims that the police should have located additional records. If a requester claims that additional records exist beyond those found by the institution, the issue is whether the institution has conducted a reasonable search for records as required

³² Order MO-1573.

³³ Section 43(2) of the *Act*.

by section 17 of the *Act*.³⁴ If the IPC is satisfied that the search carried out was reasonable in the circumstances, it will uphold the institution's decision. Otherwise, it may order the institution to conduct another search for records.

[80] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, they still must provide a reasonable basis for concluding that such records exist.³⁵ The *Act* does not require the institution to prove with certainty that further records do not exist. However, the institution must provide enough evidence to show that it has made a reasonable effort to identify and locate responsive records;³⁶ that is, records that are "reasonably related" to the request.³⁷

[81] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request, makes a reasonable effort to locate records that are reasonably related to the request.³⁸ The IPC will order a further search if the institution does not provide enough evidence to show that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.³⁹

[82] The police provided an affidavit from one employee who conducted a search for records related to Incident 1, and an explanation of the searches done by another employee for records related to Incident 2. The affidavit and explanation outline the employees' experience in conducting records searches at the institution and provided an overview of how searches for records responsive to the appellant's access request were conducted.

[83] The appellant did not provide representations on the polices' search efforts, or otherwise dispute or take issue with the polices' explanation of how the searches were conducted. Based on the information before me, and without any arguments from the appellant, I am satisfied that the police had experienced employees knowledgeable in the subject matter of the request expend a reasonable effort to locate records which are reasonably related to the request. I find that the search conducted by the police was reasonable.

ORDER:

1. I uphold the decision of the police to withhold the information at issue for Incident 1 and uphold their search as reasonable.

³⁴ Orders P-85, P-221 and PO-1954-I.

³⁵ Order MO-2246.

³⁶ Orders P-624 and PO-2559.

³⁷ Order PO-2554.

³⁸ Orders M-909, PO-2469 and PO-2592.

³⁹ Order MO-2185.

2. For Incident 2, I find that the records are not excluded from the scope of the *Act*, but I find that they are exempt from disclosure, with the exception of the appellant's witness statement (identified as page 22 in the index of records).
3. I order the police to disclose the appellant's witness statement by **July 22, 2024** but not before **July 17, 2024**.
4. In order to verify compliance with Order provision 3, I reserve the right to require the police to provide me with a copy of the record disclosed to the appellant.

Original Signed by: _____
Chris Anzenberger
Adjudicator

_____ June 17, 2024