Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3247

Appeal MA15-36

Toronto Police Services Board

September 30, 2015

Summary: The appellant, a regulatory agency that is not an institution under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), made a request under the *Act* to the Toronto Police Services Board (the police) for access to information about police interactions with residents of a retirement home at a specified address. The police denied access to the requested records under section 14(1) of the *Act* (personal privacy). The appellant disputes the position taken by the police that the records are exempt from disclosure. The appellant also argues that the public interest override found at section 16 of the *Act* applies. The appellant states that its "primary interest" in this appeal is to obtain a declaration that it is a law enforcement agency for the purposes of the "permitted disclosure" provisions at sections 32(f)(ii) and (g), found in Part II of the *Act*.

In this order, the adjudicator reaches the following conclusions: (1) based on previous jurisprudence, the "permitted disclosure" provisions at section 32 of the *Act* do not apply in the context of an access request; (2) he lacks the jurisdiction to issue the declaration sought by the appellant; (3) the records at issue are exempt under section 14(1) of the *Act*; and (4), the public interest override at section 16 of the *Act* does not apply.

In a postscript, the adjudicator encourages the police and the appellant to consider the possibility that section 32(e) of the *Act*, in conjunction with section 75(1) of the *Retirement Homes Act*, could provide a basis for addressing the appellant's interest in receiving timely access to information.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 1(a)(i), 1(b), 2(1) (definitions of "law enforcement" and

"personal information"), 4(1), 14(1)(b), (d) and (f), 14(2)(b), (c), (d) and (f), 14(3)(b) and (h), 16, 32(c), (e), (f)(ii) and (g), 39, 41 and 43. *Retirement Homes Act, 2010*, S.O. 2010, c. 11, sections 1, 16(a), 75(1), (3) and (5), 77 and 113(3).

Orders and Investigation Reports Considered: Orders M-96, M-339, M-787, MO-2677, MO-2343, P-11, P-867, P-984, PO-2541, PO-2556; Investigation Reports I94-023P and MC-060020-1.

Cases Considered: *Wellington County Board of Education and Tom Mitchinson, Assistant Information and Privacy Commissioner of Ontario* (Tor. Doc. 407/93, February 6, 1995); *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionelles)*, [1993] 2 S.C.R. 756; *Essex County Roman Catholic School Board v. Ontario English Catholic Teachers' Assn.* (2001), 56 O.R. (3d) 85, *Joshi et al. v. Minister of Health and Long-term care*, 2015 ONSC 1001 (SCDC); *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559; *R.v. Dyment*, [1988] 2 S.C.R. 417; and *Municipal Property Assessment Corporation* v. *Ontario (Information and Privacy Commissioner*), 71 O.R. (3d) 303 (Div. Ct.).

OVERVIEW:

[1] The appellant, the Retirement Homes Regulatory Authority, submitted a request to the Toronto Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for the following information:

> • Report [specified number] taken by [a named officer] on November 11, 2014 regarding [a named individual] who was found wandering on the morning of November 11, 2014. [The named individual] is a resident at [an identified municipal address], a premises at which the operator [named], continues to operate a retirement home in contravention of the Retirement Homes Act.
>
> • Any prior incident reports in respect of wandering by [the named individual] since he took up residence at the premises [the identified municipal address] on December 21, 2012.
>
> • Any additional reports recorded by Toronto Police in relation to [the named municipal address] or its residents.
>
> • Any by-law charges issued in relation to [the named municipal address].
>
> • Information about any orders, tickets or charges relating to [the named municipal address].

[2] The appellant, the Retirement Homes Regulatory Authority, is a regulatory

agency established as a corporation without share capital under section 10 of the *Retirement Homes Act* (*RHA*). The appellant is not an "institution"[1] under the *Act*. The identified municipal address referred to in the request is the location of a retirement home (the "retirement home") that fell under the appellant's regulatory mandate when the requested records were generated.

[3] The owner/operator of the retirement home has been: denied a licence by the appellant (a denial that was upheld by the Licensing Appeal Tribunal); ordered to cease operations by the appellant; and charged with and convicted of operating a retirement home without a licence under section 33 of the *RHA*, and sentenced to jail time and placed on probation. The retirement home has also been the subject of an inspection by the appellant under section 77 of the *RHA* during which the appellant seized the personal files of all residents.

[4] In its request letter, the appellant stated that it is a "law enforcement agency" and that disclosure of the requested information to it would be permitted under section 32(g) of the *Act*.[2] The appellant provided extensive references to its governing statute in order to substantiate its position that it is a "law enforcement agency." The appellant also described its mandate to provide licences in its area of authority or, on occasion, to withhold them in order to protect the public interest; to conduct inquiries, inspections and investigations; and to launch prosecutions.

[5] In their decision, the police advised the following:

> Access to Toronto Police Service records is controlled by the *Municipal Freedom of Information and Protection of Privacy Act* (hereinafter *MFIPPA*). Section 2(1) of *MFIPPA* defines "law enforcement" to mean:
>
> > "(a) policing,
> >
> > (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
> >
> > (c) the conduct of proceedings referred to in clause (b);"
>
> Certain of the provisions of *MFIPPA* permit disclosure of personal information for law enforcement purposes, and, in particular, I would bring to your attention sub-sections 32(f)(ii) and 32(g), that provide as follows:

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[1] as defined in section 2(1) of the *Act*.

[2] Section 32 is in Part II of the *Act* ("Protection of Individual Privacy"), and is captioned "where disclosure permitted" in the accompanying marginal note.

> "An institution shall not disclose personal information in its custody, or under its control except,
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> …
>
> (f) if disclosure is by a law enforcement institution,
>
> (ii) to another law enforcement agency in Canada;
>
> (g) if disclosure is to an institution or a law enforcement agency in Canada to aid an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;"
>
> Based on the information provided, the discipline function (which would include investigations and prosecutions) of the [appellant] does not, in my opinion, meet the definition of "law enforcement". It is unclear how the [appellant] falls within the scope of definition whereby the request is "consistent" with the purposes of a police investigation into criminal conduct and we have treated your request accordingly.
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> …

[6] The police provided partial access to an eight-page record that was initially located. They denied access to some information in this record under the mandatory exemption at section 14(1) of the *Act* (personal privacy), with reference to sections 14(1)(f) and 14(3)(b). Further information was withheld by the police because they determined that it is not responsive to this request.

[7] The appellant appealed this decision. In its appeal letter, the appellant stated that it seeks access to the requested records, and a confirmation that it is a "law enforcement" agency within the meaning of section 2(1) of the *Act*.

[8] This office assigned the appeal to a mediator under section 40 of the *Act*. During mediation, the appellant advised that it does not seek access to the non-responsive information. Also during mediation, the police conducted a search for further records and located various occurrence and community inquiry reports. These records were withheld in full under section 14(1) of the *Act*. The appellant reaffirmed its position that it is entitled to access to the records. The appellant relies on the "permitted disclosure" provisions in sections 32(f)(ii) and 32(g) of the *Act*.

[9] No further mediation was possible and accordingly, this appeal has moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*.

[10] I began the inquiry by sending a Notice of Inquiry to the police. The notice

invited them to provide representations concerning the application of section 14(1) of the *Act*. I also invited the police to provide representations on the possible application of section 16 (the public interest override). The police responded with representations.

[11] I then sent a Notice of Inquiry to the appellant. I enclosed the non-confidential portions of the police's representations. I invited the appellant to provide representations on all issues, including sections 32(c) (which I raised), 32(f)(ii) and 32(g) of the *Act*. The appellant responded with representations.

[12] In response to a request in the Notice of Inquiry I sent to the police, they provided an explanation of which undisclosed parts of pages 1-8 of the records are non-responsive. The police essentially take the position that all of the undisclosed information in these pages, with the exception of the event numbers, is non-responsive. Having reviewed the records and the wording of the request, I agree with this assessment, and since the appellant has affirmed that it does not seek access to non-responsive information, those portions of pages 1-8 are no longer at issue.

[13] The appellant's representations confirm that the two proceedings against the owner/operator of the retirement home that were pending at the time of the request are now concluded.

[14] The appellant's representations also confirm that, after being convicted of operating a retirement home without a licence, the owner/operator of the retirement home was placed on probation on terms that include: (1) a prohibition against admitting anyone over sixty-five years of age as a resident of the retirement home; and (2) a requirement that the owner of the retirement home provide monthly reports to the appellant setting out information about residents of the facility, including their names, dates of birth and care services provided to them.

[15] Although mootness was not raised as an issue in the Notice of Inquiry, the appellant provided submissions to the effect that the appeal is not moot, on the basis that "the issues currently under appeal are bound to recur." The mootness issue apparently arises from the resolution of the proceedings against the owner/operator of the retirement home. In my view, however, the appeal is not moot because the central issue in the appeal, namely the refusal of the police to disclose the records at issue, remains unresolved.

RECORDS:

[16] The records at issue consist of a number of occurrence reports, community inquiry reports and other police records comprising 136 pages.

ISSUES:

A. What is the impact of sections 32(c), (f)(ii) or (g) in the context of this request and appeal?

B. Do the records contain personal information?

C. If so, does the mandatory exemption at section 14(1) apply?

D. Does the public interest override at section 16 apply?

DISCUSSION:

A. What is the impact of sections 32(c), (f)(ii) or (g) in the context of this request and appeal?

[17] As already noted, the appellant has taken the position, commencing with its access request, that it is a "law enforcement agency" and, as such, is entitled to disclosure of the records under section 32 of the *Act*. As is evident from their decision letter referred to above, the police disagree.

[18] Section 32 is found in Part II of the *Act*, which is entitled, "Protection of Individual Privacy." Sections 32(c), (f)(ii) and (g) of the *Act* state:

> An institution shall not disclose personal information in its custody, or under its control except,
>
> > (c) for the purpose for which it was obtained or compiled or for a consistent purpose;
> >
> > (f) if disclosure is by a law enforcement institution,
> >
> > > (ii) to another law enforcement agency in Canada;
> >
> > (g) if disclosure is to an institution or a law enforcement agency in Canada to aid an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;"

[19] Section 2(1) of *MFIPPA* defines "law enforcement" to mean:

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

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

[20] In its representations, the appellant states:

> The [appellant]'s primary interest in this appeal is for a ruling that it is a "Law Enforcement Agency" pursuant to section 32 of [the *Act*]. The [appellant] takes the position that [the police] and any other "Law Enforcement Institution" is entitled to disclose information to the [appellant] pursuant to the provisions of sections 32(f)(ii) and 32(g).

[21] In effect, the appellant seeks a declaration that it is a "law enforcement agency" in the apparent belief that this would give it a right of access under section 32.

[22] In the Notice of Inquiry sent to the appellant, I invited it to provide representations on the impact of Order M-96, in which former Assistant Commissioner Tom Mitchinson found that section 32 does not confer a right of access under Part I of the *Act*. I also noted that Order M-96 was upheld by the Divisional Court in *Ontario Secondary School Federation District 39 and Wellington County Board of Education and Tom Mitchinson, Assistant Information and Privacy Commissioner of Ontario* ("*Wellington County Board of Education*").[3]

[23] In Order M-96, former Assistant Commissioner Mitchinson explained his decision that section 32 does not create a right of access under Part I of the *Act* as follows:

> Section 32 is contained in Part II of the *Act*. This Part establishes a set of rules governing the collection, retention, use and disclosure of personal information by institutions in the course of administering their public responsibilities. Section 32 prohibits disclosure of personal information except in certain circumstances; it does not create a right of access. The Federation's request to the Board was made under Part I of the *Act*, and this appeal concerns the Board's decision to deny access. In my view, the considerations contained in Part II of the *Act*, and specifically the factors listed in section 32, are not relevant to an access request made under Part I.

[24] In upholding this decision in *Wellington County Board of Education*, the Divisional Court stated that ". . . the approach to the Act taken by the Assistant Commissioner and the findings made were not unreasonable patently or otherwise."

[25] In its representations, the appellant suggests that Order M-96 and *Wellington County Board of Education* can be distinguished on the basis that in that case, "the interests of the parties was adversarial," whereas "[i]n this case, the [appellant] submits that its interests align with [the police] and that [the police] and other 'Law

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[3] (Tor. Doc. 407/93, February 6, 1995). See also: Order P-1014.

Enforcement Institutions' would disclose information on request by the [appellant] provided that the IPC concludes that the [appellant] is a law enforcement agency.

[26] I do not agree that this provides a sound basis for distinguishing these decisions. In my view, the question of whether the relationship between the parties is adversarial has no bearing on whether Part II of the *Act* is relevant in addressing an access request under Part I.

[27] Moreover, although it would be open to me to adopt another reasonable interpretation, because Order M-96 was upheld by the Divisional Court on a reasonableness standard of review, rather than correctness,[4] I agree with former Assistant Commissioner Mitchinson's approach to the relationship between section 32 and the right of access under Part I of the *Act*.

[28] As can be seen from its wording, section 32 of the *Act* prohibits the disclosure of personal information except in certain circumstances. It does not take the added step, when those circumstances are present, of *requiring* that the information be disclosed. Section 32 should therefore be seen as a privacy protective provision that confers discretion on institutions to disclose personal information if one of the listed exceptions to the prohibition against disclosure applies.

[29] This is quite different than the scheme in Part I of the *Act*, which deals with access requests. Section 4(1) creates the right of access to records under Part I. It states:

> Every person has a right of access to a record or part of a record in the custody or under the control of an institution unless,
>
> > (a) the record or the part of the record falls within one of the exemptions in sections 6 to 15 or;
> >
> > (b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

[30] It is apparent from reading section 4(1) that the right of access it creates is mandatory unless subsection (a) or (b) applies.

[31] Incorporating the provisions of section 32 into the mandatory access scheme created by section 4(1) would therefore transform the discretion to disclose under section 32 into a mandatory vehicle for disclosure. This would be at odds with the

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[4] See *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionelles)*, [1993] 2 S.C.R. 756 and *Essex County Roman Catholic School Board v. Ontario English Catholic Teachers' Assn.* (2001), 56 O.R. (3d) 85. The principle of binding precedent known as *stare decisis* does not apply to administrative tribunals (*Domtar*), and judicial decisions on the reasonableness standard are not binding (*Essex County*).

evident legislative purpose of allowing institutions discretionary latitude with respect to disclosures under section 32 while also protecting individual privacy.

[32] By way of illustration, if section 32(f)(ii) were interpreted as creating a right of access, any law enforcement agency in Canada could require any law enforcement institution in Ontario to disclose personal information in the latter's possession, without regard for the nature of the information or the circumstances of its collection. This would contradict the legislative purposes I have just identified, and it would be inconsistent with the purpose of the *Act* "to protect the privacy of individuals with respect to personal information about themselves held by institutions . . ." as set out in section 1(b).

[33] The force of this analysis is not diminished by the fact that some of the exemptions in Part I are discretionary; the essential fact remains that in an access request, unless an exemption applies, or the request is frivolous or vexatious, disclosure is mandatory.[5]

[34] This analysis is sufficient to dispose of section 32. However, I would also observe that, for the reasons that follow, I do not have the authority to issue a declaration of the kind sought by the appellant.

[35] The right to appeal "any decision of a head" is conferred by section 39(1), and section 43 requires the Commissioner to issue an order "disposing of the issues raised by the appeal" after the evidence for an inquiry has been received.

[36] In this case, the police's decision letter did refer to, and reject, the appellant's arguments relating to section 32, which the appellant had included in its request. Nevertheless, it is clear from the wording of the decision letter that the decision to deny access was made by applying section 14 of the *Act*. As stated in the decision letter:

> Access is denied to certain information pursuant to subsections 14(1)(f) and 14(3)(b) of the *Act*.

[37] In view of the discussion, above, of Order M-96 and *Wellington County Board of Education*, my decision in this appeal does not turn on whether or not the appellant is a law enforcement agency. Moreover, the appeal powers granted to the Commissioner under sections 39, 41[6] and 43 of the *Act* do not confer the authority to issue a declaration on a matter that is not a necessary aspect of deciding an appeal.

[38] Accordingly, I find that I do not have jurisdiction to issue the declaration sought

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[5] In some cases, a fee must be paid before access is granted, but that is not an issue here. See section 45 of the *Act*.

[6] Section 41 of the *Act* mandates the inquiry portion of the appeal process, and sets out the Commissioner's powers in conducting an inquiry.

by the appellant in the context of an access request and appeal.

[39] I have included a postscript to this order in which I suggest a possible alternative approach under section 32(e) of the *Act*. If adopted, that approach would not rely on the right of access under Part I.

B. Do the records contain personal information?

[40] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates.

[41] 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;

[42] 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.[7]

[43] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[8]

[44] The police submit that the records contain personal information. In particular, the police submit as follows:

> The records contain the personal information of [the named individual] . . . as well as other individuals. This information includes names, family relationships, addresses, telephone numbers, dates of birth, mental health and health details, investigative details . . . of involved parties, for whom written authorization was not provided. . . .

[45] The police also refer to Order M-339, which they submit demonstrates that the information listed their submission (and reproduced in the preceding paragraph) qualifies as personal information.[9]

[46] The appellant submits that the records do not contain personal information. It submits that the records do not contain "investigative details" but rather, observational information that does not meet the definition of "personal information" in section 2(1) of the *Act*. The appellant seeks to distinguish Order M-339 because of notice being given to affected parties in that case, and uncertainty as to what had actually been disclosed. In my opinion, Order M-339 is not determinative of the issue, although it strongly suggests that the records in this case contain personal information.

[47] The appellant also submits that information about the named individual, who had been found wandering, is not personal information because the fact of wandering implies nothing specific about this individual's physical or mental health, age or any other personal aspect of their life.

[48] It appears that the appellant is referring to the listed items in paragraphs (a) though (h) of the definition[10] and arguing that the information in the records does not correspond to any of them. In this regard, it is significant that the first part of the definition of "personal information" refers to "recorded information about an identifiable individual, including. . . ." It is clear that the list of examples that follows in the

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[7] Order P-11.

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

[9] Order M-339 dealt with an inspection of the former premises of the requester in that case under the *Fire Code*.

[10] In particular, paragraphs (a) and (b).

definition is not exhaustive.[11] It is equally clear that the information in the records qualifies as recorded information about identifiable individuals.

[49] Barring the application of an exception like section 2(2) or 2(2.1) of the *Act*, recorded information about identifiable individuals' involvement with police will generally qualify as personal information. Neither section 2(2) nor 2(2.1)[12] applies in this case to support a finding that the records do not contain personal information. The information cited by the appellant about an individual who is wandering is, in fact, a prime example of personal information.

[50] I find that the case numbers on pages 1-8 are "identifying numbers" assigned to the investigation of particular individuals. I also find that the remainder of the records at issue, which record police responses to reports of missing persons and other incidents, consist of personal information.

[51] The appellant's representations also indicate that the appellant would accept the severance of some of the names in the records, and of family relationships, addresses, telephone numbers, dates of birth, mental health and health details. Even if that information were severed, I would still find that the withheld information is about identifiable individuals. In that regard, I note that paragraph 40 of the affidavit that accompanied the appellant's representations, sworn by the appellant's Director, Regulatory Affairs, states that as part of an inspection of the retirement home, the appellant "seized the personal files of each resident." In that situation, I conclude that even with identifiers severed, the information in the records would be about identifiable individuals, and would therefore remain personal information.

[52] In short, I find that the undisclosed parts of the records are personal information.

C. If so, does the mandatory exemption at section 14(1) apply?

[53] Section 14(1) of the *Act* states, in part:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > (b) in compelling circumstances affecting the health or safety of an individual, if upon disclosure notification thereof is mailed to the last known address of the individual to whom the information relates;

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[11] Order P-11.

[12] Section 2(2) refers to information about an individual who has been dead for more than thirty years. Section 2(2.1) relates to contact information in a business, professional or official capacity.

> (d) under an Act of Ontario or Canada that expressly authorizes the disclosure;
>
> (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

[54] The appellant argues that each of these exceptions to the mandatory exemption created by section 14(1) applies.

Section 14(1)(b)

[55] This exception applies "in compelling circumstances affecting the health or safety of an individual."

[56] In Order PO-2541, I found that the equivalent of section 14(1)(b) in the *Freedom of Information and Protection of Privacy Act* (*FIPPA*)[13] applied, with the result that the personal privacy exemption[14] did not apply, and for that reason I ordered the requested information disclosed. In that case, a father had requested medical information from the Archives of Ontario concerning his birth father in order to assist in the medical diagnosis and treatment of his daughter.

[57] In my reasons in that case, I noted that the purpose of this section is:

> . . . to permit disclosure of significant (and in some cases, possibly even life-saving) medical information.

[58] The police submit that the appellant did not advise of any concerns about existing residents. In fact, however, I note that the appellant mentioned one resident by name in its request, in connection with incidents when he was found wandering.

[59] The appellant cites Order MO-2677 and refers to its analysis to the effect that in order to meet the "compelling" threshold, the purpose of seeking the personal information in question must be a matter of "immediate and essential health or safety." The appellant submits that this is established with respect to the individual named in the request. It submits that this individual ". . . and more generally individuals residing in retirements [*sic*] homes, are vulnerable and in need of protection (which is why the [appellant] was established in the first place) and where concerns arise relating to the potential abuse and neglect of these residents in violation of the *RHA*, an interpretation of privacy legislation ought to be made in a manner favouring the protection of residents." The appellant submits that release of this information to it might have prevented the named individual from wandering again three months later, which he did at great risk to his health, safety and wellbeing.

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[13] See section 21(1)(b) of *FIPPA*.
[14] Section 21(1) of *FIPPA*.

[60] The appellant does not specify what it could have done, in addition to the actions it has already undertaken, in order to protect the named individual. It has refused to issue a licence to the owner/operator to operate the retirement home. There was a successful prosecution of the owner/operator for operating without a licence, which resulted in a probation order requiring that, among other things, no one over the age of 65 be admitted, and that significant information about the residents of the retirement home be submitted to it monthly.

[61] As is abundantly clear from the appellant's request and representations, the appellant already has detailed information about the named individual's situation, but the appellant has not explained what steps it has taken, or could take, to remedy this situation. The appellant has not provided evidence or argument to indicate how the release of records documenting past wandering by this resident, or information about other residents in the records, would assist the appellant in protecting any of them.

[62] In my view, in order to find that there are "compelling circumstances affecting the health or safety of an individual," it must either be self-evident, or evidence must be provided, to demonstrate that release of the information could reasonably be expected to ameliorate any health or safety issues.

[63] In this case, I am not satisfied that the disclosure of historical information about the named individual, or other residents, could reasonably be expected to achieve this purpose. Moreover, I note that most of the information in the records does not relate to the treatment or diagnosis of the residents of the facility.

[64] In these circumstances, I find that section 14(1)(b) does not apply.

Section 14(1)(d)

[65] This exception to the section 14(1) exemption requires that another Act of Ontario or Canada "expressly authorizes" the disclosure.

[66] The police submit that "[u]nder no section of the [*RHA*] are the police obliged to provide information to assist in issuing or denying retirement home licenses." They also point out that the appellant is empowered, in certain circumstances, to disclose personal information to the police.

[67] Although the police were not specific about which provisions contemplate the appellant giving information to them, I note that section 113(3) of the *RHA* requires the appellant to preserve secrecy with respect to "information, including personal information and personal health information, obtained in performing a duty or exercising a power under [the *RHA*]," with certain exceptions. One of the exceptions is section 113(3)(c), which permits "disclosure to a peace officer to aid an inspection, investigation or similar proceeding undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result."

[68] The appellant relies on Section 75(1) of the *RHA* in support of its argument that this exception applies. This section states:

> A person who has reasonable grounds to suspect that any of the following has occurred or may occur shall immediately report the suspicion and the information upon which it is based to the Registrar:
>
> 1. Improper or incompetent treatment or care of a resident that resulted in harm or a risk of harm to the resident.
>
> 2. Abuse of a resident by anyone or neglect of a resident by the licensee or the staff of the retirement home of the resident if it results in harm or a risk of harm to the resident.
>
> 3. Unlawful conduct that resulted in harm or a risk of harm to a resident.
>
> 4. Misuse or misappropriation of a resident's money.

[69] The appellant's representations concerning section 14(1)(d) are very brief. It submits that police officers are obligated to report the information described in section 75(1) of the *RHA* to it, and states that section 75(1) "implicitly provides for the [police] to provide . . . any information relevant to the report."

[70] In my view, section 75(3) of the *RHA* provides additional context with respect to the interaction between section 75(1) of that statute and section 14(1)(d) of the *Act*. Section 75(3) states:

> Even if the information on which a report may be based is confidential or privileged, subsection (1) applies to a person mentioned in paragraph 1, 2 or 3 and no action or other proceeding for making the report shall be commenced against a person who acts in accordance with subsection (1) unless that person acts maliciously or without reasonable grounds for the suspicion:
>
> 1. A legally qualified medical practitioner or any other person who is a member of a College as defined in subsection 1 (1) of the Regulated Health Professions Act, 1991.
>
> 2. A person who is registered as a drugless practitioner under the Drugless Practitioners Act.
>
> 3. A member of the Ontario College of Social Workers and Social Service Workers.

[71] I note that section 75(3) expressly contemplates reporting under section 75(1)

by classes of persons who may be legally constrained from doing so. However, it does not specifically mention disclosure to the appellant by the police or other institutions under the *Act*.

Analysis

[72] The language used in section 14(1)(d) does not refer to reporting requirements of other statutes. Instead, it refers to *disclosure* being "expressly authorized" under another statute. Section 75(1) of the *RHA* does not refer directly to disclosure by the police. A reporting requirement that applies broadly to the general public is not the same thing as a provision expressly authorizing disclosure by an institution that is subject to the privacy protection provisions found in the *Act*.

[73] Previous orders of this office have analyzed the connection between section 14(1)(d) of the *Act* and the wording of other statutes that does not precisely match the language used in section 14(1)(d).

[74] In Order P-867, Adjudicator Anita Fineberg considered whether the identical provision in section 21(1)(d) of *FIPPA* applied to permit disclosure of version codes associated with the Ontario health numbers of three patients, requested by their physicians, on the basis that disclosure was authorized under the *Heath Card Numbers Control Act, 1991* (the HCNCA). Section 2(1) of that statute prohibits persons from (1) requiring production of; (2) collecting; and (3) using, these numbers. Section 2(2) provides an exception to the prohibition. It states, in part:

> Despite subsection (1), a person *may collect or use* another person's health number for purposes related to the provision of provincially funded health resources to that other person. . . . [Emphasis added.]

[75] Adjudicator Fineberg found that this provision was not sufficient to "expressly authorize" the disclosure. She cited earlier decisions[15] to the effect that this phrase:

> . . . requires either that specific types of personal information collected be expressly described in the statute, or a general reference to the activity be set out in the statute, together with a specific reference to the personal information to be collected in a regulation made under the statute, i.e., in a form or in the text of the regulation.

[76] She explained the basis for her conclusion that discretion to collect or use the information was insufficient to qualify as express authorization to disclose, as follows:

> This strict interpretation is consistent with one of the fundamental purposes of the Act, namely to protect the privacy of individuals with

[15] Privacy Investigation Report I90-29P; Order M-292.

> respect to personal information about themselves held by institutions [section 1(b)]. The power to disclose the version codes under section 2(2) of the HCNCA is not explicit, although it may be implied. Thus, this legislation does not contain the requisite express statutory authority for the purposes of section 21(1)(d) of the Act.

[77] I note that she reached this conclusion about section 2(2) of the HCNCA regardless of the fact that the information (*i.e.* the health number) is expressly described in statutory language. In the present case, section 75(1) of the *RHA* specifies the type of information to be reported. However, I note that, like the statutory provision addressed in Order P-867, the *RHA* does not explicitly deal with the disclosure of information by an institution (such as the police) that is covered by the privacy regime set out in the *Act*.

[78] In Order M-787, Adjudicator Holly Big Canoe reached the opposite conclusion about the applicability of section 14(1)(d) where the statutory provision in question was section 16(5) of the *Divorce Act*. In that case, an access parent had asked the East York Health Unit for information about his daughter. This section of the *Divorce Act* states:

> Unless the court orders otherwise, a spouse who is granted access to a child of the marriage *has the right to make inquiries, and to be given information*, as to the health education and welfare of the child. [Emphasis added.]

[79] Adjudicator Big Canoe found that this provision expressly authorized the Heath Unit to disclose the requested information to the access parent. Thus, in Order M-787, a provision conferring a right on a particular individual to receive information was considered to be sufficient to constitute express authorization for an institution to disclose it. [16]

[80] To summarize, in Order P-867, a statutory discretion to collect and use information was not "express authorization" for an institution to disclose it under section 14(1)(d), and Order M-787 indicates that a provision granting an individual a *right* to make inquiries and be given information was "express authorization" to disclose.

[81] While these orders may appear to be contradictory, I believe that the outcomes are based on the difference between the levels of entitlement provided in the two statutes. The right conferred by section 16(5) of the *Divorce Act* confers a greater entitlement on an individual seeking information than the discretion to collect or use the information conferred under section 2(2) of the HCNCA.

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[16] See Orders MO-1179 and P-1933, which also found that the discretion to disclose was not sufficient to constitute "express authorization" to do so.

[82] The statutory provision under consideration here does not present an exact parallel with the provision under consideration in either Order P-867 or M-787. Rather, it incorporates a third, and distinct, approach: it requires certain information to be *reported* to a specific officer of the appellant, namely the Registrar. The information that must be reported is a "suspicion" that certain activities have occurred or may occur, and the information upon which the suspicion is based.

[83] At the outset of this analysis, I noted that section 14(1)(d) does not refer to a *reporting* requirement under another statute; rather, it requires that the statute contain an express authorization for an institution to *disclose*. While the concepts are related, they are not identical.

[84] Moreover, the requirement under section 75(1) of the *RHA* to report a "suspicion" and "the information upon which the suspicion is based" does not have an easily determined connection with the contents of the occurrence reports and other records that are at issue in this appeal. In addition, although the records in this case date from 2007 to 2014, section 75(1) requires that reporting occur "immediately."

[85] For these reasons, the question of how section 14(1)(d) of the *Act* relates to section 75(1) of the *RHA* has no obvious or easy answer. In this situation, the principles of statutory interpretation must be considered.

[86] As stated by Swinton J. in the recent decision of Ontario's Divisional Court in *Joshi et al.v. Minister of Health and Long-Term Care*:[17]

> The Supreme Court of Canada has repeatedly endorsed the purposive approach to statutory interpretation, which requires that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."

Purposes of the *RHA* and the *Act*

[87] The "fundamental principle" that underlies the *RHA* is described in section 1 of that statute as follows: ". . . a retirement home is to be operated so that it is a place where residents live with dignity, respect, privacy and autonomy, in security, safety and comfort. . . ."

[88] In addition, section 16(a) of the *RHA* stipulates that, among other things, the objects of the authority are ". . . to administer this Act and the regulations, including overseeing their enforcement, for the purpose of ensuring that retirement homes are operated in accordance with this Act and the regulations."

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[17] 2015 ONSC 1001 (SCDC) at para. 20. Swinton J. is quoting from *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at para. 26.

[89] With respect to the purposes of the *Act*, section 1(b) indicates that one of them is "to protect the privacy of individuals with respect to personal information about themselves held by institutions. . . ."

[90] Both of these purposes are extremely important. In my view, a contextual understanding of the purpose of the *RHA* must include the fact that it is intended to protect a population consisting of individuals who are, in many cases, vulnerable and in need of protection.

[91] With respect to the purposes of the *Act*, privacy is widely acknowledged to be a vital and fundamental value. For example, in *R. v. Dyment*,[18] the Supreme Court of Canada quotes the following commentary on the importance of privacy:

> . . . society has come to realize that privacy is at the heart of liberty in a modern state. . . . Grounded in man's physical and moral autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order. The restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state.

[92] The *Act*'s other purpose, articulated in section 1(a), recognizes the importance of public access to information. Section 1(a) of the *Act* articulates the following purpose:

> . . . to provide a right of access to information in accordance with the principles that,
>
> > (i) information should be available *to the public*, . . . [Emphasis added.]

Section 75(1) of the *RHA* and section 14(1)(d) of the *Act*

[93] In my view, there are a number of significant problems and/or inconsistencies that arise from the provisions of section 75(1) of the *RHA* on the one hand, and section 14(1)(d) and the overall scheme of the *Act* on the other hand. These may be summarized as follows:

- what must be reported under section 75(1) is a *suspicion* of wrongdoing and the *information on which it is based*, and this suggests the need for reporting under a formulation that incorporates these elements, which the records at issue do not do in any precise way;

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[18] [1988] 2 S.C.R. 417 at para. 17. The Court is directly quoting from Alan F. Westin, *Privacy and Freedom* (1970), pp. 349-50.

- section 75(1) contemplates an *immediate* duty to report, but the records at issue date from 2007-2014;

- the preamble of section 75(1) of the *RHA* requires that information be reported to a particular person, namely the Registrar, which is inconsistent with the circumstances of the request in this case, which was not submitted by the Registrar;

- section 75(3) of the *RHA* explicitly contemplates the situation of a number of classes of persons who may be legally constrained from making reports that would otherwise be required under section 75(1) and protects them from liability for doing so, but does not mention the police;

- by contrast, section 113(3)(c) of the *RHA* expressly contemplates disclosures *to* the police by the appellant.

[94] I will now discuss these concerns in more detail.

The language of section 75(1) of the *RHA* in relation to the contents of the records

[95] In my view, a significant problem with interpreting section 75(1) of the *RHA* as an express authorization to disclose information for the purposes of section 14(1)(d) of the *Act* arises from the difficulty in answering the following question: precisely which information in the records would fall under section 75(1) of the *RHA* and, hypothetically, be disclosable under section 14(1)(d)?

[96] Based on its own terms, the information to be reported under section 75(1) would only relate to residents who may be, or have been: improperly or incompetently treated in a way that caused harm or risk to that person; abused or neglected by staff; harmed or placed at risk by unlawful conduct; or whose money was misused or misappropriated. This would most often be the information of residents and staff members. Much of the information in the records does not fall within this description, and some of it is personal information of non-residents such as relatives and friends. All of that information would have to be identified and severed. In my view, section 75(1) does not contemplate this elaborate and complicated type of disclosure; rather, it simply requires individuals to report a reasonable suspicion and the grounds for it.

[97] Moreover, the records at issue do not state that their authors harbour a "suspicion" of past or apprehended wrongdoing. Rather, they consist of reports that document events and the way in which they were handled by the police. Some of the events might be seen as implicitly suggesting a suspicion, and the events themselves would be the information upon which the suspicion is based. However, this is an assessment that must be made by the person who has the duty to report. In addition, it is for that person to report the basis or grounds for holding the suspicion. Imposing a requirement on the police, as recipients of an access request under the *Act*, or on this office, to decide whether a person *might have had* or *ought reasonably to have had* a

suspicion under section 75(1) of the *RHA* in order to decide whether to apply section 14(1)(d) of the *Act*, is inconsistent with the clarity implicit in the standard set out in that section, that is, *express* statutory authority to disclose.

[98] As already noted, the records also contain a considerable amount of information that is unrelated to the categories enumerated in section 75(1) of the *RHA*. While severed versions of some of the records might be used in a report under section 75(1) of the *RHA*, my reading of that provision suggests that it contemplates a more formulated kind of disclosure, possibly verbal,[19] and the records are, at best, an awkward way of achieving this objective.

Immediate reporting

[99] A further problem with the application of section 75(1) of the *RHA* in conjunction with section 14(1)(d) of the *Act* relates to timing. Section 75(1) requires that the information it describes be reported *immediately*. This has no obvious application to the information at issue in this case, where the most recent records date from 2014 and the oldest from 2007. Disclosing this information now hardly qualifies as "immediately." Even more significantly, with respect to the use of section 14(1)(d) to obtain information that should be reported under 75(1) of the *RHA* on a going forward basis, institutions have up to 30 days to respond to an access request, and in some cases, even longer.[20] Seen from this perspective, an access request under the *Act* fails to achieve the immediate reporting required under section 75(1) of the *RHA*.

Reporting *to the registrar* under section 75(1) of the *RHA*

[100] Section 75(1) requires that information be reported to the Registrar of the appellant organization. I note that the request that is the subject of this appeal was filed not by the Registrar, but by the Senior Law and Enforcement Clerk. Although both these people are part of the same organization and it may seem overly technical to emphasize the fact that the *RHA* mandates reporting to the Registrar, the specific individual who was empowered to act was a significant factor in *Municipal Property Assessment Corporation v. Ontario (Information and Privacy Commissioner)*,[21] where the Court stated:

> The *Assessment Act* neither obligates nor authorizes MPAC to do anything besides making the municipal rolls available to the municipal clerk. We do not accept the Commissioner's submission that because the "head" and

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[19] Page 013 of the records documents a verbal disclosure to the appellant by a police officer.

[20] See sections 19, 20 and 21 of the *Act*. If disclosure of the records "might constitute an unjustified invasion of personal privacy," section 21 requires notice to the affected party or parties prior to disclosure. This normally results in a processing time that exceeds the normal 30-day period. Under sections 21(7) and (8), the affected parties must also receive, and be given additional time to appeal, any decision to grant access.

[21] 71 O.R. (3d) 303 (Div. Ct.)

> the "clerk" are part of the same institution, it does not matter who is named in the statute as having the authority to disclose the information. To override the important privacy interests addressed in *MFIPPA*, MPAC must have express authorization to disclose.

[101] Seen from this perspective, the fact that the request was not made by the Registrar casts doubt on whether section 75(1) can be seen as express authority for disclosure in this case.

Sections 75(3) and 113(3)(c) of the *RHA*

[102] As already noted, section 75(3) of the *RHA* allows for reporting under section 75(1) by a number of classes of persons who might otherwise be constrained by law from doing so. In my opinion, it is significant that section 75(3) does not make a similar provision for the police, who are also constrained at law from disclosing personal information because the police are an institution under the *Act* and subject to its privacy requirements.

[103] Given the classes of persons who are mentioned in section 75(3), and those who are not, I infer that the legislative intent underlying section 75(1) of the *RHA* did not extend so far as to *expressly authorize* the police to disclose information in a manner that would override and displace the privacy protection scheme imposed by the *Act*.

[104] By contrast, however, the *RHA does* expressly contemplate the disclosure of information by the appellant to the police under section 113(3)(c).

[105] Thus it is clear that the Legislature turned its mind to information sharing between the appellant and other persons, including the police. In that context, the omission of the police from those expressly exempted from privacy constraints under section 75(3) of the *RHA* is significant. In my view, it supports the view that section 75(1) does not provide the kind of express authority to disclose that would be required in order to apply section 14(1)(d) of the *Act*.

Conclusions concerning section 14(1)(d)

[106] Taking into account the overall statutory context, bearing in mind the purposes of the *RHA* and the *Act*, and viewing the words in their grammatical and ordinary sense harmoniously with the scheme and objects of both statutes, and legislative intention, I find that section 75(1) of the *RHA* does not "expressly authorize" the disclosure of the records at issue to the appellant.

[107] Moreover, in my view, consideration of all the circumstances of this case strongly suggests that an access request under the *Act* is not an appropriate or effective vehicle for accomplishing the statutory objectives that underlie section 75(1) of the *RHA*, namely, the timely protection of individuals who live in retirement homes. In fact, in my view, the discretionary "permitted disclosure" regime found in Part II of the *Act*, and

section 32(e) in particular, may provide a more appropriate vehicle to accomplish that objective with respect to information in the possession of the police. I will return to this subject in the postscript at the end of this order.

[108] For all these reasons, I find that section 14(1)(d) does not apply.

Section 14(1)(f)

[109] This exception to the section 14(1) exemption applies "if the disclosure does not constitute an unjustified invasion of personal privacy." The factors and presumptions in sections 14(2) and (3) help in making this determination. Also, section 14(4) lists situations that would not be an unjustified invasion of personal privacy.

[110] If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 14. Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the "public interest override" at section 16 applies.[22]

[111] If any of the paragraphs in section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 14(1).

[112] If no section 14(3) presumption applies and the exception in section 14(4) does not apply, 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.[23] In that instance, in order to find that disclosure does not constitute an unjustified invasion of personal privacy, factors or circumstances favouring *disclosure* under section 14(2) must be established. In the absence of any such factor or circumstance, the exception in section 14(1)(f) is not established and the mandatory section 14(1) exemption applies.[24]

Representations on section 14(1)(f) generally

[113] The appellant's representations concerning section 14(1)(f) recall the appellant's argument, cited earlier, that the records do not contain personal information. Here, the appellant argues that "[t]he invasion of privacy is minimal in this case and that it does not seek the personal information (ie information regarding the race, colour, religion etc) contained in the records" and asks that the records be severed to remove this, rather than withholding the entire record. However, I have found, above, that the information sought by the appellant is, in fact, personal information.

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[22] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).
[23] Order P-239.
[24] Orders PO-2267 and PO-2733.

[114] I disagree with the appellant's submission that the "invasion of privacy is minimal in this case." In my view, police records detailing interactions between police and members of the public are among the most sensitive types of personal information.

[115] The appellant also submits that ". . . there is a reduced expectation of privacy where an individual chooses to reside in a retirement home." I also disagree with this submission. In my view, the residents of retirement homes have the same expectation of privacy as all other individuals.

[116] In support of this assertion, the appellant submits that where residents are suspected to be subject to abuse and neglect, it is not an unjustified invasion of privacy for the police to share that information with the appellant.

[117] The question of whether the *Act* permits the disclosure sought by the appellant must be resolved by referring to the guidance found in section 14 on the subject of whether disclosure is an unjustified invasion of personal privacy. As already noted, this requires consideration of sections 14(2), (3) and (4). I now turn to those sections.

[118] I will first consider the presumed unjustified invasions of privacy set out in section 14(3).

Sections 14(3)(b) and (h)

[119] The police submit that the presumed unjustified invasions of privacy in sections 14(3)(b) and (h) apply. These sections state:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> > (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;
> >
> > (h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

Section 14(3)(b)

[120] The police submit that a portion of the records were compiled as part of an investigation into a possible violation of law.

[121] The appellant disputes that this section applies, stating that "[i]t is insufficient for the [police] to merely assert that they were investigating a criminal matter."

[122] In fact, the records themselves provide evidence to support the position taken by

the police. I therefore find that the disclosure of portions of the records would be a presumed unjustified invasion of privacy under section 14(3)(b).

Section 14(3)(h)

[123] The police submit that this section applies because "[d]escriptions of involved individuals are listed in the records."

[124] The appellant ". . . disputes whether the records contain any of those identifiers." In the alternative, the appellant submits that this information should be severed, rather than withholding the entire record.

[125] Having reviewed the records, it is clear that they contain information of the type identified in section 14(3)(h). I find that section 14(3)(h) applies to this information.

Sections 14(2)(b), (c), (d) and (f)

[126] In their representations, the parties rely on the factors identified in sections 14(2)(b), (c), (d) and (f). These parts of section 14(2) state as follows:

> 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,
>
> . . .
>
> (b) access to the personal information may promote public health and safety;
>
> (c) access to the personal information will promote informed choice in the purchase of goods and services;
>
> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
>
> . . .
>
> (f) the personal information is highly sensitive;
>
> . . .

Section 14(2)(b)

[127] Section 14(2)(b) is a factor favouring disclosure if access to the information may protect public health and safety.

[128] In its comments about section 14(2)(b), the appellant refers to its

representations in relation to section 14(1)(b), and in addition, states:

> . . . the records sought are to advance the protection of the health and safety of [name of retirement home] . . . residents.

[129] The police submit:

> A review of the case that prompted the original request noted that the [appellant] has already prosecuted the unlicensed home and has an order to Cease to Operate in effect. As well, the owner/operator has been sentenced to jail time.

[130] The threshold for finding that section 14(2)(b) is a relevant factor favouring disclosure is lower than the threshold for finding that section 14(1)(b) applies. Section 14(1)(b) requires "compelling circumstances affecting the health or safety of an individual" while the section 14(2)(b) simply requires that access "may promote public health and safety." Where section 14(1)(b) applies, the information is not exempt under section 14(1). The relevance of section 14(2)(b), on the other hand, is a factor to consider in deciding whether or not disclosure would constitute an unjustified invasion of personal privacy.

[131] Nevertheless, the evidence relating to both sections in this case is essentially the same. The appellant cites the case of the individual it named in the request, who had been found wandering on more than one occasion. As I have already noted, the appellant argues that reporting a suspicion of neglect or abuse to it would not be an unjustified invasion of privacy, a submission which relates to the protection of public health or safety.

[132] For essentially the same reasons I outlined above in rejecting the application of section 14(1)(b), I am not satisfied that the lower threshold under section 14(2)(b) is met. The appellant does not specify what it could have done, in addition to the actions it has already undertaken, in order to protect the individual referred to in the request, or other residents of the retirement home. Nor has the appellant provided evidence or argument to indicate how the release of records documenting information about other residents in the records would assist the appellant in protecting any of them.

[133] As I also noted in the discussion of section 14(1)(b), above, most of the information in the records does not relate to the treatment or diagnosis of the residents of the facility. In addition, the records are not current. As I have already noted, they are dated between 2007 and 2014.

[134] In these circumstances, I am not satisfied that disclosing the records "may promote public health or safety" and I therefore find that the relevance of this factor is not established.

Section 14(2)(c)

[135] Section 14(2)(c) is a factor favouring disclosure relating to the promotion of informed choice in the purchase of goods and services.

[136] The appellant submits:

> Living in a retirement home is a service for which residents pay. The licencing process provides consumer protection in that it is designed to protect the public from retirement homes which do not meet basic standards. Evidence contained in police records is vital to refuse a licence, revoke a licence or to uphold various administrative orders.

[137] The appellant's argument suggests that if disclosure can be seen as promoting informed choice in goods and services in an indirect fashion, such as disclosure to a regulator, this should be considered a relevant factor. Without commenting on whether or not that is the case, I conclude that this argument cannot succeed on the facts of this appeal.

[138] In order for this theory of section 14(2)(c) to be made out, disclosure would have to assist the appellant in carrying out its mandate, as it relates to ensuring that individuals are able to select a competently managed retirement home.

[139] I am not satisfied that the information in the records at issue in this case would assist the appellant in achieving this objective. As I have already noted, the appellant has never granted a licence to the owner/operator to operate the retirement home. The appellant's refusal to do so has been upheld by the Licensing Appeal Tribunal. The owner/operator of the retirement home was convicted and sentenced for operating without a licence. The appellant has seized the personal files of all residents. It is not clear what further actions could be taken by the appellant, based on the contents of the records at issue, to promote informed choice in the purchase of goods or services.

[140] It appears, however, that this submission relates more generally to disclosure to the appellant of police records concerning retirement homes in future cases, and not just in this specific case. The appellant's desire for a precedent that would govern future cases cannot be determinative of the outcome here. To the contrary, I am required to decide whether the records before me in this appeal, with its unique fact situation, are exempt from disclosure. I am not in a position to make general findings about this category of records that would apply in different circumstances. Each appeal must be decided on its own facts.

[141] Even assuming that the appellant's theory of section 14(2)(c) (*i.e.* that promoting informed choice in goods and services in an indirect fashion, such as by disclosure to a regulator, would meet the requirements for establishing this factor) is correct, I find that the relevance of section 14(2)(c) is not made out on the facts of this particular appeal.

Section 14(2)(d)

[142] Section 14(2)(d) is a factor favouring disclosure relating to a "fair determination of rights." The police submit that this section requires that the right to be determined is related to a proceeding which is either existing or contemplated, not one which has been completed.[25] The police point out that all proceedings with respect to the retirement home and its owner/operator have now been completed. The appellant did not make submissions concerning this section.

[143] The police's submission correctly enunciates one aspect of the test under section 14(2)(d), namely that the rights to be determined must relate to a proceeding that is existing or contemplated. In the circumstances, therefore, I find that section 14(2)(d) is not a relevant factor.

Section 14(2)(f)

[144] Section 14(2)(f) is a factor favouring privacy protection and it applies to highly sensitive information. To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.[26]

[145] The appellant submits:

> The information contained in these police reports do not relate to the criminal record of the individual, nor is there anything of a highly sensitive matter. It could not be expected that the disclosure of this information to the [appellant] could cause excessive personal distress to the individual.

[146] The police do not provide representations that specifically address this section. They do, however, note that the records contain investigative details. The records document investigative activities undertaken by the police, or encounters by members of the public, including residents of the retirement home, with the police. Having conducted a detailed review of the records that are at issue in this appeal, I am satisfied that disclosure could reasonably be expected to cause significant personal distress. I therefore find that the information is highly sensitive and the relevance of this factor is established.

<u>The appellant's legislative mandate</u>

[147] The preamble of section 14(2) requires that the head consider "all relevant circumstances" in deciding whether a disclosure of personal information constitutes an unjustified invasion of privacy. Although not cited by either of the parties in the context

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[25] 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.).
[26] Orders PO-2518, PO-2617, MO-2262 and MO-2344.

of section 14(2), I will consider the appellant's legislative mandate and decide whether this is a relevant factor in the circumstances of this appeal.

[148] The *RHA* confers significant regulatory powers on the appellant, including the power to inspect premises without a warrant, to question individuals, and to demand the production of records.[27]

[149] As already noted, the appellant is charged under the *RHA* with regulating retirement homes in a manner consistent with the object stated at section 1 of the *RHA*:

> ". . . a retirement home is to be operated so that it is a place where residents live with dignity, respect, privacy and autonomy, in security, safety and comfort. . . ."

[150] Section 16(a) of the *RHA* stipulates that, among other things, the objects of the authority are ". . . to administer this Act and the regulations, including overseeing their enforcement, for the purpose of ensuring that retirement homes are operated in accordance with this Act and the regulations."

[151] If the records could reasonably assist with the appellant's legislative mandate, then this would be a relevant circumstance favouring disclosure. As already noted, however, it is not clear what steps the appellant could take in relation to this particular retirement home that it has not already taken. As well, the records are no longer current. I am therefore not satisfied that these particular records will assist the appellant in discharging its mandate.

[152] In the section of its representations dealing with mootness, the appellant refers to the possibility of the owner/operator applying for a retirement home licence in the future. In my opinion, this submission is highly speculative. Moreover, when one considers the terms for granting a licence under section 35 of the *RHA* in combination with the earlier denial of a licence, and the fact that this individual has been successfully prosecuted for operating without a licence, I do not find this to be a persuasive argument.[28]

[153] The appellant also submits that the issues currently under appeal are likely to recur, and therefore appears to seek general direction from this office as to the disclosure of police records to it. As I have already stated, however, I must decide this appeal based on its specific facts, and because I am not satisfied that the records at

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[27] Sections 77(1), 77(5)((a), (c) and (d).

[28] Paragraph 33 of the Affidavit accompanying the appellant's representations outlines the reasons why the initial licence application was refused. Section 35 of the *RHA* refers to the "past conduct" of the applicant, and whether it "affords reasonable grounds to believe that the home will be operated" in accordance with legislation, "with honesty and integrity," and "in a manner that is not prejudicial to the health, safety or welfare of its residents."

issue in this appeal would assist the appellant in discharging its mandate, I find that the appellant's mandate is not a relevant circumstance favouring disclosure.

Does section 14(1)(f) apply?

[154] As already discussed, the section 14(1)(f) exception to the application of the exemption is established if disclosure of the personal information would not constitute an unjustified invasion of personal privacy.

[155] Section 14(4) indicates that the disclosure of certain types of information would not be an unjustified invasion of personal privacy. I have not received any arguments to suggest that section 14(4) applies, and based on my independent review, none of the types of information it lists appear in the records. I find that section 14(4) does not apply.

[156] I have found, above, that the presumed unjustified invasions of privacy under sections 14(3)(b) and 14(3)(h) apply to some of the information in the records. I have also found that the factor favouring privacy protection in section 14(2)(f) applies. I have not found that any of the factors favouring disclosure apply.

[157] Accordingly I find that disclosure of the records would constitute an unjustified invasion of personal privacy, and the exception to the application of the exemption found in section 14(1)(f) therefore does not apply.

Conclusions re section 14(1)

[158] I have found that none of the exceptions to the application of the mandatory section 14(1) exemption that have been raised, namely sections 14(1)(b), (d) and (f), are applicable in the circumstances of this appeal. The mandatory section 14(1) exemption therefore applies to the records in their entirety.

D: Does the public interest override at section 16 apply?

[159] 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. [Emphasis added.]

[160] 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.

[161] The *Act* is silent as to who bears the burden of proof in respect of section 16. This onus cannot be absolute in the case of an appellant who has not had the benefit of

reviewing the requested records before making submissions in support of his or her contention that section 16 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.[29]

[162] In considering whether there is a "compelling public interest" in disclosure of the records, 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.[30] Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, 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.[31]

[163] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[32]

[164] Any public interest in *non*-disclosure that may exist also must be considered.[33] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".[34]

[165] A compelling public interest has been found to exist where, for example:

- the integrity of the criminal justice system has been called into question;[35]
- public safety issues relating to the operation of nuclear facilities have been raised;[36] or
- disclosure would shed light on the safe operation of petrochemical facilities[37] or the province's ability to prepare for a nuclear emergency.[38]

[166] A compelling public interest has been found *not* to exist where, for example:

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[29] Order P-244.
[30] Orders P-984 and PO-2607.
[31] Orders P-984 and PO-2556.
[32] Order P-984.
[33] *Ontario Hydro v. Mitchinson,* [1996] O.J. No. 4636 (Div. Ct.).
[34] Orders PO-2072-F, PO-2098-R and PO-3197.
[35] Order PO-1779.
[36] Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805.
[37] Order P-1175.
[38] Order P-901.

- another public process or forum has been established to address public interest considerations;[39]

- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding;[40] or

- the records do not respond to the applicable public interest raised by appellant.[41]

[167] The existence of a compelling public interest is not sufficient to trigger disclosure under section 16. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

Is there a compelling public interest in disclosure of the records?

Representations

[168] The appellant submits that there is a compelling public interest in disclosure. It states:

> The [appellant] was established to administer licences, investigate complaints, ensure retirement homes are following the prescribed care and safety standards, to safeguard the rights of residents and to monitor compliance with best practices for the operation of retirement homes. The purpose for which the [appellant] seeks these records is to assist in fulfilling this public protection mandate. The *RHA* was passed as a result of public concern regarding the abuse and neglect of retirement home residents. [Citations omitted.]

[169] The appellant submits further that ". . . in addition to protecting vulnerable people who already live in retirement homes, the [appellant] also has a role in protecting the public against retirement homes who are not operating in compliance with the *RHA*."

[170] The appellant cites Order MO-2343, in which Adjudicator Laurel Cropley found that there was a compelling public interest in the disclosure of orders against farmers who were selling unpasteurized milk products. The requester in that case was a journalist, and the compelling public interest was based on public health and safety.

[171] The police submit:

> . . . that allowing access to the personal information of residents will not promote public health and safety. There are no pending "grave

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[39] Orders P-123/124, P-391 and M-539.
[40] Orders M-249 and M-317.
[41] Orders MO-1994 and PO-2607.

> environmental health or safety hazard"[42] concerns in relation to the unlicensed retirement home. The operator has been jailed and fined and the story has been fleshed out in [a named media outlet] over several years. A simple 'google' search would reveal the unlicensed status and history of the prosecution of the owner and the [media outlet's] undercover investigation undertaken in 2010, prior to the creation of the [appellant].

[172] In the conclusion of their representations, the police state further:

> The information was sought in order to assist with the prosecution of the unlicensed retirement home and owner. The prosecution was concluded in March of 2015. The information sought is no longer required to aid in the prosecution. Any release of personal information at this time, would only be an unjustified invasion of the involved parties personal privacy, contrary to the Act.

[173] In the section of its representations arguing that this appeal is not moot (referenced under "Overview," above), the appellant responds to this by arguing that it requires records from the police to verify the accuracy of information reported to it under the probation order[43]. The appellant also responds by stating:

> Further, the timelines under which the [appellant] operates are short and would not allow the [appellant] to discharge its public protection mandate in an expeditious manner while awaiting the outcome of a future *MFIPPA* request and appeal. By way of example, in this case, both [the appellant's] proceedings against [the business] resolved months before the inquiry stage of this appeal began. For that reason, there is a public interest to having this issue considered.

Analysis

[174] The protection of residents of retirement homes and members of the public are important objectives. Retirement homes are not operated directly by governments, and in my view, the records do not cast light on the "operations of government" or assist the public in making political choices as mentioned in Orders P-984 and PO-2556. Nevertheless, if I found that disclosure of the records to the appellant would actually offer additional protection to residents or the public, I would find that there is a compelling public interest in disclosure because of the significant public health and safety issues that could be involved.

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[42] A reference to section 5 of the *Act*.

[43] As noted earlier, the probation order issued against the owner of the business on her conviction for operating a retirement home without a licence required her to report information about residents of the business to the appellant on a monthly basis.

[175] However, I am not satisfied that a compelling public interest in disclosure is established on the facts of this appeal. I addressed similar arguments under sections 14(1)(b) and 14(2)(b), above, and the same analysis also applies here. The appellant does not specify what it could have done, in addition to the actions it has already undertaken, in order to protect the individual referred to in the request, or other residents of the retirement home. Nor has the appellant provided evidence or argument to indicate how the release of records containing information about other residents would assist it in protecting any of them.

[176] In these circumstances, I am not persuaded, on the evidence and argument that have been provided to me, that disclosure of the records that are at issue in this appeal would promote the health or safety of residents of the retirement home or the public generally.

[177] In addition, as noted elsewhere in this order, the *RHA* confers significant inspection powers on the appellant, which has already seized each resident's file in the course of an inspection it conducted. The exercise of these powers would also allow it to assess the accuracy of information provided to it under the probation order. Moreover, any breach of the probation order is a criminal offence. In my view, these other processes support a finding that a compelling public interest in disclosing the records at issue in this case has not been established.

[178] Before leaving this subject, I would also note that the appellant makes repeated reference to its need for this type of information on an ongoing basis, regardless of the fact that its proceedings against the owner/operator of the retirement home are completed. As I have already noted, my authority is confined to disposing of the issues in this access-to-information appeal, and I am not in a position to issue a declaration that the police are a law enforcement agency for the purposes of section 32(f)(ii) of the *Act,* nor to make general findings about future access requests.

[179] For all these reasons, I find that a compelling public interest in disclosure of the records at issue has not been established, and section 16 does not apply.

ORDER:

I uphold the decision of the police and dismiss the appeal.

Original Signed by: September 30, 2015
John Higgins
Adjudicator

POSTSCRIPT

[180] As discussed in my analysis of the public interest override, the protection of the residents of retirement homes and of the public generally are important objectives. Moreover, I agree with the appellant that the process of making a request under the Part I of *Act* and filing an appeal are not an efficient way for the appellant to ensure that it is carrying out its mandate. That fact is made abundantly clear by the analysis in this order, which upholds the denial of access by the police because of the application of section 14(1), which applies in the context of an access request under Part I of the *Act*.

[181] The appellant has identified its main objective in pursuing this appeal as a declaration that it qualifies as a "law enforcement agency" within the meaning of section 32(f)(ii) of the *Act*. If the appellant is a "law enforcement agency," then the police would have the discretion to disclose personal information to it under that section. From this, it appears that the appellant's concern is to ensure that it receives pertinent information from the police. Section 75(1) of the *RHA* identifies information that is particularly important for the appellant to receive.

[182] In my view, the *Act* provides another possible avenue for disclosure of this type of information by the police to the appellant, namely section 32(e) of the *Act*, read in conjunction with section 75(1) of the *RHA*. These sections state:

> Section 32(e) of the *Act:*
>
> An institution shall not disclose personal information in its custody or under its control except,
>
> > (e) for the purpose of complying with an Act of the Legislature or an Act of Parliament, an agreement or arrangement under such an Act or a treaty;
>
> Section 75(1) of the *RHA*:
>
> A person who has reasonable grounds to suspect that any of the following has occurred or may occur shall immediately report the suspicion and the information upon which it is based to the Registrar:
>
> > 1. Improper or incompetent treatment or care of a resident that resulted in harm or a risk of harm to the resident.
> >
> > 2. Abuse of a resident by anyone or neglect of a resident by the licensee or the staff of the retirement home of the resident if it results in harm or a risk of harm to the resident.

3. Unlawful conduct that resulted in harm or a risk of harm to a resident.

4. Misuse or misappropriation of a resident's money.

[183] In Investigation Report I94-023P, this office found that for section 32(e)[44] to apply, the statute in question must impose a *duty* on the institution to disclose the individual's personal information; a discretionary ability to disclose is not sufficient. Arguably, the duty imposed on all persons by section 75(1) of the *RHA* would include the police, were it not for the constraints on disclosure that apply to institutions under the *Act*. This constraint is addressed under section 32(e), which gives the police the discretion to disclose information in order to comply with a statutory duty such as the one imposed by section 75(1) of the *RHA.* This situation is different than under section 14(1)(d), which requires "express authority" to *disclose* information, rather than a duty to report. A clear duty to report comports much more closely with the language used in section 32(e).

[184] The appellant's representations indicate that four police forces have contacted it to share information about retirement homes, and page 013 of the records documents a verbal disclosure to the appellant by a police officer. While the authority the police relied on for this purpose was not stated, it could well be section 32(e) of the *Act*.

[185] I would encourage the parties to consider the possibility that section 32(e) of the *Act* might provide a basis for the police to comply with section 75(1) of the *RHA*, and that this might, in turn, address the concerns that resulted in the appellant's access request in this case.

[186] This approach could also address the appellant's need for timely reporting (which section 75(1) requires to be done immediately), and also ensure that only the relevant and necessary information is provided.

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[44] That investigation was conducted under the identical provision (section 42(e)) of the *Freedom of Information and Protection of Privacy Act*. See also Investigation Report MC-060020-1.