Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3059

Appeal MA12-385

Toronto Police Services Board

June 12, 2014

Summary: This order addresses the issues raised by an access request submitted to the police under the *Act*, seeking police records related to a March 2012 incident. The police withheld portions of the records under sections 38(a) (discretion to refuse requester's personal information), along with section 8(1)(l) (hamper control of crime), as well as section 38(b) (unjustified invasion of personal privacy), together with the presumption in section 14(3)(b) (investigation into possible violation of law). The appellant appealed the access decision, raising concerns about the processing of her request and challenging the adequacy of the searches conducted. In this order, the adjudicator partly upholds the access decision of the police under section 38(b), but orders other information that does not qualify for exemption disclosed to the appellant. While acknowledging the validity of the appellant's concerns about aspects of the handling of her request by the police, the adjudicator ultimately upholds the searches as reasonable.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) definition of personal information, 4(2), 14(2)(a), 14(2)(d), 14(2)(e), 14(2)(f) & 14(2)(h) 14(3)(b), 17 and 38(b).

OVERVIEW:

[1] This order addresses the issues raised in an appeal of the decision of the Toronto Police Services Board (the police) arising from a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). Having obtained the consent of a family member, who was one of the individuals involved in a specified incident that took place in March 2012, the requester sought access to the following records:

- 911 call/ICAD[1] report
- All notes for the officers involved in the incident
- Witness statements – video statements including contact information
- Complete CIPS[2] case
- Occurrence reports – incident reports
- In car camera/audio for 1st responding scout, car/arresting
- FI5 SOCO pictures relating to event

[2] The police issued a decision to the requester, granting partial access to the records. Portions of the records were withheld under section 38(a) (discretion to refuse requester's personal information), together with section 8(1)(l) (hamper control of crime) and section 38(b) (personal privacy), in conjunction with the presumption in section 14(3)(b) (investigation into a possible violation of law). The police indicated that "several other individuals" had not yet provided their views on disclosure of the information in the records relating to them, "but upon receipt representations [sic], those responsive records will be forwarded to you as soon as practicable." The police also advised that some parts of the records were severed because they were not responsive to the request.

[3] The requester (now the appellant) appealed the access decision to this office and also challenged the adequacy of the police's search for responsive records. During the mediation stage of the appeal, one of the individuals (affected parties) notified of the request under section 21(1)(b) of the *Act* provided written consent to disclose the information about her in the records. The other three affected parties did not respond to the notification or provide their consent to disclosure. Some disclosure was made on the basis of the consent received, but the appellant identified concerns with the completeness of that disclosure. Among items alleged to be missing was a copy of the 911 call that the consenting affected party made to the police. This record remained central to the appellant's concerns with the adequacy of the searches conducted by the police, along with other responsive records she believes are missing, including "in car camera" video footage.

[4] The appellant decided not to pursue access to the information withheld as non-responsive or the severances relating to "police codes," which resulted in the corresponding exemption claims in

[1] Intergraph Computer Aided Dispatch.
[2] Criminal Information Processing System.

section 38(a), with section 8(1)(l), being removed from the scope of the appeal. The information withheld under section 38(b) remained at issue, and the police maintained their position that they would not disclose the remaining withheld portions of the records without the consent of the affected parties.

[5] As a mediated resolution of the appeal was not possible, the appeal was transferred to the adjudication stage for an inquiry. At this point, copies of certain records at issue had not yet been sent to this office, and I issued the Notice of Inquiry to the police without having received them. Two video-taped statements of witnesses to the incident were subsequently delivered to this office. In this initial Notice of Inquiry, I also reminded the police that they had undertaken during mediation to issue a supplementary decision disclosing the audio recording of the 911 call made by the consenting affected party, the appellant's mother. After some delay, I received representations from the police, as well as a copy of the March 15, 2013 supplemental decision to the appellant regarding the 911 call record.[3]

[6] After resolving a minor preliminary issue with respect to sharing the police's representations with the appellant, I sent a modified Notice of Inquiry, along with the police's non-confidential representations, inviting representations from the appellant in response. After reviewing the appellant's representations, I concluded that they raised issues with the adequacy of the police's search and with the completeness of their submissions on that issue that the police should address. I then forwarded the appellant's representations to the police, inviting reply representations. At the time, I directed the police's attention specifically to addressing a persistent lack of clarity around the availability of certain in-car camera footage and the request for a "transcript" of the 911 call. The police provided terse reply representations.

[7] Next, I offered the appellant an opportunity to respond to those reply representations and the clarification provided. The appellant did so. In the appellant's sur-reply, she expressed concern – as she had consistently throughout the appeals process – with "excessive and unwarranted difficulties in trying to obtain release of the requested records" from the police, including delay and intransigence, unsatisfactory "internal processes," frustrating personal interactions (with access staff), and with the poor "quality of the records released." The appellant believes that her experience highlights serious problems with access to information at Toronto Police, including "no accountability in the process, and therefore nothing to ensure that the TPS adheres to the [*Act*]," which in her case "caused confusion and unnecessary delays in the resolution of my appeal."

[8] Some of these concerns are elaborated upon below, as they relate more specifically to the search issue. However, as I advised the appellant during the inquiry process, there are limits on my authority and the jurisdiction of this office to remedy concerns with process and staffing matters at an

[3] 40 pages that were partially disclosed to the appellant in this supplemental decision, pursuant to the written consent, were not included with the copy of it submitted to this office. At my request, this oversight was remedied by the police during the preparation of this order. The police also sent additional (front-facing) in car camera footage referred to in their supplementary reply representations as being denied under section 14.

institution. Therefore, to be clear, this order addresses the access decisions[4] appealed by the appellant and the "reasonableness" of the searches conducted by the police for records that are responsive to the appellant's request.

[9] In this order, I partly uphold the decision of the police to withhold the personal information of other identifiable individuals under section 38(b). Clear communication by the police earlier in this appeal process would have resolved many, if not most, of the appellant's concerns about search. Ultimately, however, I find that the search for responsive records by the police was reasonable for the purpose of section 17 of the *Act.*

RECORDS:

[10] The records remaining at issue consist of the withheld portions of a record of arrest, a supplementary record of arrest, witness list, police officers' notes, detective constable's notes, an occurrence report, photos, an in-car camera recording,[5] and video statements.[6]

ISSUES:

Preliminary Issue: responsiveness

A. Do the records contain "personal information" according to the definition in section 2(1) of the *Act*?

B. Does the personal privacy exemption in section 38(b) apply to the withheld information?

C. Did the police properly exercise their discretion under section 38(b)?

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[4] The initial decision of July 23, 2012 was followed by three revised or supplemental decisions issued during this appeal on September 26, 2012, March 15, 2013 and June 19, 2013.

[5] As provided to this office recently, the in car camera (ICC) recording shows both the rear-facing camera footage (disclosed to the appellant) and the front-facing footage on a split screen. Only the front-facing footage is at issue.

[6] Cover letter of January 11, 2013: three unmarked CDs, which I determined to be of the 911 call audio recording and two witness statements. The 911 call audio recording by the appellant's mother was disclosed to the appellant in the March 15, 2013 supplementary decision.

D. Did the police conduct a reasonable search for records?

DISCUSSION:

Preliminary Issue: responsiveness

[11] As stated above, the appellant decided not to pursue access to the information severed by the police on the basis that it was not responsive to her request. The appellant's correspondence and representations make it clear that she understood "non-responsive" to describe information relating to other police matters or involving certain police codes that did not reveal substantive information about this police matter. During my review of the records, however, I concluded that I should address several severances that had been made under the premise that the text was non-responsive.

[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.[7] To be considered responsive to the request, records must "reasonably relate" to the request.[8]

[13] On the copies of the records provided to this office, the basis of the severances is not marked on all pages. On some pages with multiple severances, the only indication of the reason is in index. Regarding pages 11, 26 and 28, the index lists "14(1)(f), 14(3)(b), 38(b), nr [non-responsive]." However, based on my review of these severances, I conclude that they relate to the appellant's request because they relate to the incident that led to the creation of the records. Therefore, I find that the information on those three pages which was withheld by the police as non-responsive is, in fact, responsive to the request, with very minor exceptions. Notably, I accept that certain information on page 11 was removed from the scope of the appeal.[9]

[14] Accordingly, I will review the possible application of the exemptions claimed with respect to the information on pages 11, 26 and 28 that I find to be responsive, along with the other withheld information, below.

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[7] Orders P-134 and P-880.
[8] Orders P-880 and PO-2661.
[9] It is the type of information the police had severed under section 38(a), together with section 8(1)(l).

A. Do the records contain "personal information" according to the definition in section 2(1) of the *Act*?

[15] In order to determine if section 38(b) applies, together with the exemption in section 14 claimed by the police, I must first decide 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 if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

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

[17] Sections 2(2.1) and (2.2) also relate to the definition of personal information and 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 (3) 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.

[18] 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.[10] However, 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.[11]

Representations

[19] The representations provided by the police refer only to paragraph (c) (identifying number, symbol or other particular) of the definition of personal information in section 2(1) of the *Act*, noting that it can include a license plate. The police cite and provide excerpts from several past orders of this office that review whether disclosure of license plates would reveal personal information about an

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

identifiable individual. The police refer to "innocent third parties driving by in their vehicle … having their personal privacy breached based on the ready availability of technology that could enhance the license plates, which may lead to their identification." These submissions are not connected with any of the records at issue specifically. Further, the representations do not directly address any other types of personal information appearing in the records, although they mention an individual's medical condition, thereby alluding to paragraph (b) of the definition.

[20] The appellant submits that she wants to receive the contents of the witness statements and says that the names of the individual witnesses may be removed "if privacy is a concern." The appellant also suggests that if the information is widely known, such as the identity, or images, of another specified individual who was involved in the incident, then this information may be disclosed because it is "within the public domain." Submissions in this vein will be addressed further under section 38(b), and the absurd result principle. Apart from these references, the appellant expresses interest in obtaining access to others' view or opinions about the incident so that the "truth of this serious matter [is] release d." She concedes that license plate images could reveal personal information, but maintains that these could be severed to prevent such disclosure.

Analysis and findings

[21] Although the appellant argues that information in the records cannot qualify as "personal information" if it is already public or well-known, these factors are not relevant to the determination of whether information fits within the definition of the term in section 2(1) of the *Act.* Rather, according to the definition in section 2(1), "personal information" means recorded information about an identifiable individual.

[22] I have reviewed the records to determine whether they contain "personal information" and, if so, to whom it relates. Based on this review, I find that the records contain information pertaining to the appellant that qualifies as her personal information within the meaning of paragraphs (a) (age, sex, marital or family status), (d) (address or phone number) and (h) (name, with other personal information) of the definition in section 2(1) of the *Act*.

[23] As suggested above, the police's representations on personal information in the records focus nearly exclusively on license plate numbers. I find that there is information of this nature in the records that fits within paragraph (c) of the definition of personal information in section 2(1) of the *Act.* However, the records also speak for themselves. In the nearly 130 other pages of records, I find that there is also personal information about other identifiable individuals that falls under the following paragraphs of the definition: (a) (age, sex, marital or family status), (b) (employment, medical), (c) (identifying number or other assigned particular), (d) (address or phone number), (g) (views or opinions about them), and (h) (names, with other personal information relating to these individuals).

[24] There are several exceptions to my finding that the records contain personal information about identifiable individuals. Portions of pages 26 and 28, which I found above to be responsive, in their entirety, contain information that is not about any identifiable individual. I find that this information - procedural and technical in nature – does not fit within the definition of "personal information" in section 2(1) of the *Act*. Disclosure of information that is not personal information cannot result in an unjustified invasion of personal privacy, and I find that these portions do not qualify for exemption under section 38(b) on this basis.

[25] Additionally, some of the information in the records fits within the exception in section 2(2.1). Previous orders have found that a police officer's badge number does not qualify as personal information because it is associated with the officer in a professional, rather than a personal capacity.[12] I agree with these orders, and I find that the badge numbers in the records (e.g., page 66) are the officers' professional information and do not reveal anything of a personal nature about them. Furthermore, pursuant to section 2(2.1) of the *Act,* the "name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity" does not qualify as "personal information." Accordingly, I find that information fitting within section 2(2.1) and the badge numbers contained in the records do not qualify as the personal information of these individuals referred to in the records.

[26] In summary, since the records contain the mixed personal information of the appellant and other identifiable individuals, I will review the possible application of section 38(b), which is the discretionary personal privacy exemption.

B. Does the personal privacy exemption in section 38(b) apply to the withheld information?

[27] Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. This approach 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.

[28] Sections 14(1) to (4) are considered in determining whether the unjustified invasion of personal privacy threshold is met. The exceptions in sections 14(1)(a) to (e) are relatively straightforward. None of them apply in this appeal. The exception in section 14(1)(f) (where "disclosure does not constitute an unjustified invasion of personal privacy"), is more complex and requires a consideration of additional parts of section 14.

[29] Section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy. Section 14(3) lists the

[12] Orders MO-2050, MO-2112, MO-2252, MO-2527 and MO-2911.

types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Finally, section 14(4) identifies information whose disclosure is not an unjustified invasion of personal privacy.

[30] For records claimed to be exempt under section 38(b), this office will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties in determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy.[13] This represents a shift away from the previous approach under both sections 38(b) and 14, whereby a finding that a section 14(3) presumption applied could not be rebutted by any combination of factors under section 14(2). As explained by Adjudicator Laurel Cropley in Order MO-2954:

> … [I]t is apparent that the mandatory and prohibitive nature of section 14(1) is intended to create a very high hurdle for a requester to obtain the personal information of another identifiable individual where the record does not also contain the requester's own information. On the other hand, section 38(b) is discretionary and permissive in nature, which, in my view, reflects the intention of the legislature that careful balancing of the privacy rights versus the right to access one's own personal information is required in cases where a requester is seeking his own personal information.[14]

[31] I will approach my review of the information at issue under section 38(b) with this rationale in mind.

Representations

[32] Although the police cite the application of the presumption in section 14(3)(b) in their decision letters and the index of records, they do not provide representations to support the application of this exemption for personal information gathered during an investigation into a possible violation of law.

[33] Regarding their decision to withhold information under section 38(b), the police refer to the "element of trust" accorded to police in conducting investigations that they will act responsibly when dealing with recorded personal information. The police submit:

> The records collected and redacted involving third parties and the affected party … were all supplied in confidence. Items such as … statements … and … personal opinions were all provided with an understanding that there would be some degree of anonymity.

[13] Order MO-2954.
[14] Order MO-2954 at page 24, paragraph 74.

[34] With specific reference to video content showing the other affected party involved in the incident with the appellant's family member, the police allude to the factor in section 14(2)(f) in submitting that:

> It is clear that there is an adversarial relationship … that has gone on for decades and to release this type of video could lead to harassment and malicious activity by the appellant. Furthermore, innocent third parties driving by in their vehicle, could also be subject to having their personal privacy breached based on the ready availability of technology that could enhance the license plates, which may lead to their identification.

[35] The police then provide an excerpt from Order P-312 where former Assistant Commission Tom Mitchinson referred to the third requirement (of four) for establishing the relevance of the factor favouring disclosure in section 14(2)(d). Next, the police quote from Order M-352, where the adjudicator wrote that it would be the "rare case" where the personal information of an individual other than the requester would be disclosed "in circumstances where that would constitute an unjustified invasion of personal privacy." The police do not elaborate on the link between these excerpts and the facts of this appeal. There is a later reference to Orders 12 and P-224, which the police suggest stand for the necessity of balancing affected party's privacy rights with any entitlement by an appellant to have names and addresses disclosed in the context of section 14(2)(d).

[36] The police reiterate that consent to disclose was not obtained from the affected party witnesses and the other affected party involved in the incident. Alluding to the factor in section 14(2)(e), the police submit that "it is also within reason to believe that any further release of personal information could be used punitively against the affected party." The police do not specify which "affected party."

[37] Respecting the possible application of the absurd result principle, the police submit:

> In this case, it is not absurd to withhold the information in the circumstances outlined above. The appellants' belief that there are additional records is correct; however it is their entitlement to those redacted portions where the belief is erroneous. This institution contends that the information believed to be "clearly within the requester's knowledge" does not negate any personal privacy rights.

[38] From statements that follow, the police appear to be suggesting that although the appellant or the consenting family member may already know what appears in the in-car camera footage or the redacted content of the records, the privacy rights of the other affected parties must not be "negated" by disclosure and should override the appellant's right of access in the circumstances.

[39] In response to the representations provided by the police, the appellant submits that a number of the exceptions to the personal privacy exemption apply in this appeal that "directly justify the disclosure of the records requested." In the appellant's view, the "adversarial relationship" between her family members and their neighbours relied on by the police in denying access is based on conjecture and should not have been factored into their decision. However, she believes that section 14(1)(b), which permits disclosure of personal information in compelling circumstances where health or safety is at risk, is applicable due to longstanding animosity and conflict between the households, for which the other involved individual - a neighbour – is responsible. According to the appellant, the incident has exacerbated the problem and she contends that there must be a means of holding the neighbour accountable for his aggressive actions. The appellant submits that section 14(1)(b) applies because her mother's health has been greatly affected by the stress of the ongoing situation.

[40] The appellant submits that the factors in sections 14(2)(a) and (d) apply because "the determination of truth is of paramount public importance." Referring to the factor in section 14(2)(a), the appellant submits that there were "numerous instances of questionable tactics and policy errors" by the police in handling this incident. According to the appellant, disclosure of the withheld personal information in this situation is justified because it is for the purpose of subjecting the activities of the police to public scrutiny. The appellant maintains that the police must be held accountable for their actions to ensure that they comply with applicable statutes and policies.

[41] The appellant also argues that the factor favouring disclosure in section 14(2)(d) applies because she believes that her family member was wrongly accused and treated and she wants to "correct the accuracy of the police records regarding the incident." She submits that her family member was "almost charged with assault as a direct result of suspected false testimony" by the neighbour. For this reason, the appellant submits that "information that will establish the truth of this serious matter [must] be released."

[42] The appellant offers her view that section 14(3)(b) is relevant because disclosure is necessary in this case "to continue the investigation in order to establish truth, ensure justice, and re-establish public trust and confidence in the [Toronto Police Service]."

[43] According to the appellant, the police's position on balancing her right of access with the need to protect the privacy of other individuals is flawed because the balancing principle should not be:

> … blindly applied when [it] would result in obstruction of truth and justice.. If TPS reviewed the actual history of the "antagonistic relationship" that they cite, they would see that public safety and justice must govern over privacy concerns in this case. The TPS cites concern that release of information will ensure that [our neighbour] is never held accountable for his aggressive behaviour and will guarantee his continuation of [it] … I have to question who TPS believes is under threat here.

[44] The appellant submits that the absurd result principle applies since she has the consent of her family member (who was involved) for disclosure and he was present during the incident. She also notes that the identities of the individuals involved in the incident are already well known to each other "and" that there is nothing new or unknown because they have lived in the same neighbourhood for 35 years.

Analysis and findings

[45] Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. As stated above, this approach involves a weighing of the requester's right of access to his or her own personal information against the other individuals' right to protection of their privacy. Therefore, I will consider the factors and presumptions in sections 14(2) and (3) to balance the interests of the parties in determining whether the disclosure of the personal information in the records *would* constitute an unjustified invasion of personal privacy under section 38(b). Based on the personal information remaining at issue, my analysis under section 38(b) addresses, for the most part, the disclosure of the personal information of identifiable individuals, other than the appellant's family.

[46] First, I will address the appellant's contention that the exception in section 14(1)(b) is relevant in this appeal. Section 14(1)(b) provides that "A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except … in compelling circumstances affecting the health or safety of an individual…" This exception is one for the *head* of an institution to invoke in compelling circumstances where the records contain potentially significant medical or safety information that ought to be provided to the relevant individual.[15] It does not apply where the requester is seeking another individual's personal information, including for the purpose of pursuing a proceeding or other action against that individual.[16] I find, therefore, that it does not apply in the circumstances.

[47] Next, and as I noted in setting out the representations provided in this appeal, the police claimed the presumption in section 14(3)(b) to deny access, but provided no submissions to substantiate this claim. The appellant sought to rely on section 14(3)(b) in support of disclosure in this appeal because she would like to pursue her own exploration of the circumstances. However, the "presumed unjustified invasion of privacy" in section 14(3)(b) is not intended to provide a means of obtaining access to the personal information of other individuals to pursue a private investigation (or prosecution).

[48] Notwithstanding the lack of submissions from the police on this provision, however, I have considered the content of the records at issue, and I find that the presumption against disclosure at section 14(3)(b) applies to the withheld portions of the records. Section 14(3)(b) states:

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

[15] Order PO-2541.
[16] See Order MO-1664.

> 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;

[49] In particular, I find that the personal information in these records was compiled by the police and is identifiable as part of an investigation to determine if the offence of assault under section 266 of the *Criminal Code* had been committed by the appellant's family member against a neighbour. Even if no criminal proceedings were commenced against any individuals, as in this matter, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.[17]

[50] The next determination under section 38(b), therefore, is what weight to afford this presumption, recognizing that the types of information set out in section 14(3) are generally regarded as particularly sensitive.[18] The appellant's stated reasons for seeking access to the withheld information about the identified incident include "establishing the truth," which she believes will permit the correction of erroneous information and promote greater accountability on the part of the police and her family's neighbour. Based on the appellant's stated reasons for obtaining access, I conclude that some of the personal information about other identifiable individuals in these records is related to those interests. Accordingly, I find that the presumption in section 14(3)(b) weighs only moderately in favour of privacy protection for this information. For the information that I conclude is unrelated to that interest, I find that section 14(3)(b) weighs heavily in favour of protecting the privacy of the individuals to whom the information relates.

[51] I will now address the possible application of the factors in section 14(2). The factors listed at paragraphs (a) through (d) of section 14(2) of the *Act* are those which may be relied upon to support the disclosure of information at issue in an appeal. The appellant's representations suggest that the factors at paragraphs (a) and (d) of section 14(2) may justify disclosure of the information. However, for the reasons set out below, I find that neither factor is applicable in the circumstances of this appeal.

[52] In order to support a finding that section 14(2)(a) (public scrutiny) applies to the disclosure of the personal information at issue, it must be shown that the activities of the police have been called into question publicly *and that the information sought will contribute materially to the scrutiny of those specific activities*. In the present appeal, however, the personal information sought by the appellant relates to an incident between neighbours on private property. In my view, this is a private interest. Moreover, although the appellant has expressed concern about the foundation for the decision by the police to initially accuse her family member of being the aggressor in the incident, there is no evidence before me to support a finding that disclosure of the personal information of other individuals in the

[17] Orders P-242 and MO-2235.
[18] Order MO-2954.

records at issue would serve to promote the objective of greater scrutiny of police activities by the public at large.[19] Therefore, I find that the factor at section 14(2)(a) is not applicable.

[53] Both the appellant and the police refer to section 14(2)(d) (fair determination of rights), albeit for different reasons. The appellant's desire to review the actions of the police in dealing with the incident and, tangentially, in addressing her concerns throughout this process, might suggest the application of the factor at section 14(2)(d), which relates to a fair determination of rights. However, this section does not apply in the circumstances. Previous orders of this office have established a four-part test for reliance upon this factor. 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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> (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.[20]

[54] The appellant clearly conveys why it is important to her that the "truth" about this incident be established by disclosure of the withheld information. Indeed, there is no reason to doubt her conviction that her family member's "rights" were not, at least initially, respected or fairly determined by the police. However, there is no evidence, either provided by the appellant or implicit in the circumstances of the appeal, to satisfy me that the first part of the test under section 14(2)(d) is met, namely that the right in question is a legal right drawn from the concepts of common law or statute law. Furthermore, there is also no evidence to establish the second requirement of an existing or reasonably contemplated proceeding. Notwithstanding the appellant's perception that her family member was treated unfairly by the police with respect to this incident, the four-part test under section 14(2)(d) has not been met, and I find that the factor does not apply.

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[19] See Order P-1014.

[20] 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.).

[55] The factors listed at paragraphs (e) through (i), which serve to protect the privacy of the individuals to whom the withheld personal information relates, must also be considered in balancing the factors under section 14(2). Although the representations provided by the police on the factors favouring privacy protection were not particularly helpful, I am satisfied that several of the factors are relevant in the circumstances of this appeal.

[56] Respecting section 14(2)(e) (unfair exposure to harm), this office has held that although the disclosure of personal information may be uncomfortable for those involved in an acrimonious relationship, this does not mean that harm would result, or that any resulting harm would be unfair.[21] However, it has also been held that the unfair harm contemplated by section 14(2)(e) is foreseeable where disclosure of personal information is likely to expose individuals to unwanted contact with the requester, or where such disclosure could expose the individuals concerned to repercussions as a result of their involvement in an investigation by the institution.[22] Based on the information before me, it is reasonable to conclude that the appellant does not consider this matter resolved. In the circumstances, I am satisfied that disclosure of some of the withheld personal information relating to the witnesses could lead to unfair exposure to the harm this section is intended to avoid. Accordingly, I find that the factor at section 14(2)(e) is a relevant consideration respecting that personal information.

[57] The police rely on the longstanding adversarial relationship between the neighbours involved in this matter. They suggest that disclosure of the video footage "could lead to harassment and malicious activity" by the appellant against the neighbours or, somewhat implausibly, the drivers whose license plate information could be gleaned from the footage. Implicitly, this suggests that section 14(2)(f) (highly sensitive) is relevant. For personal information to be considered highly sensitive in the manner contemplated by section 14(2)(f), I must be satisfied that disclosure of the information could reasonably be expected to cause significant personal distress to the subject individual.[23] Based on the circumstances, I am persuaded that disclosure of the witnesses' personal information in the video-taped witness statements could cause significant personal distress to them. I find that the factor at section 14(2)(f) is also a relevant consideration for their personal information in the records; however, I find that it does not otherwise apply to the remaining personal information.

[58] The police also imply that section 14(2)(h) (supplied in confidence) is relevant because the witnesses were supposedly assured of a degree of anonymity and confidentiality in providing their witness statements. The relevance of the factor is determined by evaluating whether the personal information was supplied by the individual to whom the information relates in confidence. Section 14(2)(h) does not generally apply when one person supplies personal information about another individual to an institution.[24] In giving witness statements to the police, the individuals identified in these records supplied the police with personal information relating to themselves and to other individuals, including the appellant's family member. I find that it reasonable to conclude from the circumstances that these individuals expected some level of confidentiality or discretion regarding the

[21] Order PO-2230.
[22] Orders M-1147, MO-2415 and PO-1659.
[23] Order PO-2518.
[24] Order P-606.

use or disclosure of their own personal information. In the circumstances of this appeal, I find that the factor in section 14(2)(h) is a relevant consideration in relation to the personal information of witnesses.

[59] Having balanced the competing interests of the appellant's right to disclosure of information against the privacy rights of other individuals, I conclude that there are no factors weighing in favour of the disclosure of the personal information of other individuals that is contained in these records. However, I find that the disclosure of the personal information that is subject to the presumption against disclosure in section 14(3)(b) and the privacy protective factors in sections 14(2)(e), (f) & (h) would constitute an unjustified invasion of the personal privacy of the individuals to whom it relates. Therefore, certain information about the witnesses and the neighbour qualifies for exemption under section 38(b).

[60] In my view, however, the absurd result principle is relevant in the circumstances of this appeal. According to the absurd result principle, whether or not the factors or circumstances in section 14(2) or the presumptions in section 14(3) apply, where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 14(1), because to find otherwise would be absurd and inconsistent with the purpose of the exemption.[25] One of the grounds upon which the absurd result principle has been applied in previous orders is where the information is clearly within the requester's knowledge.[26] In this section, I am concerned with the names and certain other details about the family's neighbours, where they appear intertwined with statements given by the appellant's family members. I have considered this information, and I conclude that it is clearly within the appellant's knowledge. In the particular circumstances of this appeal, I conclude that disclosure of this specific, limited, personal information would not result in an unjustified invasion of another individual's personal privacy under section 38(b), regardless of the application of the presumption in section 14(3)(b) or any of the factors in section 14(2). Under the circumstances, I find that refusing to disclose this specific information to the appellant would lead to an absurd result. Therefore, I will order the police to disclose this information, along with the other information that I have found not to be exempt under section 38(b).

[61] Additionally, I note here that the police applied certain confounding severances to the records, some of which involve information that does not qualify as "personal information." For example, in several instances, the police severed the plural ending from certain words. Since these severances do not consist of "personal information," they cannot qualify for exemption under the personal privacy exemption. However, since these brief snippets or portions of words do not contribute meaningfully to the overall narrative of the records, I conclude that is not reasonably necessary (or practical) for me to order them disclosed, pursuant to section 4(2).[27]

[62] In sum, subject to my review of the police's exercise of discretion, I find that the discretionary exemption in section 38(b) applies to the remaining personal information of other individuals in the

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[25] Orders M-444 and MO-1323.
[26] Orders MO-1196, PO-1679, MO-1755 and PO-2679.
[27] The key question raised by section 4(2) of the *Act* is one of reasonableness. A valid section 4(2) severance must provide a requester with information that is responsive to the request, while at the same time protecting the confidentiality of the portions of the record covered by the exemption.

records. With regard to the types of records at issue, I find that section 38(b) applies to portions of the record of arrest, supplementary record of arrest, witness list, police officers' notes, occurrence report, photos, all as marked on the paper copies of the records provided to the police with this order. I also find that section 38(b) applies to the front-facing in-car camera recording up to 9:17:24. With regard for the video statements of two witnesses, I find that section 38(b) applies to them, in their entirety. It is not reasonably practicable to disclose any portion of these two video-taped statements without also disclosing the identities and other personal information about those two witnesses.

C. Did the police properly exercise their discretion under section 38(b)?

[63] Since I have upheld the decision of the police to deny access, in part, under section 38(b), I must now consider whether they properly exercised their discretion in doing so. Since section 38(b) is a discretionary exemption, the police had the discretion to disclose the withheld information, even if it qualified for exemption. This is the essence of a discretionary exemption.

[64] On appeal, an adjudicator may review the institution's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so. In doing so in this appeal, I may find that the police erred in exercising their discretion where, for example, I find that they did so in bad faith or for an improper purpose, took into account irrelevant considerations, or failed to take into account relevant considerations. In such a case, I may send the matter back to the police for an exercise of discretion based on proper considerations. However, section 43(2) of the *Act* states that I may not substitute my own discretion for that of the police.[28]

Representations

[65] The police submit that the balance between the appellant's right of access to the withheld information and the protection of privacy "must be given in favor of protecting the privacy of the third party," given the nature of the police service as an institution that operates in a law enforcement context. The police elaborate on this point, stating:

> Given the unique status of law enforcement institutions within the *Act* and the unique status to authorize the collection of personal information, we generally view the spirit and content of the *Act* as placing a greater responsibility to safeguarding the privacy interests of individuals [whose] personal information is being collected.

[28] Order MO-1573.

[66] The police maintain that in this case, as in "each and every access request file," they "scrupulously" weighed the factors in exercising their discretion to withhold the affected parties' personal information, including information that may already be known to the appellant's family member.

[67] The appellant's representations on the police's exercise of discretion communicate her concerns with delay and with the piecemeal disclosure of records during the appeal process. She points out that the signed consent from one of her family members was not acted upon by the police (with a revised access decision) for seven months. The appellant construes this example, and others she mentions, as evidence of poor conduct and bad faith on the part of the police. The appellant submits that her situation suggests "an abuse of discretion" by the police, one that does not inspire public confidence that the police are fairly releasing information. The appellant then provides her views on the factors the police ought to have considered relevant in their exercise of discretion, including: the limited and specific application of exemptions; the interests the exemption seeks to protect; and increasing public confidence in the institution. The appellant acknowledges that balancing privacy and access rights can be difficult, but submits that "public health, safety and security, and enforcement of the law" in this situation ought to take precedence in determining the appropriate level of disclosure. She also explains how public trust and confidence in the fairness and transparency of the Toronto Police Service was damaged in this case and why greater disclosure (and cooperation) would serve to enhance that necessary confidence in the police.

Findings

[68] To begin, I note that my review of the exercise of discretion by the police relates only to the information in the records for which I have upheld the claim of section 38(b), with reference to section 14(3)(b) and the factors in sections 14(2)(e), (f) and (h).

[69] In my review of the exercise of discretion by the police in denying access to the undisclosed information, I acknowledge the appellant's frustration and her concerns about the delays and intransigence of the police in processing the request. However, there is no evidence that the challenges and difficulties the appellant and this office encountered with the police during this appeal factored into their decision to withhold certain information. Rather, based on my review of the representations of the police, I conclude that they were mindful of the competing interests at stake when claiming the exemptions. In particular, I am satisfied that police understood their obligation to balance the appellant's interests in seeking access to this information with protecting the privacy interests of other individuals in a law enforcement context. The reasons given demonstrate that the police considered relevant factors in exercising their discretion to withhold the portions of the records that I have found exempt and that they exercised their discretion in good faith. In the circumstances, therefore, I find that the police have properly exercised their discretion, and I will not interfere with that exercise of discretion on appeal.

D: Did the police conduct a reasonable search for records?

[70] As suggested in the introduction to this order, the search issue in this appeal appears to have arisen mainly as a consequence of there being a persistent lack of clarity around the identification and disclosure of records. In response to this lack of clarity, the appellant apparently concluded she had no choice but to appeal to this office to review the adequacy of the police's searches.

[71] As outlined in many past orders of this office, 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.*[29] 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.

[72] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[30] To be responsive, a record must be "reasonably related" to the request.[31] The *Act* does not require the police to prove with absolute certainty that further records do not exist. However, the police must provide sufficient evidence to show that a reasonable effort to identify and locate responsive records has been made.[32] Additionally, 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.[33]

Representations

[73] Although the appellant raised questions and concerns that touched upon the search issue throughout the appeal process, by the end of the inquiry the issue had been narrowed to concerns about the search for in car camera footage for a specified time period and a "transcript" of the 911 call made by the appellant's mother. The narrowing of the scope of the search issue was also directly connected with the ongoing disclosure of other records during the mediation and adjudication stages of the appeal.

[74] The police submit that the searches for responsive records were conducted by two different analysts over the course of the appeal, "both of whom were unavailable to provide the details of their step by step searches." However, the police submit that a third analyst undertook to review and describe the searches conducted. According to the police, they:

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[29] Orders P-85, P-221 and PO-1954-I.
[30] Orders M-909, PO-2469 and PO-2592.
[31] Order PO-2554.
[32] Orders P-624 and PO-2559.
[33] Order MO-2246.

> Ran all checks on the Toronto Police Service databases utilizing the information provided – addresses, names, in addition to telephone calls made through the ICAD … system. This system deals with all calls via the 911 system. If an officer was dispatched as a result of a telephone call to 911, the officer(s) dispatched are recorded on the ICAD database. The memo books of all attending officers noted for the incident were called in…
>
> The Unit received all memorandum book notes for attending officers to the 911 call that were detailed as responsive. The releasable portions of the relevant memorandum book notes were disseminated to the appellant.
>
> The occurrence report and CIPS report were accessed via the mainframe database and vetted according to the *Act*.
>
> The Communications Unit was contacted … to obtain the responsive 911 calls made by various parties. Portions of the 911 call transcript as it related to parties for whom we have been provided authorization, were released. The audio CD of the 911 call was released in full.
>
> The Video Services Unit was contacted to provide witness statements, in-car video footage. … Once a determination was made on what we had written support to disseminate, those DVD's were copied and released, with the remainder being withheld via the use of section 14 exemptions.

[75] The appellant took issue with the police's submission that characterized her concern about missing in-car camera footage as a "belief" that it was missing, stating: "… They [the missing minutes between 9:34 and 9:46] have either been intentionally blocked out or they do not exist because the camera was turned off."

[76] Regarding the written transcript of the 911 call by her mother, the police disclosed another copy of the ICAD report to her on June 19, 2013, noting that it was "previously released to you on September 26th, 2012." Based on the appellant's representations, I wrote to the police to seek clarification about the "missing" portion of the rear-seat in-car camera footage, the front windshield in-car camera footage, and the written 911 call transcript. I stated:

> In her June 24, 2013 correspondence … the appellant points out that the police have released the same ICAD report to her once again, but not the written transcript of her mother's 911 call that she has been trying to obtain from the police. **This discrepancy has never been addressed or explained by the police in any written submissions received by this office.** If the position of the police is that the ICAD report is the same record as the written 911 transcript, this has never been clarified. … [emphasis in original]

[77] Additionally, the police had advised that the circumstances of the "missing" in car camera footage were under investigation by the police's Professional Standards Unit, but had otherwise only stated that "no additional records beyond those two clips exist." The police had not submitted the requested representations on the search issue. A copy of the appellant's June 24th correspondence was provided to the police in a further attempt to clarify the outstanding matters with search. I specifically asked the police for "clarification of the issue surrounding the 911 written transcript disclosure (versus ICAD report); [and] a better explanation of the missing video footage (0934 to 0946) of the rear seat in-car camera; and the front windshield in-car camera video.

[78] The police responded on July 25, 2013 with reply representations that stated:

> It is common knowledge that the 911 transcript and ICAD Event Report are one in [sic] the same document. The appellant never raised that as an issue; rather, she simply stated that she did not receive the transcript. When it was explained multiple times that she had in fact received the transcript, confirming yet again by releasing the same document, I am not clear what more we can offer to clarify this matter.
>
> The In Car Camera (ICC) was shut off at 0934 hrs and started again at 0946 hrs. The time between does not exist as nothing was recorded. The front facing video was denied under sec 14 as it is footage of the involved party and NOT of the [appellant.] …

[79] Upon being provided with the police's July 25 reply representations, the appellant stated:

> Regarding the missing 911 transcript and the missing rear seat in-camera video from 9:34 to 9:46, I am pleased to finally receive clarity form TPS on these issues. TPS has stated that there is no written transcript of my mother's 911 call – it does not exist. They have also finally admitted that the arresting officers turned off the rear facing in-

> car camera between 9:34 and 9:46 am on March 20, 2012, and therefore the video footage in that time period does not exist. Since apparently no further documentation exists, these admissions satisfy my requests for information on these two issues.
>
> …
>
> Regarding their explanation [of] the 911 call transcript, … the ICAD report and a transcript are not "one in the same document" … and to state that they are is false and certainly not "common knowledge". A transcript is normally word-for-word written documentation of an event stated verbally or captured on video. … Had she merely stated that a written transcript of the 911 call "does not exist" when I first asked for it, or in response to any of my subsequent requests for it, this issue could have been closed a long time ago.
>
> Second, it is extremely disturbing that it took over a year of correspondence and an appeal to finally get an admission that the missing rear facing in-car video footage I had been requesting does not exist because the camera was turned off. I had questioned this many times in my correspondence with Access and Privacy Section, senior members of TPS, and the OIPRD. Each response to me sought to avoid the issue. … [T]his issue also could have been closed over a year ago.

Analysis and findings

[80] As previously stated, in appeals involving a claim that additional records exist, the issue to be decided is whether an institution has conducted a reasonable search for responsive records as required by section 17 of the *Act*. The police were required to provide sufficient evidence to show that a reasonable effort to identify and locate responsive records has been made.[34]

[81] The search issue in this appeal illustrates the importance of an institution communicating clearly with requesters from the beginning of the request process. As suggested above, issues with the adequacy of the police's search seem to have arisen from the lack of adequate communication with the appellant regarding in car camera footage and the 911 call transcript, rather than a failure to conduct searches for responsive records. The effects of that communication gap were long-lasting, particularly considering that I was still seeking evidence from the police on the search issue up to the very end of this inquiry.

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[34] Orders P-624 and PO-2559.

[82] I am persuaded by the available evidence and the overall circumstances of this appeal that the police made a reasonable effort to identify and locate any existing records that are responsive to the appellant's request. I accept that relevant and appropriate police staff conducted searches and that they were aware of what records should exist. In this appeal, I am satisfied that reasonable efforts were made to search for, and identify, responsive records, even if later communication created the impression of inadequacy.

[83] First, I accept the evidence of the police – as the appellant also apparently does – that in-car camera footage between 9:34 a.m. and 9:46 a.m. on March 20, 2012, does not exist for the reason now given. The camera was turned off.

[84] Second, no transcript of the 911 call recording exists. Although the police insisted in their July 2013 representations that "[i]t is common knowledge that the 911 transcript and ICAD Event Report are one [and] the same document," I agree with the appellant that this is neither "common knowledge;" nor is it necessarily correct. According to a May 2009 document titled "Summary of ADS Functions,"[35] which was provided to this office on the same CD as the front-facing in car camera video, verbatim *transcripts* of calls received by the police on their voice logging systems, including 911 calls, are "prepared by ADS only under special circumstances and only for court purposes, as of June 1999." I interpret this summary document to confirm that a 911 call transcript is, in fact, a separate document from an ICAD event report. As noted above, however, the appellant received both the complete audio recording of her mother's 911 call during adjudication and non-exempt portions of the ICAD report (on two occasions during mediation and adjudication), and she concedes this aspect of the search issue in her final submissions.

[85] This aspect of the appeal could have been resolved with earlier clarification of the appellant's concerns about the "911 call transcript" and "missing" in-car camera footage by the police. However, based on the information available to me at this time, I find that the search for records responsive to the appellant's request was adequate for the purposes of section 17 of the *Act*, and I dismiss this part of the appeal.

ORDER:

1. I uphold, in part, the decision of the police to withhold the personal information of other identifiable individuals under section 38(b) of the *Act.* Section 38(b) applies to the front-facing in car camera footage up to 9:17:24 only. The video recordings of the two witness statements are exempt under section 38(b), in their entirety.

2. I order the police to disclose to the appellant all other withheld responsive and non-exempt portions of the records by **July 18, 2014** but not before **July 14, 2014**. To verify compliance with

[35] Audio and Data Systems, which is part of TPS Communications.

this provision, I reserve the right to require the police to provide me with a copy of the records disclosed to the appellant.

3. With this order, I provide only copies of the paper records for which the police's decision is **not** being upheld. The information I find to be exempt under section 38(b) (or where the police severed information as non-responsive) is marked with orange highlighter.

4. I uphold the search by the police for records responsive to the appellant's request.

Original Signed By: June 12, 2014

Daphne Loukidelis

Adjudicator