Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2844

Appeal MA10-405

Peel Regional Police Services Board

Feb 13, 2013

Summary: The appellant's lawyer submitted a request to the Peel Regional Police Services Board for records relating to a named individual, referring to two occurrence reports. The police granted partial access to the records they identified as responsive to the request, withholding some portions pursuant to section 38(b) (personal privacy). At mediation, the police sought to raise the application of section 8(1)(l), in conjunction with section 38(a) to the police codes that appear in the records. With some limited exceptions, the appellant sought access to all the withheld information, and claimed that it was in the public interest that it be disclosed. The appellant also took issue with the scope of the appeal, whether the information the police identified as non-responsive was in fact responsive to the request and the reasonableness of the police's search for responsive records.

In this order, the adjudicator permits the late raising of section 38(a) in conjunction with section 8(1)(l) and finds the police codes to be exempt under those sections. He further determines that the scope of the appeal pertains to information related only to the two occurrence reports identified in the request and not to other occurrence reports and that with one exception the police have properly identified the responsive information. The adjudicator also determines that the police have conducted a reasonable search for responsive records, and except for certain information that does not qualify as personal information, the balance of the withheld responsive information is exempt under section 38(b). Finally, the adjudicator finds

that the public interest override at section 16 does not apply in the circumstances of this appeal.

Statutes Considered: *The Constitution Act, 1982*, section 7; *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 2(1) (definition of personal information), 8(1)(l), 14(1)(b), 14(2)(a), 14(2)(b), 14(2)(d), 14(2)(f), 14(2)(h), 14(3)(b), 14(3)(d), 16, 17, 38(a), 38(b).

Orders Considered: MO-1378, MO-1436, MO-1498, MO-1664, MO-2019, P-984, PO-1779, PO-2113, PO-2167, PO-2236, PO-2285, PO-2541.

OVERVIEW:

[1] The Peel Regional Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFFIPA* or the *Act*) from the appellant's lawyer for access to information. The request was worded in the following way:

> I hereby request copies of the following records and information from the [police] regarding [a named individual], occurrence [specified occurrence report number] and [specified occurrence report number]:
>
>> (i) Any information pertaining to the identities of individuals who may have hired, or who were associated with, [the named individual], that [the named individual] may have disclosed or that the police may have discovered during the course of the investigation;
>>
>> (ii) Any and all notes taken or made by police officers of any statements made by [the named individual];
>>
>> (iii) Any and all notes made by police officers during the course of their investigation into the incident(s) forming part of the occurrence(s);
>>
>> (iv) Any and all of the records that formed part of, or that would have formed part of, the Crown's disclosure to [the named individual]; and
>>
>> (v) Any other records in the [police's] file(s), both electronic and hardcopy, for [the named individual] and occurrence numbers.

[2] In response, the police issued an initial decision letter setting out a fee of $81.80 to process the access request. Upon receipt of payment of the fee, the police processed

the request and granted partial access to the records they identified as responsive to the request relying on the exemption at section 38(b) (personal privacy) to deny access to the portion they withheld. Among the responsive records partly disclosed to the appellant were videotapes of two interviews that the police conducted of the appellant. Three other videotapes of interviews that the police conducted of two affected parties were withheld in full.

[3] The appellant appealed the police's decision to this office.

[4] At mediation, the appellant asserted that it is in the public interest that the withheld information be disclosed. Accordingly, the possible application of section 16 (public interest override) of the *Act* was added as an issue in the appeal. The appellant also took issue with the reasonableness of the police's search for responsive records, asserting that additional occurrence reports relating to him ought to exist. In response, the police took the position that they conducted a reasonable search for responsive records and that any occurrence reports that related to the appellant, other than the ones indicated in the request, would fall outside the scope of the request. The police asserted that a new request would have to be filed if the appellant sought access to other occurrence reports. The appellant then took issue with the manner in which the police characterized the scope of the request. As a result, the scope of the request and the reasonableness of the police's search for responsive records were also added as issues in the appeal.

[5] Also at mediation, the police advised that certain portions of the identified records contain information that is not responsive to the request. In addition, the police advised the mediator that they intended to rely on section 8(1)(l) of the *Act* (facilitate unlawful act) to withhold access to certain police codes that are contained in the responsive records. As the records containing the codes also contain the appellant's personal information, this raised the possible application of the discretionary exemption at section 38(a) (discretion to refuse to disclose requester's own information) in conjunction with section 8(1)(l) of the *Act*. Also at mediation, the police advised that at the request stage they had obtained the consent of a party whose interests may be affected by disclosure to disclose any of their information that may appear in the responsive records. The police advised that they did not notify any other affected party. The mediator's attempts to contact two affected parties during mediation regarding their position on disclosure were unsuccessful. However, the police ultimately decided to reconsider their position with respect to withholding the name of a fourth affected party and issued a supplementary decision letter releasing this individual's name to the appellant.

[6] The appellant then indicated that he continues to seek access to:

- the information the police identified as non-responsive to the request,
- the police codes,
- the three withheld videotapes,
- the photograph "of the accused" that was severed from one of the disclosed videotapes of the appellant's interviews with the police, and
- the officers' notes,

[7] He also advised that he no longer seeks access to the photographs of other individuals that were part of a photo line-up that was severed from the disclosed videotapes of the appellant's interviews with the police. Accordingly, that information is no longer at issue in the appeal.

[8] Mediation did not resolve the matter and it was moved to the adjudication stage of the inquiry process, where an adjudicator conducts an inquiry under the *Act*.

[9] I commenced the inquiry by inviting representations from the police and two affected parties on the facts and issues set out in a Notice of Inquiry. Only the police provided responding representations. I then sent a Notice of Inquiry to the appellant along with the non-confidential representations of the police. The appellant provided responding representations. I determined that the appellant's representations raised issues to which the police should be provided an opportunity to reply. Accordingly, I sent a letter to the police along with the appellant's representations inviting their reply representations. The police provided reply representations.

RECORDS:

[10] At issue in this appeal are videotapes of the police interviews of two affected parties, the photograph "of the accused" that was severed from one of the disclosed videotapes of the appellant's interviews with the police, the withheld portions of the occurrence report's identified in the request as well as police officers' notes.

ISSUES:

A. What is the scope of this appeal?

B. What information in the records at issue is responsive to the request?

C. Did the police conduct a reasonable search for responsive records?

D. Should the police be permitted to rely on section 38(a), in conjunction with section 8(1)(l) of the *Act*, to deny access to police codes?

E. Do the records contain personal information?

F. Does the discretionary exemption at section 38(a), in conjunction with section 8(1)(l) of the *Act*, apply to the police codes in the records?

G. Does the discretionary exemption at section 38(b) apply to the personal information in the records?

H. Would it be absurd to withhold the photograph "of the accused" that was severed from one of the disclosed videotapes?

I. Can the records be reasonable severed without disclosing information which is exempt?

J. Did the police appropriately exercise their discretion?

K. Is there a public interest in the disclosure of information found to be exempt under the *Act*?

DISCUSSION:

A. What is the scope of this appeal?

[11] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record: and
>
> …
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[12] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[1]

[13] The police submit that the request was detailed and specific and identified specific occurrence reports by their numbers. The police also submit that in the course of reviewing the police officers' notes they identified and severed non-responsive information relating to other incidents that did not pertain to the request, or to any of the parties involved in the two occurrences identified in the request.

[14] The appellant submits that the police unreasonably narrowed the scope of the request and that "the inclusion of occurrence numbers was merely for reference." The appellant submits that:

> … the request was worded [in that manner] given the information received by the officer-in-charge of the file, who advised [the appellant] that all materials in relation to [the appellant's] matter were filed under the occurrence numbers [indicated in the request], including his father's assault. It would be unreasonable to expect [the appellant] to be knowledgeable about the relevant occurrence numbers without access to the filing procedures of [the police].

[15] The appellant submits that given the "limited access to police procedural information", the appellant's access request was broad enough to cover other occurrence reports dating back to 2003. The appellant further submits that:

> Even in his notes, the officer confirms the fact that these occurrences were related. To acknowledge the connection between these occurrences both to [the appellant] and in their notes, and then claim that the records are non-responsive is a blatant attempt by the police to use the provisions of the *Act* as a shield to conceal relevant information.

[16] In reply, the police submit that throughout the process they were in contact with the appellant's lawyer and, after receiving the appellant's consent to the release of his own information from the appellant's lawyer, the request was amended, but only to the extent that the request was changed by adding "access to own personal information" in addition to "access to general records". The police further submit that the lawyer's accompanying letter stated that other than the noted change, the "request in all other aspects remains the same". The police submit that both the appellant and his representative "made the request clear and specific as to what they were seeking."

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[1] Orders P-134 and P-880.

Analysis and Finding

[17] I have reviewed the file and the representations and I find that the scope of the appeal is clearly and unambiguously set out in the initial and amended request. It pertains to information related only to the two occurrence reports identified in the initial and amended request and not to other occurrence reports, unless the information is found in the notes or records that the police identified as responsive to the initial and amended request. Should the appellant seek access to information related to other occurrence reports he remains free to make an access request for information relating to them, in accordance with the provisions of the *Act*.

B. What information in the records at issue is responsive to the request?

[18] To be considered responsive to the request, records must be "reasonably related" to the request.[2]

[19] The police submit that:

> In the course of reviewing the police officer's notes, there were some instances where they contained non-responsive [information] which [was] severed. This … would include the officers' notes pertaining to other incidents non-related to this request or any of the parties involved.

[20] The appellant makes no specific representations on this issue, but state that except for the information discussed in the Overview above, he seeks access to all of the other withheld information at issue in the appeal.

Analysis and Finding

[21] The most significant portions of the information the police identified as non-responsive can be found in the copies of the police officers' notes. The police officers' notes describe in detail all tasks undertaken and the incidents referred to in the course of an officers' day, including in this appeal, those that describe other occurrences which do not involve the subject matter of the request.

[22] My review of these records confirms that many of the portions of the records indicated to be non-responsive are not responsive to the request because they deal with unrelated matters or tasks or contain other unrelated information that that does not involve matters that fall within the scope of the request. Accordingly, I uphold the decision of the police to deny access to this information as being not responsive to the request. That said, a copy of a police officer's business card that the police withheld is,

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[2] Order PO-2554.

in my view, responsive to the request. Accordingly, I will order that the police make an access decision with respect to this information.

C. Did the police conduct a reasonable search for responsive records?

[23] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 of the *Act*.[3] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[24] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[4]

[25] As set out above, to be responsive, a record must be "reasonably related" to the request.[5]

[26] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[6]

[27] The police's representations describe in detail the steps they took to locate and identify responsive records.

[28] The appellant's position regarding the reasonableness of the search is two-fold. Firstly, by narrowly interpreting the scope of the request to be for information pertaining to the two specified occurrence numbers, the police failed to conduct a reasonable search for responsive records. Secondly, the appellant submits that:

> … he saw four banker's boxes of records that the police considered relevant and brought them to be presented in open court. If the records were available and ready to be disclosed in open court, then it would be inconsistent on the part of the police to refuse to disclose the same records and label them as "non-responsive" for this request.

[29] In reply, the police submit that:

> … four banker's boxes were not produced in court related to the case in question. The investigating officer has confirmed that one banker's box

[3] Orders P-85, P-221 and PO-1954-I.
[4] Orders P-624 and PO-2559.
[5] Order PO-2554.
[6] Order MO-2246.

> was used to transport files relevant to the court case to court and that the information contained within was provided to the Information and Privacy Unit for the purposes of responding to this request.

Analysis and Finding

[30] The scope of the request has been determined above, and need not be revisited. I am satisfied that the police's representations demonstrate that it made a reasonable effort to address the appellant's request, to locate and identify records that were responsive to it and to refute the appellant's allegation that there were four banker's boxes of responsive records. I have also reviewed the portions of the records that the police identify as being non-responsive and I am satisfied that, except for the police officer's business card discussed above, they relate to other matters that do not fall within the scope of the request. Although an appellant will rarely be in a position to indicate precisely which records the institution has not identified, the appellant still must provide a reasonable basis for concluding that such records exist. In my view, the appellant has not provided a reasonable basis for concluding that other responsive records exist. Accordingly, I am satisfied that the police conducted a reasonable search for responsive records.

D. Should the police be permitted to rely on section 38(a), in conjunction with section 8(1)(l) of the *Act*, to deny access to police codes?

[31] Section 11.01 of this office's *Code of Procedure* provides:

> In an appeal from an access decision, excluding an appeal arising from a deemed refusal, an institution may make a new discretionary exemption claim only within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

[32] In their initial decision letter, the police only claimed the application of the discretionary exemption at section 38(b) of the *Act*. At mediation, the police advised the mediator that they were relying on section 8(1)(l) of the *Act* to withhold access to certain police codes that are contained in the responsive records. As the records containing the police codes also contained the appellant's personal information, this raised the possible application of the discretionary exemption at section 38(a), in conjunction with section 8(1)(l) of the *Act*. The police explain in their representations that it was through oversight that it did not originally claim the application of section 8(1)(l) to the codes.

Analysis and Findings

[33] The purpose of this office's 35-day policy is to provide institutions with a window of opportunity to raise new discretionary exemptions, but only at a stage in the appeal where the integrity of the process would not be compromised and the interests of the requester would not be prejudiced. The 35-day policy is not inflexible, and the specific circumstances of each appeal must be considered in deciding whether to allow discretionary exemption claims made after the 35-day period.[7] The 35-day policy was upheld by the Divisional Court in *Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg*[8].

[34] In Order PO-2113, dealing with the provincial equivalent of the *Act*, Adjudicator Donald Hale set out the following principles that have been established in previous orders with respect to the appropriateness of an institution claiming additional discretionary exemptions after the expiration of the time period prescribed in the Confirmation of Appeal:

> In Order P-658, former Adjudicator Anita Fineberg explained why the prompt identification of discretionary exemptions is necessary in order to maintain the integrity of the appeals process. She indicated that, unless the scope of the exemptions being claimed is known at an early stage in the proceedings, it will not be possible to effectively seek a mediated settlement of the appeal under section 51 of the *Act*. She also pointed out that, where a new discretionary exemption is raised after the Notice of Inquiry is issued, this could require a re-notification of the parties in order to provide them with an opportunity to submit representations on the applicability of the newly claimed exemption, thereby delaying the appeal. Finally, she pointed out that in many cases the value of information sought by appellants diminishes with time and, in these situations, appellants are particularly prejudiced by delays arising from the late raising of new exemptions.
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> The objective of the 35-day policy established by this Office is to provide government organizations with a window of opportunity to raise new discretionary exemptions, but to restrict this opportunity to a stage in the appeal where the integrity of the process would not be compromised or the interests of the appellant prejudiced. The 35-day policy is not inflexible. The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.

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[7] Orders P-658 and PO-2113.

[8] (21 December 1995), Toronto Doc. 110/95, leave to appeal refused [1996] O.J. No. 1838 (C.A.).

[35] In the circumstances of this appeal, I am prepared to consider the application of section 38(a), in conjunction with section 8(1)(l), to the police codes that appear in the responsive records. In my view, the police's timing in claiming section 38(a), in conjunction with section 8(1)(l) has not resulted in any significant prejudice to the appellant, nor has it compromised the integrity of the process. This issue was raised at mediation and the appellant has had an opportunity to make representations on the application of section 38(a), in conjunction with section 8(1)(l), during the exchange of representations. The appellant chose not to provide any representations on the late raising of this discretionary exemption by the police. In the circumstances, I find that the prejudice to the police in disallowing its claim that section 38(a), in conjunction with section 8(1)(l) applies to the police codes in the records would outweigh any prejudice to the appellant in allowing it. As a result, I will consider the application of section 38(a), in conjunction with section 8(1)(l), in this appeal.

E. Do the records contain personal information?

[36] The discretionary personal privacy exemptions in sections 38(a) and 38(b) of *MFIPPA* apply to "personal information". Consequently, it is necessary to determine whether the records contain "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "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 where 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 the name would reveal other personal information about the individual;

[37] Sections (2.1) and (2.2) of the *Act* also relate to the definition of personal information. These sections state:

> (2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[38] In addition, previous IPC orders have found that to qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[9]

[39] However, previous orders have also found that even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[10]

[40] Having carefully reviewed the records at issue and the representations, I conclude that all of the records at issue contain the appellant's personal information within the meaning of the definition of personal information at section 2(1) of the *Act*, including his name, and the views of other individuals about him. Some of the records also contain the personal information of other identifiable individuals collected in the course of criminal investigations, including those who were witnesses in relation to the

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[9] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[10] Orders P-1409, R-980015, PO-2225 and MO-2344.

events alleged in the occurrence reports, or were investigated regarding any role that they may have had in those events. Furthermore, some of the records contain the employment history of police officers which qualifies as their personal information under paragraph (b) of the definition of personal information.

[41] That said, I find that some of the information in the records that was withheld does not, in my view, qualify as personal information. I have highlighted this information in green on the portion of the pages of the records that I have provided to the police along with a copy of this order. As this information does not qualify as personal information it cannot qualify for exemption under sections 38(a) or 38(b) and I will order that it be disclosed to the appellant.

F. Does the discretionary exemption at section 38(a), in conjunction with section 8(1)(l) of the *Act*, apply to the police codes in the records?

[42] Section 36(1) of *MFIPPA* gives individuals a general right of access to their own personal information held by an institution. Sections 38(a) and (b) of *MFIPPA* provide a number of exemptions to this general right of access. Section 38(a) states:

> 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, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information [emphasis added];

Section 8(1)(l): facilitate the commission of an unlawful act

[43] Section 8(1)(l) reads:

> 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.

[44] The police submit that section 8(1)(l) was applied to the police codes in the records at issue. The police submit that the "use of ten codes by law enforcement is an effective and efficient means of conveying a specific message without publicly identifying its true meaning" and that this information could "be used to counter the actions of police personnel responding to situations" and allow criminals to evade detection, thereby "hampering the control of crime".

Analysis and finding

[45] A number of decisions of this office have consistently found that police ten codes and "900" codes qualify for exemption under section 8(1)(l) of the *Act*[11] These codes have been found to be exempt because of the existence of a reasonable expectation of harm to individuals (including police officers) and a risk of harm to the ability of the police to carry out effective policing in the event that this information is disclosed. I adopt the approach taken by previous orders of this office. I find that the police have provided me with sufficient evidence to establish a reasonable expectation of harm with respect to the release of this information. As a result, I find that section 8(1)(l) applies to this information.

[46] Accordingly, I find that this information is exempt under section 38(a) of the *Act*.

G. Does the discretionary exemption at section 38(b) apply to the personal information in the records?

[47] Section 38(b) states:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
>> if the disclosure would constitute an unjustified invasion of another individual's personal privacy.

[48] Because of the wording of section 38(b), the correct interpretation of "personal information" in the preamble is that it includes the personal information of other individuals found in the records which also contain the requester's personal information.[12]

[49] In other words, where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

[50] If the information falls within the scope of section 38(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

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[11] See for example Orders M-393, M-757, MO-2370, PO-1665 and PO-2409.
[12] Order M-352.

[51] For section 38(b) to apply, on appeal I must be satisfied that disclosure of the information *would* constitute an unjustified invasion of another individual's personal privacy.

[52] In determining whether the exemption in section 38(b) applies, sections 14(1), (2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of another individual's personal privacy. Section 14(2) provides some criteria for the police to consider in making this determination; section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. In addition, if the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy under section 38(b).

[53] The police submit that section 38(b) applies to the withheld responsive information remaining at issue. They also refer to the factors in sections 14(2)(f) and 14(2)(h) and the presumption in section 14(3)(b) in support of their decision. The appellant refers to the exception in section 14(1)(b) and the factors favouring disclosure at sections 14(2)(a), 14(2)(b) and 14(2)(d) in support of his position that the information should be disclosed. The appellant also submits in the alternative that the exception in section 14(3)(b) applies, because disclosure of the information is necessary to continue an investigation into the manner in which the police conducted their own investigation. Finally, although the police made no submissions on the police officer employment history information contained in the records, this type of information raises the possible application of the presumption in section 14(3)(d) of the *Act*.

[54] Sections 14(1)(b) and (f) provide:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > (b) in compelling circumstances affecting the health or safety of an individual, if upon disclosure notification thereof is mailed to the last known address of the individual to whom the information relates;
> >
> > …
> >
> > (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

[55] Sections 14(2)(a), (b), (d), (f) and (h) 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,
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;
>
> (b) access to the personal information may promote public health and safety;
>
> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
>
> (e) the personal information is highly sensitive;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence.

[56] Sections 14(3)(b) and (d) read:

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

The representations of the police

[57] The police submit that:

> The records at issue consist of part of an occurrence report, officer's notes and witness statements in which the [the appellant] reported to [the police] that an aggravated assault had occurred. [The police] at that time commenced an investigation into the alleged aggravated assault, which would be an offence under the *Criminal Code* of Canada[13]. All information

[13] R.S.C. 1985, c. C-46.

> obtained by the investigating officers from the complaint was compiled at that time and is identifiable as part of that investigation into a possible violation of law.
>
> …
>
> Paragraph 14(3)(b) applies as all the information compiled by the police was done so as part of the investigation into an offence under the *Criminal Code* of Canada. The records were completed as part of the investigation of a violation of law. Further, none of the records at issue were created after the completion of the investigation.

[58] The police also submit that:

- section 14(2)(f) applies because the information is highly sensitive. The police rely on their confidential submissions in this regard.
- section 14(2)(h) applies because "the information is implicitly provided in confidence to the police, the information being essential for the police to properly investigate any violation of a law".

[59] As set out above, the police make no specific submissions with respect to the police officer employment history information contained in the records.

The representations of the appellant

[60] The appellant states that the assault that occurred was the culmination of a pattern of harassment against him. The appellant asserts that it was a paid targeted attack. He further states that there have been other attacks against him and his father, as well as other harassing conduct. He takes the position that there are, therefore, compelling circumstances affecting the health or safety of him and his family and section 14(1)(b) of the *Act* is applicable in the circumstances. The appellant submits that if the police have information that would enable him to obtain a restraining order against the individuals behind the attack and protect him and his family, then they should disclose that information to him.

[61] The appellant submits that:

> The "compelling circumstances" in question, are not a hypothetical or potential safety threat, but a very real one that [the appellant] and his family had to suffer through numerous times. Both [the appellant] and his family are, to this day, recovering from the physical and psychological aftermath of the assaults.

[62] The appellant then recounts two other incidents, one involving the appellant and the other involving the appellant's father, as well as threatening phone calls and a threatening visit to a family store, and states that:

> Following these vicious attacks and intimidation tactics, [the appellant] has had to change his lifestyle completely to protect himself and his family. He makes every effort to stay out of the public eye, rigorously guarding his and his family's privacy. Soon after the assault, [the appellant's] family had to sell the extremely profitable store because the store provided easy access to [the appellant] and his family's location giving way to uninvited attention and threats on a regular basis.
>
> The only connection still available to [the appellant] is through his parent's home. Consequently, around 5-6 times a year, burly and well-built men visit his parent's home where [the appellant] resided at one time. According to [the appellant's] parents, these men would stop outside the house and make threatening gestures such as cutting the throat actions. The family is living in constant terror of being assaulted or harassed while walking to and from their home.

[63] The appellant submits that the withheld information should be disclosed because it will thereby provide the appellant with the details necessary to obtain a restraining order against "the person responsible for these attacks".

[64] Relying on Orders MO-1498 and MO-2019 the appellant further submits that the responsive records were not compiled for the purpose of the investigation, "but compiled after the fact". The appellant submits that the records therefore do not fall within the scope of the section 14(3)(b) presumption. In addition, the appellant submits that any information provided by the individual named in the request "in return for any deals made by the police, or any information or statement of facts that [the individual named in the request] may have provided at trial should be disclosed as they were not compiled for the purpose of the investigation itself…".

[65] The appellant submits in the alternative that:

> The exception to the exemption applies since disclosure of the records is necessary to continue the investigation into the manner in which the police conducted their investigation. It is a matter of public safety to ensure that the police do not abuse their authority and conduct investigations with integrity and diligence so as not to bring the administration of justice into disrepute. During the investigation, [the individual named in the request] confessed to being paid a sum of money to commit the assault. However, the police made no arrest of the individual who conspired to assault [the appellant]. [The appellant]

> requires access to the information to ensure that the investigation was conducted carefully and thoroughly.

[66] With respect to the factors at sections 14(2)(a), (b) and (d), the appellant submits that:

> Disclosure is desirable for the purpose of submitting the activities of the institution to public scrutiny. Even though [the individual named in the request] admitted to being paid to assault [the appellant] the police made no further arrests. If [the individual named in the request] provided the name of the third party who conspired to assault [the appellant] then the public should be made aware of the reasons why no further investigation was conducted and why no arrests were made. If [the individual named in the request] did not provide the name of the conspirator, then the duty to disclose still remains to determine whether the manner in which the investigation was conducted was reasonable.
>
> Secondly, access to the personal information may promote public health and safety. Given the importance of police in our society, the police are subjected to higher ethical standards of conduct. Police are given increased authority and unparalleled discretion so that we may live in a safe community. Maintaining public trust requires that police misconduct be investigated and dealt with efficiently. If the police are found to abuse their public authority and trust, then it puts the public's health and safety at risk. Access to this information will promote public safety because it will bring the abusive and unreasonable activities of the police into light and create a safer society.
>
> Finally, the personal information is relevant to a fair determination of [the appellant's] rights. Every person has the right not to be deprived of security (section 7 of the *Charter*). By conducting the investigation in an improper and unreasonable manner, the police are depriving [the appellant's] right to security. To conduct a fair determination of his rights, the disclosure of the manner in which the police conducted their investigation is necessary.

[67] In reply, the police submit that any claims of police misconduct could have been brought to the attention of the police through a complaint or by advising independent agencies tasked with investigating the police. The police state that this appears never to have been done and that they would not comment any further on these "baseless accusations".

[68] Finally, the police submit that information pertaining to "any deals made by the police" would be in the custody and control of the crown attorney's office, "who hold purvey over prosecutions and not the police".

Analysis and findings

Section 14(1)(b)

[69] Section 14(1)(b) of the *Act* establishes that the personal information of other individuals can be disclosed in compelling circumstances affecting the health or safety of an individual, if upon disclosure notification thereof is mailed to the last known address of the individual to whom the information relates.

[70] In Order PO-2541, former Senior Adjudicator John Higgins addressed the equivalent provision under the *Freedom of Information and Protection of Privacy Act*. In that appeal, the Archives of Ontario had received a request for two correctional centre files relating to a named individual believed to be that requester's birth father. The request was made for medical reasons. The medical profession had been unable to isolate the reason for that requester's daughter (the named individual's grand-daughter) loss of function of her arm and suggested that a medical history might provide essential information. Former Senior Adjudicator Higgins determined that "this is precisely the sort of situation contemplated in [the Provincial equivalent of section 14(1)(b)]", and the "compelling" threshold was met.

[71] In Order MO-1664, Adjudicator Donald Hale addressed a request for access to the date of birth of a student who was involved in an ongoing conflict with the requester's daughter. He wrote:

> The appellant argues that there are compelling circumstances present in this case that affect the health or safety of her daughter, within the meaning of section 14(1)(b). In my view, section 14(1)(b) speaks to compelling circumstances where the health or safety of an individual is at risk unless that individual is notified of the existence of certain information. In this appeal, the appellant is seeking information about another individual in order to initiate a criminal prosecution against him. In my view, these are not the type of "compelling circumstances" addressed by section 14(1)(b).

[72] I have carefully considered the contents of the records, and the representations on this issue. I find that the appellant has not provided sufficient evidence to demonstrate that the circumstances of this appeal qualify as sufficiently compelling circumstances affecting the health or safety of an individual under section 14(1)(b). The appellant is seeking any information in the records about the initiator of the incidents involving the requester, or his family, for the purpose of obtaining a restraining order

against “the person responsible for these attacks”. The request is not made for medical reasons, and the appellant has already informed the police of his concerns. In all the circumstances, therefore, I am not satisfied that this is the type of situation contemplated in section 14(1)(b) that would meet the “compelling” threshold. Accordingly, I find that the exception in section 14(1)(b) does not apply.

Section 14(2)(a)

[73] The objective of section 14(2)(a) of the *Act* is to ensure an appropriate degree of scrutiny of an institution by the public. In the appeal before me, I find that for the purposes of section 14(2)(a), the appellant’s motives in seeking access to the information in the records are private in nature. In my view, the basis for the request is to satisfy the appellant and not the public that the police’ investigation into the matters involving the appellant were conducted and concluded in an appropriate manner. In my view, for the purposes of the section 14(2)(a) analysis, this is a private interest, and therefore, section 14(2)(a) is not a relevant consideration. Additionally, in my view, the subject matter of the records does not suggest a public scrutiny interest.[14] Accordingly, I find that the factor favouring disclosure in section 14(2)(a) does not apply to the information that remains at issue.

Section 14(2)(b)

[74] Section 14(2)(b) contemplates disclosure of information that may promote public health and safety. In my view, the appellant has failed to demonstrate that the disclosure of the withheld information will promote public health or safety in any real or demonstrable way. This section is intended to address records that contain information about public health and safety issues rather than personal information about a particular individual who the appellant may view as being a risk to him or to public safety.[15] I find that section 14(2)(b) has no application in the circumstances of this appeal.

Section 14(2)(d)

[75] For section 14(2)(d) to apply, the appellant must establish that:

(1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and

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[14] See Order PO-2905 where Assistant Commissioner Brian Beamish found that the subject matter of a record need not have been publicly called into question as a condition precedent for the factor in the provincial equivalent of section 14(2)(a) to apply, but rather that this fact would be one of several considerations leading to its application.
[15] See Order MO-1664.

(2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and

(3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and

(4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing[16]

[76] The appellant submits that one of the reasons that the information is being sought is because it will provide the appellant with the details necessary to obtain a restraining order against "the person responsible for these attacks". The appellant cites his rights to life, liberty and security of the person under section 7 of the *Canadian Charter of Rights and Freedoms*[17] (the *Charter*), as support for disclosure of the withheld information.

[77] In Order MO-1436, former Adjudicator Dawn Maruno addressed a situation where a requester sought access to the name and address of an individual who allegedly assaulted him in order to initiate a civil action and/or a private prosecution before the criminal courts against that person concerning the alleged assault. She wrote:

> With respect to the proposed civil action, I am satisfied that the name and address of the affected party is significant to a determination of the appellant's legal right to seek redress from the affected party. I am also satisfied that the appellant is seeking the information in order to obtain a determination of his common law rights and this information is required to prepare for the proceedings which the appellant intends to bring (Orders M-39, M-1146 and PO-1715). Accordingly, I find that the four criteria required to establish the relevance of section 14(2)(d) have been met as they relate to the contemplated civil proceeding. I therefore find that section 14(2)(d) is a relevant consideration with respect to the appellant's proposed civil action. In the circumstances, I assign this factor high weight in favour of disclosure.
>
> With respect to the contemplated criminal prosecution, I find that section 14(2)(d) is not a relevant factor. For this factor to apply, the

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[16] 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.).
[17] *The Constitution Act, 1982*. Section 7 Reads: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

> determination of rights must be those "affecting the person who made the request". By definition, the prosecution of an alleged offence under the *Criminal Code* engages the rights of the accused and "Her Majesty the Queen" or the Crown. In contrast to the proposed civil action, the criminal proceedings do not involve a determination of the rights of the party who initiates the prosecution, whether that party is the police, the alleged victim or any other individual. On this basis, I find that the appellant is not sufficiently affected by the proposed determination of rights in the criminal proceedings, and thus section 14(2)(d) cannot apply in this regard.

[78] If the appellant contemplates obtaining a restraining order in the criminal courts, I adopt the reasoning expressed in that decision and find that the appellant has failed to establish that he is "sufficiently affected by the proposed determination of rights". Accordingly, the factor favouring disclosure listed in section 14(2)(d) would not apply.

[79] If I am in error in this regard and the appellant is seeking a civil or *Charter* remedy, if such a Charter remedy exists, in the civil courts, then to the extent the information exists, I would give section 14(2)(d) some weight.

[80] However, there are alternative ways for the appellant to obtain information. As former Adjudicator Dawn Maruno held in Order MO-1436:

> In determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, pursuant to section 14(1)(f), a decision maker must consider all the relevant circumstances and not just the nine criteria listed in section 14(2). Certain unlisted factors relevant in the circumstances of this appeal will therefore also be considered.
>
> Previous orders of this office have discussed alternative methods of obtaining access to personal information of an unidentified individual for the purpose of commencing or maintaining a civil action against the individual (Orders M-1146, PO-1728, P-689, and P-447). Adjudicator Laurel Cropley in Order M-1146 explained how a plaintiff can commence a civil action against an individual where the plaintiff does not know the defendant's address. She states:
>
>> ... the registrar will issue a statement of claim without a defendant's address or with an "address unknown" notation ....
>>
>> Once the claim is issued, the appellant, as plaintiff, could bring a motion under rule [30.10 of the Rules of Civil

> Procedure] for the production of the record in question from the Health Unit, in order to obtain the address.
>
> In Order PO-1728, Senior Adjudicator David Goodis, agreed that "these principles could apply where the *name* as well as the address of the potential defendant is unknown, by use of a pseudonym such as 'John Doe' [see *Randeno v. Standevan* (1987), 61 O.R. (2d) 726 (H.C.), and *Hogan v. Great Central Publishing Ltd.* (1994), 16 O.R. (3d) 808 (Gen. Div.)]".
>
> Based on the above, I am satisfied that the appellant would be able to commence his proposed civil action against the affected person as an unnamed defendant, by use of a pseudonym, and then use the civil court process to obtain the affected person's name and address from the Police. …

[81] Accordingly, to the extent that section 14(2)(d) applies, in light of the above, I would assign it moderate weight in favour of disclosure.

Sections 14(2)(f) and (h)

[82] I am not satisfied that the personal information contained in the withheld portions of the records has been supplied in confidence by the individuals whose information it is, within the meaning of section 14(2)(h). However, with the exception of the police officer employment history, I do find that the character and quality of some of the information is "highly sensitive" within the meaning of section 14(2)(f) and I would assign this factor high weight in favour of non-disclosure.

Section 14(3)(b)

[83] In determining whether information was exempt under the provincial equivalent of section 38(b), *in Grant v. Cropley* [2001] O.J. 749, the Divisional Court said the IPC could:

> . . . consider the criteria mentioned in s.21(3)(b) [the provincial equivalent of section 14(3)(b) in determining, under s.49(b) [the provincial equivalent of section 38(b)], whether disclosure . . . would constitute an unjustified invasion of [a third party's] personal privacy.

[84] If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the personal information is presumed to be an unjustified invasion of personal privacy. In my view, the only possible presumptions that could apply to the personal information in the records at issue are sections 14(3)(b) or (d). The application of section 14(3)(d) is discussed below.

[85] Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.[18] The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.[19]

[86] I have reviewed the records and it is clear from the circumstances that the personal information in them was compiled and is identifiable as part of the police's investigation into a possible violation of law, namely the *Criminal Code* of Canada.

[87] In addition, I do not accept the appellant's argument that his desire to continue the investigation into the manner in which the police conducted their investigation thereby triggers the application of the section 14(3)(b) exception for disclosures "necessary" to "continue the investigation". A requester's own "investigation" does not constitute the continuation of the investigation referred to in section 14(3)(b). That investigation is the one in which the information at issue was compiled.[20] Furthermore, the words "to continue the investigation", does not include an independent investigation to determine whether a police investigation was adequate.[21]

[88] Accordingly, I find that the personal information in the records, with the exception of the police officer employment history, was compiled and is identifiable as part of an investigation into a possible violation of law, and falls within the presumption in section 14(3)(b).

<u>Section 14(3)(d)</u>

[89] Information which reveals the dates on which former employees are eligible for early retirement, the start and end dates of employment, the number of years of service, the last day worked, the dates upon which the period of notice commenced and terminated, the date of earliest retirement, entitlement to and the number of sick leave and annual leave days used has been found to fall within the section 14(3)(d) presumption.[22] However, a person's name and professional title, without more, does not constitute "employment history".[23]

[90] In my view, the police officer employment history information contained in the records, qualifies as the type of information that is subject to the presumption in section 14(3)(d) of the *Act*.

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[18] Orders P-242 and MO-2235.
[19] Orders MO-2213 and PO-1849.
[20] See Order PO-2167.
[21] See Orders PO-2167 and PO-2236.
[22] Orders M-173, P-1348, MO-1332, PO-1885 and PO-2050.
[23] Order P-216.

Balancing the presumptions and the factors

[91] Given the application of the factor at section 14(2)(f) and the presumptions in sections 14(3)(b) and 14(3)(d) (to the police officer employment history information) and the moderate weight attached to the factor in section 14(2)(d), I am satisfied that the disclosure of the remaining responsive personal information in the records would constitute an unjustified invasion of another individual's personal privacy. Accordingly, I find that this information is exempt from disclosure under section 38(b) of the *Act*.

H. Would it be absurd to withhold the photograph "of the accused" that was severed from one of the disclosed videotapes?

[92] This issue arises because the appellant continues to seek access to a portion of his videotaped interview that contained the photographic image "of the accused". The photograph was severed from the copy of a videotape that was disclosed to the appellant.

[93] Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 38(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption.[24]

[94] The absurd result principle has been applied where, for example:

- the requester sought access to his or her own written witness statement[25]
- the requester was present when the information was provided to the institution[26]
- the information is clearly within the requester's knowledge[27]

[95] If disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.[28]

[96] With respect to whether or not disclosure is consistent with the purpose of the section 14(3)(b) exemption, former Senior Adjudicator David Goodis reviewed this issue when considering the provincial equivalent of section 14(3)(b) in Order PO-2285. He stated:

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[24] Orders M-444, M-451, M-613, MO-1323, PO-2498 and PO-2622.
[25] Order M-444.
[26] Orders M-444, P-1414 and MO-2266.
[27] Orders MO-1196, PO-1679, MO-1755 and MO-2257-I.
[28] Orders MO-1323, PO-2622 and PO-2642.

> Although the appellant may well be aware of much, if not all, of the information remaining at issue, this is a case where disclosure is not consistent with the purpose of the exemption, which is to protect the privacy of individuals other than the requester.

[97] Former Senior Adjudicator Goodis then went on to refer to the following excerpt from Order MO-1378:

> The appellant claims that [certain identified photographs] should not be found to be exempt because they have been disclosed in public court proceedings, and because he is in possession of either similar or identical photographs.
>
> In my view, whether or not the appellant is in possession of these or similar photographs, and whether or not they have been disclosed in court proceedings open to the public, the section 14(3)(b) presumption may still apply. In similar circumstances, this office stated in Order M-757:
>
>> Even though the agent or the appellant had previously received copies of [several listed records] through other processes, I find that the information withheld at this time is still subject to the presumption in section 14(3)(b) of the *Act*.
>
> In my view, this approach recognizes one of the two fundamental purposes of the *Act*, the protection of privacy of individuals [see section 1(b)], as well as the particular sensitivity inherent in records compiled in a law enforcement context. The appellant has not persuaded me that I should depart from this approach in the circumstances of this case.

[98] I adopt the approach taken to the absurd result principle set out above, as well as the approach taken by the former Senior Adjudicator in Orders PO-2285 and MO-1378.

[99] In this appeal, the police take the position that the absurd result principle does not apply to the information remaining at issue. The appellant makes no specific representations on the application of the absurd result principle.

[100] I have carefully reviewed the circumstances of this appeal, including 1) the specific records at issue, 2) the background to the creation of the videotape, 3) the significant amount of information that has been disclosed to the appellant, and the amount of information remaining at issue, 4) the nature of the exemption claim made for the photograph of "the accused" and, 5) the nature of the offence at issue. I find that, in the circumstances, disclosure would not be consistent with the fundamental

purpose of the *Act,* as identified by Senior Adjudicator Goodis in Order MO-1378 (including the protection of privacy of individuals, and the particular sensitivity inherent in records compiled in a law enforcement context). Accordingly, I find that the absurd result principle does not apply in this appeal.

I. Can the records be reasonable severed without disclosing information material which is exempt?

[101] Section 4(2) of the *Act* obliges institutions to disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt. However, no useful purpose would be served by the severance of records where exempt information is so intertwined with non-exempt information that what is disclosed is substantially unintelligible. The key question raised by section 4(2) is one of reasonableness. Where a record contains exempt information, section 4(2) requires a head to disclose as much of the record as can reasonably be severed without disclosing the exempt information. A head will not be required to sever the record and disclose portions where to do so would reveal only "disconnected snippets," or "worthless," "meaningless" or "misleading" information. Further, severance will not be considered reasonable where an individual could ascertain the content of the withheld information from the information disclosed.[29]

[102] With these principles in mind, and in light of the extent of the information that has already been disclosed to the appellant, I have concluded that the records at issue cannot reasonably be severed without disclosing information that could allow an individual to ascertain the content of the withheld information from the information disclosed or that would disclose information that I have found to be exempt.

J. Did the police appropriately exercise their discretion?

[103] The sections 38(a) and 38(b) exemptions are discretionary and permit the police to disclose information, despite the fact that it could be withheld. On appeal, this office may review the police's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so.[30]

[104] In addition, the Commissioner may find that the police erred in exercising their discretion where, for example,

- they do so in bad faith or for an improper purpose
- they take into account irrelevant considerations
- they fail to take into account relevant considerations.

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[29] Order PO-1663, *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.)].
[30] Orders PO-2129-F and MO-1629.

[105] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[31] This office may not, however, substitute its own discretion for that of the institution.[32]

[106] The appellant submits that the police have engaged in an abuse of authority against the appellant which culminated in them "exercising their discretion in bad faith in an attempt to conceal relevant information." In support of this allegation the appellant submits that:

> His files relating [to] the first assault in 2005 were misplaced and not forwarded to the Criminal Investigation Bureau (CIB) for further investigation. Following the significant assault of 2006, the police made no further investigations or arrests to determine who paid [the individual named in the request] to assault [the appellant].
>
> Even during the Access to Information process, the conduct of the police led [the appellant] to question the improper motives of the police. The police refused to disclose the additional occurrence reports even though the officer in charge of the file specifically informed [the appellant] that all matters relating to [the appellant] were being filed under occurrence numbers [specified number] and [specified number]. They acknowledge the related events in their notes, but refuse to disclose the reports because they were "unresponsive". In addition, the police informed [the appellant] that the affected parties did not provide their consent to the police allowing the police to disclose the information to [the appellant]. During the Access to Information process, it came to light that the police had not made any requests for consents and misrepresented their position. Such inconsistencies evidence the abusive conduct and improper motives of the police when exercising their discretion.
>
> [The appellant submits] that the decision to refuse to disclose the records in question stems from a desire to conceal a mismanaged investigation. [The appellant further submits] that the police are using the provisions of the *Act* as a shield to conceal relevant information from the public. There would be irreparable prejudice to the integrity of the justice system if the police were allowed to use the provisions of the *Act* as a shield to conceal relevant information and improper investigations. Disclosure of such relevant information is in the public interest to ensure accountability and transparency.

[107] The appellant made similar representations in support of his position that it is in the public interest that the withheld information be disclosed. In reply to the appellant's

[31] Order MO-1573.
[32] Section 43(2).

submissions on the application of the public interest override in section 16 of the *Act*, which is addressed in more detail below, the police submitted:

> … [the appellant] states that the police informed [the appellant] that affected parties did not provide their consent to disclose their personal information and 'misrepresented their position'. The police submit that consent was discussed in mediation and reference to this is contained in the Mediator's Report, page 3, dated July 6, 2011. That report indicates that police contacted a witness and obtained consent to release that individual's information. Further, the police did not attempt to contact the two accused parties as it was unlikely that they would provide consent. None of the other affected parties named in the record were notified at the request stage as there was no contact information available. The Mediator attempted to contact two other parties named in the record where some contact information was available however none of these individuals could be reached.

[108] In their reply representations on their exercise of discretion, the police submit:

> … [the appellant states] that the [files relating to] the appellant's first assault in [specified date] were misplaced and not forwarded to the Criminal Investigation Bureau (CIB) for investigation. Although this occurrence was not part of the appellant's request, a check of the occurrence indicates that it was in fact sent to 12 CIB and the investigation was assigned to the reporting officer, who at the time was a member of the Neighborhood Policing Unit, a unit also tasked with conducting investigations.

[109] In conclusion, the police state:

> The [appellant] claims that the police are using the *Act* to conceal information from the public. It is the position of the police that the police responded to a clear and detailed request from the appellant's representative, a lawyer and subsequently confirmed by the appellant and that the police exercised its discretion in good faith and pursuant to the provisions of the *Act*.
>
> It is the position of the police that the calculated cover-up by the police as claimed by [the appellant] is without merit as simply due to the fact that any information not disclosed could be obtained by way of a motion and obtain a court order and/or in the instance of occurrences not related to the named affected party and the two occurrence numbers provided by [the appellant], by an access request for those occurrences.

Analysis and Finding

[110] I have reviewed the circumstances surrounding this appeal and the police's representations on the manner in which they exercised their discretion. I am not satisfied that the appellant has led sufficient evidence to establish that the police exercised their discretion in bad faith or for an improper purpose or engaged in any misconduct under the *Act*. The scope of the appeal has been addressed above, and I have found that other occurrences are not within the scope of this appeal. The police's efforts to obtain consent and the reasons why they did not approach two accused and/or other affected parties were provided at mediation and repeated above. The police have provided evidence that the occurrence report pertaining to the appellant's first assault was provided to the CIB. I am not satisfied on the evidence provided by the appellant that the police were engaged in concealing relevant information or that their refusal to disclose the information in question stems from a desire to conceal a mismanaged investigation. In fact, the police disclosed extensive amounts of information to the appellant in response to his request.

[111] I am satisfied that the police have not erred in the exercise of their discretion not to disclose to the appellant the remaining withheld information contained in the records.

K. Is there a public interest in the disclosure of information found to be exempt under the *Act*?

[112] The appellant takes the position that the "public interest override" provision in section 16 of the *Act* applies to the information that I have found to be exempt.

[113] In support of his position the appellant alleges that he has encountered "abusive conduct of [the police] on a number of occasions after facing several personal assaults against himself and his family."

[114] He provides the following examples in support of this allegation:

- in a telephone call with the police during his car chase of two attackers the police advised the appellant that they did not have any available units and that he should drive to the police station to wait for somebody to talk to

- after discussing the matter with the police he was advised that the file would be forwarded to the CIB, however, during the Access to Information process he discovered that this was never done

- after the third assault in 2006, and the subsequent arrest, the police conducted no further investigation or made any arrests in order to

determine who paid [the individual named in the request] to assault [the appellant]

- the police informed the appellant that affected parties did not provide the police with their consent to disclosure, however, during the Access to Information process request the appellant discovered that the police had not requested consents and "misrepresented their position"

- after mediation the police disclosed an individual's name but no other "contextual" information, which was "inconsistent". The appellant submits that if there is no further information available pertaining to this third individual, it is in the public interest to determine why no further investigation was conducted

- while the police confirmed that there was a fourth individual involved they refused to disclose the identity of this fourth person

[115] The appellant further states that these individual events, taken together, have raised his suspicions and "forced him to take the necessary steps to explore the conduct of the police and the manner and the manner in which the police conducted the investigation … ."

[116] The appellant submits that there is a public interest in learning more about the operations of the police to ensure transparency and accountability. The appellant submits that the public interest in disclosure of the withheld information is extremely high and is demonstrated by:

(a) the public interest in learning more about the managerial operations and accountability of the police

(b) the importance of the criminal justice system in our society

(c) the importance of public access to information about the performance of the criminal justice system, and

(d) the public interest in understanding what went wrong with the investigation and how the police responded.

[117] The appellant submits that the public interest is "compelling" and relies on the decision of Former Assistant Commissioner Tom Mitchinson in Order PO-1779 in support of his position.

[118] The appellant submits that:

> … the deliberate attempt on the part of the police to use the provisions of the *Act* as a shield to conceal relevant information and the inconsistent behavior in disclosing the names of the individual involved in this case, are abusive conduct of the police. Such patently abusive conduct rouses strong interest and is [a] "compelling public interest", pursuant to section 16 of the *Act*. This is particularly so here as the police had clear evidence of a conspiracy to commit injury to [the appellant] by the statement from [the individual named in the request] that he received money to carry out the assault.

[119] The appellant further submits that the compelling public interest in disclosure of the information outweighs the purpose of the section 38(b) exemption. Referring to Order PO-1779 the appellant states:

> The police marked the appellant's file as "closed" upon [the individual named in the request's] arrest. This was so even though the investigation into the individual who conspired to assault [the appellant] was not completed. No one was arrested for committing that offence. The police ignored the ancillary issues of conspiracy that arose from the original investigation in an attempt to mark the file as "closed" faster. It is necessary to understand whether the directive to disregard ancillary issues that may have arisen from the original investigation, thereby prolonging the investigation has become an implied policy and mandate throughout the Peel Regional Police Department. Police may manipulate the statistics of their performance and be able to affect what the public perceives as their level of performance by not allowing additional investigations to be initiated or completed and by marking an incomplete investigation as "closed". There is a public interest in trying to determine whether a political interest in maintaining high statistics is overshadowing the necessity to follow up on all leads and follow through on all ancillary investigations that arise from the original investigation. This public interest in disclosure outweighs any privacy interests.

[120] The police take issue with the appellant's position and submit that the sole interest at stake is purely the appellant's private interest in obtaining the information in the records. Furthermore, the police submit that there is nothing compelling about this matter.

[121] With respect to noting an occurrence file closed, the police submit that they are required by Federal legislation to provide information to the Canadian Centre for Justice Statistics for Statistics Canada purposes under the Uniform Crime Reporting Survey (UCRS). The police submit:

> This survey collects police-reported crime statistics. UCRS sets rules on what is collected and how information [is] classified. … As an example, once a charge is laid, the occurrence report related to the charge is marked as 'Closed – Cleared by Charge'. This clearance applies to all similar occurrences involving charges regardless of whether the police are continuing to investigate other individuals that are suspected in the crime or not. Once a charge is laid, the occurrence is given a clearance.
>
> Further, UCRS requires data collection in which a separate statistical record is created for each criminal incident known as an "incident-based" reporting system. Separate crimes, even though appearing to be related by accused or property frequently require separate occurrence report numbers. In this instance, a conspiracy to have the appellant assaulted, if one occurred, would not have been at the same time and place as the assault and therefore would have required a separate occurrence number as per UCRS rules. As it is however, the investigation was not continued further and a separate occurrence was not generated.

[122] The police further submit:

> The investigating officer advises that he and the Detective Sergeant met with the appellant and his lawyer after the court case had concluded … and informed both the appellant and his lawyer that the police would not be investigating further and of the reasons for that decision.

Analysis and Finding

[123] Section 16 states:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[124] Even though section 38(b) is not listed, because section 16 may override the application of section 14, it may also override the application of section 38(b) with reference to section 14.[33] If section 16 were to apply in this case, it would have the effect of overriding the application of section 38(b), and the appellant would have a right of access to the information at issue.

[125] For section 16 to apply two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

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[33] See for example Order PO-2246, which deals with the equivalent sections of the *Freedom of Information and Protection of Privacy Act*.

[126] In considering whether there is a "public interest" in disclosure of a record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[34] In order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[35]

[127] A public interest does not exist where the interests being advanced are essentially private in nature.[36] However, where a private interest in disclosure raises issues of a more general application, a public interest may be found to exist.[37]

[128] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[38] Any public interest in *non*-disclosure that may exist also must be considered.[39]

[129] In my view, disclosure of the severed portions of personal information in the records would not "serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices", as required in Order P-984. Rather, the appellant seeks access to the severed portions of the records in order to pursue his own interests. While these are of importance to him, in my view, they are in the nature of a private rather than a public interest. In making this determination, I have not accepted the appellant's position that the police have engaged in inappropriate conduct or have sought to misuse the *Act* in any way.

[130] Furthermore, there is no "compelling" public interest in the disclosure of the personal information in this case, because in my view, the appellant is requesting the information for a predominantly personal reason.[40]

[131] Accordingly, I find that there does not exist any public interest, compelling or otherwise, in the disclosure of the withheld responsive information at issue. As a result, I find that section 16 has no application in the present appeal.

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[34] Order P-984 and PO-2607.
[35] Order P-984 and PO-2556.
[36] Orders P-12, P-347, and P-1439.
[37] Order MO-1564.
[38] Order P-984.
[39] *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.).
[40] Order M-319.

ORDER:

1. I find that the police conducted a reasonable search for responsive records.

2. I order the police to disclose to the appellant the portions of the records that I have highlighted in green on a copy of the pages of the records that I have enclosed with this order by sending it to him by **March 21, 2013** but not before **March 15, 2013**.

3. I order the police to provide to the appellant a decision letter in accordance with the *Act* with respect to access to the police officer's business card that I have highlighted in yellow on a copy of a page of the records that I have provided to the police along with this order, considering the date of this order as the date of the request.

3. In all other respects I uphold the decision of the police.

4. In order to verify compliance with this order, I reserve the right to require the police to provide me with a copy of the pages of the records as disclosed to the appellant as well as a copy of any decision letter provided to the appellant pursuant to order provision 3.

Original signed by: January 13, 2013
Steven Faughnan
Adjudicator