Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2928

Appeals MA12-42, MA12-43 and MA12-44

Toronto Police Services Board

July 31, 2013

Summary: These three appeals relate to requests for access to audio recordings and documents pertaining to 911 calls made by a named individual, as well as a "tally" of those 911 phone calls that occurred during a specified time period. The police relied on section 14(5) of the *Municipal Freedom of Information and Protection of Privacy Act* to refuse to confirm or deny the existence of any responsive records. The requester appealed the decisions and further alleged that it was in the public interest that the requested information be disclosed. This order upholds the decisions of the police.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 2(1), 2(2.1), 2(2.2), 14(2)(a), 14(2)(f), 14(5), 16.

Orders Considered: MO-2366, MO-2379, MO-2699, P-613, PO-2225.

Cases Considered: *John Doe v. Ontario (Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767 (Div. Ct); *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.); *R. v. R.L*, [2007] O.J. No. 4095 (Sup. Crt.); *Vancouver Police Department (Re)*, 2007 CanLii 9595 (BC IPC); *Grant v. Torstar Corp.* 2009 SCC 61.

BACKGROUND:

[1] These three appeals relate to requests to the Toronto Police Services Board (the police) for access under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) to audio recordings and documents in relation to any 911

phone calls made by a named individual, as well as a "tally" of any such 911 phone calls that occurred during a specified time period. As opposed to the requests at issue in Appeals MA12-39,[1] MA12-40 and MA12-41,[2] that also pertained to the named individual, these three requests are not related to a specific incident and are broad in scope. This order does not address those requests nor does it pertain to any responsive records identified by the police in those appeals.

[2] The request at issue in Appeal MA12-42 is for access to all documents in relation to any 911 phone calls made by the named individual for the time period from October 25th, 2010 to the "present day" (which, by virtue of the date the request was made, the police considered to be November 7, 2011).

[3] The request at issue in Appeal MA12-43 is for access to all audio recordings of any 911 phone call made by the named individual for the time period from October 25th, 2010 to "the present day" (which, by virtue of the date the request was made the police considered to be November 7, 2011).

[4] The request at issue in Appeal MA12-44 is for access to "a tally of all 911-phone calls made by [the named individual]" which included "all 911-phone calls made from [an identified residence]" for the time period from October 25th, 2011 to "the present day" (which, by virtue of the date the request was made, the police considered to be November 7, 2011).

[5] The police relied on section 14(5) of the *Act* to refuse to confirm or deny the existence of any responsive records with respect to the requests.

[6] The requester (now the appellant) appealed the decisions. The appellant indicated in the Appeal Forms relating to the appeals that it is in the public interest that this information be disclosed. Accordingly, the application of the public interest override at section 16 of the *Act* was added as an issue in the appeal.

[7] Mediation did not resolve the matters and they were moved to the adjudication stage of the appeal process where an adjudicator conducts an inquiry under the *Act*.

[8] I commenced the inquiry by sending a Notice of Inquiry setting out the facts and issues in the appeals to the police. The police provided responding representations. I then sent Notices of Inquiry, as well as the non-confidential representations of the police, to the appellant. The appellant also provided responding representations.

[9] As the submissions filed in all the appeals were virtually identical, and the appeals shared common issues, I have decided to address them in a single order.

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[1] Which is addressed in Order MO-2923.
[2] Which is addressed in Interim Order MO-2924-I.

ISSUES:

A. Can the police rely on section 14(5) of the *Act* in refusing to confirm or deny the existence of responsive records?

B. Is there a compelling public interest that outweighs the application of section 14(5) of the *Act*?

DISCUSSION:

A. Can the police rely on section 14(5) of the *Act* in refusing to confirm or deny the existence of responsive records?

[10] Section 14(5) reads:

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

[11] Section 14(5) gives an institution discretion to refuse to confirm or deny the existence of a record in certain circumstances.

[12] A requester in a section 14(5) situation is in a very different position from other requesters who have been denied access under the *Act*. By invoking section 14(5), the institution is denying the requester the right to know whether a record exists, even when one does not. This section provides institutions with a significant discretionary power that should be exercised only in rare cases.[3]

[13] Before an institution may exercise its discretion to invoke section 14(5), it must provide sufficient evidence to establish both of the following requirements:

> 1. Disclosure of the record (if it exists) would constitute an unjustified invasion of personal privacy; and
>
> 2. Disclosure of the fact that the record exists (or does not exist) would in itself convey information to the requester, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

[3] Order P-339.

[14] The Ontario Court of Appeal[4] has upheld this approach to the interpretation of section 21(5) of the *Freedom of Information and Protection of Privacy Act* (*FIPPA*), which is identical to section 14(5) of the *Act*, stating:

> The Commissioner's reading of s. 21(5) requires that in order to exercise his discretion to refuse to confirm or deny the report's existence the Minister must be able to show that disclosure of its mere existence would itself be an unjustified invasion of personal privacy.

[15] The effect of this interpretation is that the institution may *not* invoke section 14(5) where disclosure of the mere existence or non-existence of the record would not itself engage a privacy interest.

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

Definition of personal information

[16] Under part one of the section 14(5) test, the institution must demonstrate that disclosure of the record, if it exists, would constitute an unjustified invasion of personal privacy.

[17] The appellant submits that "disclosure of whether this information exists does not convey personal information as defined in section 2(1)".

[18] An unjustified invasion of personal privacy can only result from the disclosure of personal information. 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,

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

> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
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> (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;

[19] The list of examples of personal information under section 2(1) is not exhaustive. Therefore information that does not fall under paragraph (a) to (h) may still qualify as personal information.[5]

[20] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[6]

[21] Sections 2(2.1) and 2(2.2) of the *Act* also relate to the definition of personal information. These sections state:

> 2(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(2.2) 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.

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

[22] 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.[7]

[23] 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.[8]

[24] Under section 2(1) of the *Act*, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including the individual's name where 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. Records of the nature requested, if they exist, would reveal that the named individual made a 911 emergency service call, or calls, as well as information about the "tally" and content of those calls. There is nothing in the request, or in the materials provided, that would lead me to conclude that any 911 emergency service calls that fall within the scope of the requests would have been made in an official capacity by the named individual rather than a personal one. I find that such records, if they exist, would contain the personal information of the named individual.

Unjustified invasion of personal privacy

[25] The factors and presumptions in sections 14(2), (3) and (4), provide guidance in determining whether disclosure would or would not be "an unjustified invasion of privacy" under section 14(5).

[26] Section 14(2) provides some criteria for the police to consider in making this determination; section 14(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy; and section 14(4) refers to certain types of information the disclosure of which does not constitute an unjustified invasion of personal privacy. The Divisional Court has stated that once a presumption against disclosure has been established under section 14(3), it cannot be rebutted by either one or a combination of the factors set out in section 14(2).[9]

[27] The police submit that "[i]f responsive records did exist, it would not be possible to release this information to the appellant without violating the privacy of the [named individual]".

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[7] Orders P-257, P-427, P-1412, P-1621, R-980015 and PO-2225.
[8] Orders P-1409, R-980015, PO-2225 and MO-2344.
[9] *John Doe v. Ontario (Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767 (Div. Ct).

[28] The appellant submits that section 14(2)(a) of the *Act* is a factor that should be considered in the circumstances of this appeal. He submits:

> There have been questions as to whether or not [the named individual] tried to take advantage of his [official position] to receive special response from emergency services as well as whether or not he abused his status as [official position] in his discussion with 911 dispatchers.

[29] In Order MO-2379, Adjudicator Colin Bhattacharjee addressed a request for access to a "list" of 911 calls or calls made to the Children's Aid Society by two named individuals that resulted in police officers being dispatched to that requester's address. In that appeal, the Halton Regional Police Services Board relied on section 14(5) of the *Act* to refuse to confirm or deny the existence of responsive records. Adjudicator Bhattacharjee considered that the factors at section 14(2)(e) and 14(2)(f) were relevant considerations in the circumstances of that appeal.

[30] Sections 14(2)(a), 14(2)(e) and 14(2)(f) 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,
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> > (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;
> >
> > (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
> >
> > (f) the personal information is highly sensitive;

[31] The objective of section 14(2)(a) of the *Act*, a factor favouring disclosure that was raised by the appellant, is to ensure an appropriate degree of scrutiny of the police by the public. In my view, however, the subject matter of the records sought does not suggest a public scrutiny interest.[10] The requests are very general and very broad. The nature of the requests do not clearly indicate how the activities of the police would be appropriately scrutinized by the public through disclosure of audio recordings and documents in relation to 911 emergency service calls made by a named individual, or a "tally" and content of those 911 emergency service calls, that occurred during a specified time period, if they exist. I am not satisfied that, in the circumstances, disclosing the information, if it exists, it would result in greater scrutiny of the police.

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[10] 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 section 21(2)(a) of *FIPPA* [a provision identical to section 14(5)] to apply, but rather that this fact would be one of several considerations leading to its application.

Therefore, I am not satisfied that disclosure of the information, if it exists, would be desirable for the purpose of subjecting the activities of the police to public scrutiny. Accordingly, in the circumstances, I find that the factor at section 14(2)(a) is not a relevant consideration.

[32] In referring to the factor in section 14(2)(a), the appellant also appears to be arguing that the disclosure is desirable for the purpose of subjecting the activities of the named individual to public scrutiny. Section 14(2)(a) refers to scrutiny of the activities of "the institution", which in this case is the police. However, I will address the appellant's position with respect to the named individual in the "public interest override" discussion, below.

[33] To be considered highly sensitive under section 14(2)(f) of the *Act*, there must be a reasonable expectation of significant personal distress if the information is disclosed.[11]

[34] The requests at issue in the appeals are for information relating to 911 calls made by an identified individual and include audio recordings, documents and "tally" of calls. I find that information of this type, which relates to an individual calling 911 emergency services is, by its nature, highly sensitive information for the purpose of section 14(2)(f) of the *Act*.[12]

[35] I have found that the factor favouring non-disclosure in section 14(2)(f) applies to the type of information covered in the requests, if it exists. I have also found that the factor favouring disclosure in section 14(2)(a) does not apply. As a result, I find that disclosure of the records (if they exist) would constitute an unjustified invasion of the named individual's personal privacy.[13]

[36] Accordingly, I find that the police have satisfied part one of the section 14(5) test.

Part two: disclosure of the fact that the record exists (or does not exist)

[37] Under part two of the section 14(5) test, the police must demonstrate that disclosure of the fact that a record exists (or does not exist) would in itself convey information to the appellant, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

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[11] Orders PO-2518, PO-2617, MO-2262 and MO-2344.
[12] See for example Orders MO-2366 and MO-2379.
[13] As section 14(2)(e) is also a factor favouring non-disclosure, it is not necessary to consider whether it may also be applicable in the circumstances of this appeal.

[38] Applying part one of the section 14(5) test, I found that disclosure of the records, if they exist, would constitute an unjustified invasion of the named individual's personal privacy.

[39] In Order MO-2379, although addressing the application of the section 14(3)(b) presumption in the specific circumstances of the request before him, Adjudicator Bhattacharjee discussed the general approach to take at this stage of the analysis when considering whether section 14(5) can be relied upon by an institution in response to a request for a list of 911 emergency service calls.

[40] He explains in that decision:

> If the records do not exist, this means that no 911 calls or calls to the CAS would have been made by the two individuals named in the appellant's request, and no investigations would have taken place …
>
> However, it is possible to weigh the factors set out in section 14(2) of the *Act* in determining whether the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

[41] I agree with his approach, and apply it in this appeal.

[42] The police submit that:

> In order to maintain the integrity and utility of section 14(5), the institution cannot use this exemption only when records actually exist. To do so would be to vitiate the whole basis of having such a unique exemption available for the use of institutions, in appropriate, yet rare, circumstances. If the [police], when faced with a direct query from a third party were to answer even negatively, such a response would constitute, in itself, an unjustified invasion of another individual's privacy. Only by the application of this section in these situations can we protect the privacy of individuals regardless of whether or not the information exists.
>
> … in this instance, … it is obviously an unjustified invasion of that individual's privacy to respond negatively or affirmatively to the request.
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> …

[43] The appellant submits that the disclosure of the "mere existence of records is not an unjustified invasion of personal privacy". The appellant submits:

> It is already public knowledge that [the named individual] has made 911 – phone calls so stating there are documents is not revealing anything not already known.

[44] I disagree with the appellant.[14] In my view, disclosure of the fact that records exist (or do not exist) in the circumstances of this appeal, would in itself reveal personal information to the appellant about whether or not the named individual *actually* made 911 emergency service calls during the specified time period.[15] In my view, the analysis that I have set out above with respect to the non-application of the factor favouring disclosure at section 14(2)(a) of the *Act*, and the application of section 14(2)(f), a factor weighing in favour of non-disclosure if the records existed, is equally applicable here.

[45] I find that disclosing the existence or non-existence of responsive records would in itself convey information to the appellant, and based on the application of the factor favouring privacy protection at section 14(2)(f), the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

[46] I find, therefore, that disclosure of the fact that responsive records exist (or do not exist) would in itself convey information to the appellant, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy. Consequently, the second requirement with respect to section 14(5) of the *Act* has been met.

[47] Accordingly, I conclude that the police have established both requirements for section 14(5).

B. Is there a compelling public interest that outweighs the application of section 14(5)?

[48] The appellant submits that there is a compelling public interest that outweighs the application of section 14(5) of the *Act* in the circumstances of this appeal.

[49] 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.

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[14] See the background section, above, where I set out that the three requests at issue in the appeals I am addressing in this order are different than the other requests relating to records about 911 calls which have been identified by the police.

[15] See in this regard Orders MO-2366 and MO-2379.

[50] 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.

[51] 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.[16] 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.[17]

[52] A public interest is not automatically established where the requester is a member of the media.[18]

[53] A public interest does not exist where the interests being advanced are essentially private in nature.[19] However, where a private interest in disclosure raises issues of a more general application, a public interest may be found to exist.[20]

[54] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[21]

[55] Any public interest in *non*-disclosure that may exist also must be considered.[22] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".[23]

[56] In their representations, the police submit that there is no compelling public interest in disclosure.

[57] The police submit that disclosure of the information, if it existed, would not make the named individual more accountable to the public or serve the purpose of "informing or enlightening the citizenry about the activities of their government or agencies". The police submit that, if responsive records existed they would have no bearing on the position held by the named individual.

[58] The appellant submits that there has been a high level of public interest in regards to numerous reported 911 calls by the named individual.

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[16] Order P-984 and PO-2607.
[17] Order P-984 and PO-2556.
[18] Orders M-773 and M-1074.
[19] Orders P-12, P-347, and P-1439.
[20] Order MO-1564.
[21] Order P-984.
[22] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).
[23] Orders PO-2072-F, PO-2098-R and PO-3197.

[59] The appellant submits that there has been wide debate "as to the events that surround 911-phone calls involving [the named individual]." That said, the appellant's representations on the application of the public interest override mostly focus on records relating to the named individual's encounter at his home with CBC's This Hour Has 22 Minutes, and his subsequent 911-phone call on October 24th, 2011, which are the subject of appeals MA12-39,[24] MA12-40 and MA12-41.[25]

[60] Generally however, the appellant submits that disclosure of the information sought would shed light on the operations of government, stating:

> Such information would inform the public as to whether or not our elected officials are abusive towards city employees or if preferential treatment is being given to city officials, as has been alleged. While I pass no judgment as to whether or not the alleged abuse of 911 dispatchers and demands for preferential treatment occurred, relevant records and audio recordings would give insight into the question of whether or not the [named individual's official title] is demanding and receiving special treatment from the Toronto Police Service due to his status as [an official]. Records pertaining to the matter would enlighten Torontonians with regards to the activities of their municipal governments and police service and help answer the unanswered questions.

Analysis and Finding

[61] In my view, where the issue of public interest is raised, one must necessarily weigh the costs and benefits of disclosure to the public. As part of this balancing, I must determine whether a compelling public interest exists which outweighs the purpose of the exemption.[26] An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption.[27]

[62] Section 14 is a mandatory exemption whose fundamental purpose is to ensure that the personal privacy of individuals is maintained except where infringements on this interest are justified. In furtherance of the legislative aim of protecting personal privacy, section 14(5) may be invoked to refuse to confirm or deny the existence of a record if its requirements are met.[28]

[63] It must be borne in mind that this is a request for information pertaining to another individual's contact with the 911 telephone service, and not that of a requester

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[24] Which is addressed in Order MO-2923.
[25] Which is addressed in Interim Order MO-2924-I.
[26] Order PO-1705.
[27] Order P-1398.
[28] See Order M-615.

seeking his own information pertaining to 911 calls that he made. This office has previously commented on the importance of maintaining the confidential nature of 911 calls.[29] In my view, disclosing the information, if it exists, would reveal whether or not a 911 emergency service call (or calls) was (or were) made by the named individual, which as I have determined above, is highly sensitive information. Although it has been stated that a public figure has a lessened expectation of privacy, public figures are still entitled to privacy with respect to their personal matters.

[64] While written in the context of a defamation case, the following comments of a majority of the Supreme Court of Canada in *Grant v. Torstar Corp*,[30] bear repeating:

> … First, and most fundamentally, the public interest is not synonymous with what interests the public. The public's appetite for information on a given subject — say, the private lives of well-known people — is not on its own sufficient to render an essentially private matter public for the purposes of defamation law. An individual's reasonable expectation of privacy must be respected in this determination. Conversely, the fact that much of the public would be less than riveted by a given subject matter does not remove the subject from the public interest. It is enough that some segment of the community would have a genuine interest in receiving information on the subject.

[65] Public figures therefore do not lose their privacy rights when they enter the political sphere. That being said, there may nevertheless be times when the private activities of public officials may warrant public scrutiny.

[66] In my view, this supports a conclusion that when the private activities of public officials affect their official sphere this may give rise to a public interest. An example is when it is alleged that a public official has misused their office for personal advantage, such as is alleged in the appeal before me.

[67] Without at all suggesting or accepting whether the appellant's assertions in this regard have any merit (and the appellant himself does not say they do, but only that access to the calls would help in assessing whether that might have been the case), there is a public interest in that aspect of the events. To that extent, the appellant has satisfied me that there would be a public interest in obtaining this type of information, which may or may not be reflected in any responsive records, if they exist.

[68] I also find, however, as I did in Order MO-2923, that there is a significant public interest in non-disclosure, related to the importance of preserving the privacy of 911 calls including both the information contained in records of this nature, and confirming

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[29] See Order MO-2699.
[30] 2009 SCC 61 at paragraph 102. See also *Vancouver Police Department (Re)*, 2007 Canlii 9595 (BC IPC) and Order PO-3025.

whether or not they exist. In my view, in the circumstances of this appeal, that public interest in non-disclosure is sufficient to bring the public interest in disclosure below the threshold of compelling.

[69] In light of the information requested, and my analysis set out above, I find that there does not exist a compelling public interest which outweighs the purpose of the section 14(5) exemption.

[70] As a result, I find that section 16 does not apply.

[71] Furthermore, I have considered the circumstances surrounding these appeals and the police's representations and I am satisfied that the police have not erred in the exercise of their discretion with respect to the application of section 14(5) of the *Act*.

ORDER:

I uphold the decisions of the police.

Original signed by: July 31, 2013
Steven Faughnan
Adjudicator