Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3384

Appeal MA15-64

The Greater/Grand Sudbury Police Services Board

November 30, 2016

Summary: In response to an access request for investigation records related to incidents reported by the appellant, the police denied access to all of the records in full. The police relied on the exclusion in section 52(3) (labour relations and employment records) and the exemptions in sections 38(a) (discretion to refuse requester's personal information), together with section 8(1)(c) (law enforcement techniques or procedures), and section 38(b) (unjustified invasion of personal privacy), with section 14(3)(b) (investigation into possible violation of law). During the inquiry, the police disclosed the appellant's own witness statement and a memo she submitted to police superiors. The appellant removed certain information from the scope of her appeal. In this order, the adjudicator finds that sections 52(3) and 8(1)(c) do not apply, and only partly upholds the police's access decision and exercise of discretion under section 38(b). The adjudicator orders the appellant's personal information disclosed to her, as well as other information that does not qualify for exemption, with reference to the absurd result principle.

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), 8(1)(c), 14(1), 14(3)(b), 38(a), 38(b), 52(3) and 64(1).

Orders and Investigation Reports Considered: Orders 48, M-927, MO-2131, MO-2504, MO-2954, MO-3227, PO-2751 and PO-2819.

Cases Considered: *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 SCR 815, 2010 SCC 23 (CanLII); *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII).

OVERVIEW:

[1] This order addresses the issues raised in the appeal by an individual of a decision made by the Greater Sudbury Police Services Board (the police) in response to her request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following:

> Incident number, General Occurrence Report and accompanying reports (i.e. supplementary reports, officer will states) officer notes, my statement, involved officers: [5 named officers]
>
> All related reports and information

[2] After claiming an extension to the permitted time period for issuing a decision under section 20(1)(a) of the *Act,* the police issued a decision denying access to the records, in their entirety. In doing so, the police relied on the exemptions in sections 8(1)(a), 8(1)(c), 8(1)(d) (law enforcement) and 14(3)(b) (investigation into possible violation of law), as well as the exclusion in section 52(3)3 (employment-related matters) of the *Act.*

[3] The requester filed an appeal of the police's decision to deny access to the records with this office. After being notified of the appeal, the police advised the IPC that given the appellant's civil suit against the police, they were adding section 52(3)1 and section 12 (solicitor-client privilege). This office appointed a mediator to explore the possibility of resolution. Based on discussion with the mediator, the police issued a revised decision to advise the appellant of the additional claim to section 12 of the *Act*.[1] After further discussion with the mediator, the police issued another revised decision, granting the appellant access to an inter-office memo she had written and her own witness statement.[2] As a result, the two records were removed from the scope of the appeal. The police acknowledged that the records remaining at issue may contain the personal information of the appellant, making sections 38(a) and (b) relevant. In addition, the police confirmed that some information in the officers' notes was being denied as it was not responsive to the request.

[4] A mediated resolution of the appeal was not possible, and the file was transferred to the adjudication stage for an inquiry. I started my inquiry into the appeal by sending a Notice of Inquiry outlining the issues to the police to seek representations, which I received. In their representations, the police withdrew their exemption claims under sections 8(1)(a), 8(1)(d) and 12. After resolving an interim issue with sharing those representations with the appellant, I sent her a Notice of Inquiry and the non-confidential submissions of the police. Brief portions of the representations were

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[1] There is no indication that the police advised the appellant in a decision of the additional reliance on paragraph 1 of the exclusion in section 52(3).
[2] Pages 33-35 and 59-61.

withheld because they met the confidentiality criteria in the IPC's *Practice Direction Number 7*. The appellant submitted representations, a non-confidential version of which I provided to the police, asking them to respond to her position on section 52(3) and the law enforcement exemption, as well as her indication that she does not seek access to the personal information of an affected party, who had not been notified. The police provided reply representations, which were shared with the appellant, who then provided comments in sur-reply.

[5] In this order, I find that section 52(3) does not apply to exclude these records from the *Act.* I find that section 38(a), together with section 8(1)(c), does not apply, but I partly uphold the denial of access under section 38(b) and the exercise of discretion under it, with regard to a small amount of information.

RECORDS:

[6] The records at issue in this appeal consist of an occurrence summary, general occurrence report, and officers' notes (32 pages).[3]

ISSUES:

A. Have the police properly removed records or withheld information as non-responsive?

B. Does section 52(3) exclude the records from the *Act*?

C. Do the records contain "personal information" as defined in section 2(1)?

D. Would disclosure of the records reveal investigative information for the purpose of section 38(a), together with section 8(1)(c)?

E. Would disclosure of the records constitute an unjustified invasion of personal privacy under section 38(b)?

F. Did the police properly exercise its discretion in applying the discretionary exemptions in sections 38(a) and 38(b)?

[3] The police provided new copies of the records during the inquiry – severed and unsevered. The records were re-numbered from the original copies and the new numbering is not consecutive.

DISCUSSION:

A. Have the police properly removed records or withheld information as non-responsive?

[7] In the redacted versions of the records provided to this office at the adjudication stage, the police marked "Does Not Pertain" on page 10, apparently to signify that the severed portions were not responsive to the request. Even though no notations were made beside any of the other severed passages, I take this initial marking to provide the reason for all similar severances since all of the records were withheld in full under the exemptions. In their representations, the police submit that the severed portions of the records remove officer's notes pertaining to other matters attended to by the investigating officers, which are not related to the request. The appellant does not pursue access to information properly withheld as non-responsive.

[8] In addition, the record at pages 3-8 is identified in the index provided with the police's initial representations as a General Occurrence Report (GOR). The occurrence number on it correlates with the occurrence identified by the appellant in her request. The police refer to the record as having been prepared after the conclusion of the investigation; it appears to have been prepared on December 8, 2014 after the request was initially submitted. About this fact, the appellant states:

> Regarding the Occurrence Summary and the GOR, … they were not prepared until … approximately five months after my request was made to the FOI and subsequently appealed. It is the reason I did not request a copy of the GOR. [Named sergeant] and [named] FOI Officer told me there was none. [The named sergeant] had been told not to prepare one.

[9] In reply, the police state that based on the appellant's representations about the GOR, above, they now understand her not to be seeking access to it.

[10] Having been invited to respond to this point, the appellant clarifies that the only reason she did not request a copy of the GOR is because she was told one did not exist at the time she made her request. She states, "I would have liked to have had a copy of it."

Findings

[11] 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.[4] To be considered responsive to the request, records

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

must "reasonably relate" to the request.[5]

[12] The appellant's October 31, 2014 written request was clearly worded:

> Incident number, General Occurrence Report and accompanying reports (i.e. supplementary reports, officer will states) officer notes, my statement, involved officers: [5 named officers]
>
> All related reports and information.

[13] Through this request, the appellant sought all records and information related to a specific incident number.

[14] Based on my review of the records, I uphold the police's decision, in part. First, I find that the portions of pages 9, 11, 15, 17, 19, 21, 25, 27, 31, 36, 38, 40, 44, 50, 52, 54 and 56 which were withheld as non-responsive, are not reasonably related to the request since they deal with administrative details or other matters attended to by the recording officer. Additionally, there are several one or two-line portions of pages 48, 50 and 58 that the police did not sever for this reason, but which I find are not responsive to the appellant's request.

[15] However, there are additional, brief portions of the officer's notes that were withheld as non-responsive, but are reasonably related to the incident identified in the appellant's request. The additional responsive information appears on pages 13, 23, 29, 36, 42 and 48. I will consider whether these additional portions of the records are exempt under sections 38(a) or 38(b), along with the other portions withheld by the police on these grounds.

[16] As for the General Occurrence Report, I agree with the appellant that this record remains within the scope of the appeal. Although the GOR does appear to have been prepared after the access request was submitted, I do not interpret the appellant's remarks about its belated preparation as conveying a lack of interest in obtaining a copy of this record. Prior to asserting that the GOR is not responsive in reply, the police had treated this record as responsive throughout the course of the request and appeal, and rightly so, since the record is specifically named in the request. Notwithstanding the date of its preparation, the GOR details the events occurring within the time frame of this occurrence. Accordingly, I find the GOR to be responsive to the request, and I will review the police's denial of access to it.

[17] Before I review the exemption claims, however, I must first address the police's claim that these records are excluded from the *Act* by the operation of section 52(3).

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[5] Orders P-880 and PO-2661.

B. Does section 52(3) exclude the records from the *Act*?

[18] Section 52(3) is an exclusion that limits the authority of this office to review access decisions by institutions. It differs from the exemptions found in section 6 to 15 of the *Act*. If section 52(3) applies to the records, and none of the exceptions found in section 52(4) applies, the records are excluded from the scope of the *Act*.

[19] Since section 52(3) of the *Act* pertains directly to the issue of my jurisdiction in this appeal, I must review its possible application. Section 52(3) states:

> Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
>
> 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[20] In this appeal, none of the section 52(4) exceptions relating to agreements and expense accounts are relevant, and I find that they do not apply.

[21] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 1, 2 or 3 of this section, it must be reasonable to conclude that there is "some connection" between them.[6]

[22] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships.[7] The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a

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[6] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

[7] *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.); see also Order PO-2157.

collective bargaining relationship.[8]

[23] If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date.[9]

[24] The exclusion in section 52(3) does not exclude all records concerning the actions or inactions of an employee simply because this conduct may give rise to a civil action in which the Crown may be held vicariously liable for torts caused by its employees.[10]

[25] The type of records excluded from the *Act* by section 52(3) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions.[11]

Representations

[26] When notified of the appellant's appeal, the police took the position that due to the appellant's civil suit against them, paragraph 1 of section 52(3) applies, along with section 52(3)3 (as originally claimed), to exclude the records from the scope of the *Act.* However, the police did not mention section 52(3)1 in their representations, instead claiming that sections 52(3)2 and 52(3)3 apply and providing submissions accordingly.

[27] In arguing that section 52(3)3 applies, the police submit that the records relate to allegations about the actions of a former co-worker against the appellant, who is a police employee. The police state that the duties of a municipal police force under the *Police Services Act* (*PSA*) include keeping the peace and crime prevention, while the police services board also has certain obligations under the *Occupational Health and Safety Act* (*OHSA*) to take reasonable precautions to protect workers. The police rely on Order PO-2819 for the finding that records related to an institution's duties under the *OHSA* fall under section 52(3). According to the police, the actions taken to investigate the allegations fall within the scope of the officer's duties under the *PSA* and this fact, taken together with the police services board's obligations under the *OHSA,* makes section 52(3)3 applicable. The police also rely on Order MO-3227 where section 52(3)3 was found to apply to a record "which relates to an investigation into potential misconduct," even though the record was also connected with the institution's obligations under the *Ontario Human Rights Code*. The police submit that it is significant that in Order MO-3227, it was sufficient for the purpose of the application of

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[8] Order PO-2157.
[9] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507.
[10] *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).
[11] *Ministry of Correctional Services*, cited above.

section 52(3)3 that the investigation had the potential to lead to employment action, even if it did not. The police emphasize that the appellant's reporting of the incidents could have triggered *OHSA* obligations, even if it ultimately did not.

[28] Respecting section 52(3)2, the police submit that this exclusion also applies because of the appellant's civil claim against the institution that claims, among other things, that the police have failed in their duties under the *OHSA.* The police maintain that there are reasonable grounds to believe that the appellant's purpose in making her access request is to advance her claim against her employer and, by inference, they claim that this brings the records under section 52(3)2.

[29] In response, the appellant indicates that the police told her directly that the records were being withheld from her because of the pending civil suit. However, the appellant submits that the records at issue do not fit within the exclusion because they are not about labour relations or employment matters as described by this office in the Notice of Inquiry sent to her. The appellant maintains that the exclusion cannot be used to withhold records that are related to a criminal investigation. Although the records were prepared by employees or members of the police, their preparation was in relation to the criminal investigation involving her and the affected party, where she was the victim and the affected party was the suspect. Further, the appellant argues that the records were not created as a result of labour relations or employment related matters because the affected party was not an employee at the time. She points out that the affected party ceased to be employed by the police in 2011 and she is not seeking records dated before 2013. In this context, she argues that the *Goodis* case, under which an institution may be found vicariously liable for the actions for its employee, applies because it held that such circumstances do not qualify as an employment-related matter in which the institution has an interest. The appellant states:

> I was permitted after [the affected party ceased to be an employee] to see any records I wanted in relation to the *initial* criminal investigation, when [the affected party] would have been an employee. The records I am requesting came to exist in April 2013 when [he] was not an employee.
>
> This process should not be used to argue my civil suit or to prevent me from having documents to which I am entitled simply because there is a civil suit in existence. My question then is this "If there was no civil suit, would I be given the records?"
>
> It should not matter how or where these records will be used.

[30] In reply, the police submit that since the appellant effectively concedes that the records are sought in furtherance of her civil suit again the police, this supports the assertion that the records are related to employment-related litigation against the institution. As the police see it, this is sufficient to trigger the exclusion in section

52(3)3. The police also seek to distinguish the facts of the *Goodis* case from the ones at issue here, noting that the appellant's claim is not founded in vicarious liability alone. The police refer again to Order PO-2819, where this office upheld an institution's decision to deny access to reports, employee surveys and interviews which related to the institution's obligations under the *Human Rights Code* and the *OHSA.* In so doing, the police submit that the courts have found that such purposes do not have to be the exclusive, primary or even original purpose for the creation or collection of the records, provided that they are *one* of the purposes.

[31] In sur-reply, the appellant maintains that there is no reasonable basis upon which to conclude that the requested records relate to her employment-related litigation for the purpose of section 52(3). She also provides additional comments to clarify or refute the "miscellaneous factual assertions" of the police.

Analysis and findings

[32] I find that section 52(3) does not apply to exclude the responsive records from the *Act* in this appeal.

[33] The line of cases addressing the impact of concurrent proceedings in another venue and conduct-related investigations on the application of section 52(3) clearly distinguish between records created during initial, day-to-day police investigations of incidents involving the appellant and copies of those same records which may later find their way into a file relating to other proceedings or a subsequent investigation.[12] On this point, I specifically asked the police to address the discussion of section 52(3) in Order MO-2504, especially the excerpts from Orders MO-2131 and M-927.[13] The police did not, instead relying on other orders to support the position taken on section 52(3). I will address the matter of why these other orders are distinguishable, below.

[34] First, however, I will review Order MO-2504, and others like it, for its persuasive analysis and reasoning. At issue in that appeal were records prepared by a police officer who investigated allegations of criminal behaviour by the appellant. They consisted of that "officer's inquiries and actions pertaining to the appellant's actions and whether they constituted a criminal offence." The rather lengthy excerpt from Adjudicator Donald Hale's reasons to which I directed the police's attention explains why records, such as the ones at issue in this appeal, are not caught by the labour relations and employment records exclusion. He reviews the legislative history of the exclusion that demonstrates that sections 52(3) (and 65(6) of *FIPPA*) were intended to "ensure the confidentiality of labour relations information." Adjudicator Hale considers the judicial review decisions discussing the exclusion, including *Ministry of Correctional Services* and *Ontario (Solicitor General)*, both cited above, before concluding:

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[12] See, for example, Orders M-927, MO-2131, MO-2504, MO-2556, MO-3238.
[13] Toronto Police Services Board, March 2010, at pages 5-7, in particular.

In my view, a distinction can be made between the collection, preparation, maintenance and use of records that relate exclusively to the initial criminal investigation, like the records at issue in this appeal, and records that were collected, prepared, maintained and used by the PSB investigator who conducted the PSA investigation into the original investigating officer's activities. I find support for this approach in the decision in Order MO-2131 in which Adjudicator Frank Devries relied on an earlier decision of Senior Adjudicator John Higgins in Order M-927 to find:

> In the material provided by the appellant, one of the issues he raises is whether all of the information contained in the Public Complaint Investigation file actually relates to the investigation of the complaint. He takes the position that records created for one purpose, such as an accident investigation, and in advance of a public complaint, ought not to fall within the ambit of section 52(3) simply because they reside in the complaint file.
>
> I accept the position taken by the appellant with respect to the nature of records contained in a public complaint file. Merely placing records in a file of that nature does not mean that these records are collected, prepared or maintained "in relation to" proceedings or anticipated proceedings before a court, tribunal or other entity. Senior Adjudicator John Higgins clearly set out this distinction in Order M-927 where he stated:
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> > Section 52(3) is record-specific and fact-specific. If this section applies to a specific record, in the circumstances of a particular appeal, and none of the exceptions listed in section 52(4) are present, then the record is excluded from the scope of the *Act* and not subject to the Commissioner's jurisdiction.
> >
> > … [The records at issue] consist of pages from a police officer's notebook, five witness statements, a typed Motor Vehicle Collision Report with two supplementary reports, and photographs of the damaged vehicles.
> >
> > In my view, in assessing the possible application of section 52(3) in this case, **it is important to note that the request was essentially directed at the contents of the police investigation file concerning the accident, and any related entries in officers' notebooks. It was not a request for information relating to the allegations against the investigating officers** [emphasis added].

It is difficult to imagine any category of records which would be more integral to the basic mandate of a police force than the files kept in connection with day-to-day police investigations of incidents occurring within the force's jurisdictional boundaries, and related entries in officers' notebooks. Moreover, although some of them are prepared by employees of the Police, such records are not, in essence, related to employment or labour relations. Rather, they record the activities and conclusions of the investigating officers and, at times, others who conduct forensic analyses, etc. Generally speaking, such records are subject to the *Act*.

It is an established principle of statutory interpretation that an absurd result, or one which contradicts the purpose of the enactment, is not a proper implementation of the Legislature's intention. In *Driedger on the Construction of Statutes* (3rd ed., Butterworths), by Ruth Sullivan, the author states (at page 89):

> Legislative schemes are supposed to be elegant and coherent and operate in an efficient manner. Interpretations that produce confusion or inconsistency or undermine the efficient operation of a scheme are likely to be labelled absurd.

Applying section 52(3) to the information at issue in this appeal would have the effect of permanently removing certain information maintained by the Police with respect to their basic mandate (i.e. protection of the peace and investigation of possible criminal behaviour which comes to their attention) from the scope of the *Act*, while most information of this nature would remain subject to the *Act*. As noted above, this information is not, in essence, related to employment or labour relations, and in my view, broadly speaking, it is to these latter categories of information that section 52(3) is intended to apply. Moreover, applying this section in the context of this appeal would result in the inconsistency that some files kept in connection with day-to-day police investigations of incidents occurring within the force's jurisdictional boundaries and related entries in officers' notebooks would be subject to the *Act*, while others would not be.

In my view, therefore, **it would be a manifestly absurd result, and one not intended by the Legislature, if the records at issue were removed from the scope of the *Act* because they happen to have been reviewed in connection with an investigation of an employee's conduct** [emphasis added].

> On the other hand, in the context of a request for the file relating to an investigation of a police officer's conduct, where copies of incident reports, etc. from the original investigation formed part of that file, section 52(3) could apply to that entire file including those particular copies. However, in my view, the main investigation file housing the original incident reports, etc., and related officers' notebook entries, would remain subject to the *Act*.

[35] The common message of the IPC orders that have considered this issue is that, in keeping with the legislative intent of the exclusion in section 52(3), a distinction is to be made between original records detailing police investigations into matters over which they have jurisdiction and copies of those same records residing in a conduct-related investigation file or, for that matter, in a file related to an employee's civil claim against the police as an employer. I make this same distinction respecting the information at issue in this appeal.

[36] Section 52(3) cannot be used as a shield against disclosure of information related to this particular investigation simply because the records may later be referred to, or relied upon, in the institution's defence of the appellant's civil claim. Any such reference or reliance does not alter the character of the original records,[14] which were prepared contemporaneously with, and for the purpose of, the law enforcement investigation conducted by the Sudbury Police into the appellant's allegations about the affected party's behaviour. The law enforcement duties of the police under the *Police Services Act* would have obliged the police to conduct this investigation whether or not the appellant was employed by them. The appellant does not seek the contents of any file the police may keep regarding her civil claim or the affected party's previous conducted-related investigation. As such, I find that the records the appellant seeks were not collected, prepared or maintained *in relation to* proceedings or anticipated proceedings before a court, tribunal or other entity; nor were they collected, prepared or maintained for either of the other two listed purposes in paragraphs 2 and 3 of section 52(3): negotiations or anticipated negotiations related to labour relations or employment or meetings, consultations, discussions or communications about labour relations or employment-related matters in which the police have an interest. To paraphrase Order M-927, applying section 52(3) to the records here would effectively remove information maintained by the police under their basic mandate to protect the peace and investigate possible criminal behaviour from the scope of the *Act*, a result that would be manifestly absurd.

[37] In support of their assertion that records related to an institution's obligations under the *Human Rights Code* and the *OHSA* are excluded under section 52(3), the police rely on Order PO-2819, where a workplace investigation report prepared by an external consultant was sought. In that case, however, the investigation resulted from a

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[14] Order MO-2556.

complaint made by the appellant regarding alleged "human rights abuses and poor leadership" within a department of the responding college; further, the very record at issue was the workplace investigation report prepared on behalf of the college to address and make the necessary organizational changes. This decision does not support the police's position in the present appeal. It is clear that the college was acting in its capacity as employer when it responded to the appellant's complaint about working conditions and responded by commencing a workplace investigation. The same observation can be made for Order MO-3227, where the Toronto District School Board was clearly acting as an employer when it commissioned an internal audit report of Focus on Youth 2011 program. In both of these situations, the institutions were compelled to act to address matters of potential misconduct by their employees in the course of employment.

[38] In contrast, the information before me establishes equally clearly that the police were not acting as the employer of the individual whose actions were the subject of investigation; nor does the evidence establish that the investigation was being pursued at this point to meet the obligations of the police as an employer in relation to the appellant. Rather, the police were acting in their capacity as a law enforcement agency in investigating the circumstances of a possible violation of law by another individual. The matter under investigation could have led to a specific charge under the *Criminal Code.* I am satisfied that the information in the occurrence summary, occurrence report and officers' notes was initially collected or prepared by the police in the course of carrying out their law enforcement mandate, not in the capacity as employer of the appellant or in the capacity of defendant in the appellant's civil action against them. For these reasons, I do not uphold the claim by the police that the responsive records are excluded from the *Act* by the operation of section 52(3). The records are subject to the *Act,* and I will review the police's exemption claims under sections 38(a) and 38(b).

C. Do the records contain "personal information" as defined in section 2(1)?

[39] Before reviewing the police's exemption claims, I must first determine if the records contain "personal information" and, if so, to whom it relates. This is because the personal privacy exemption can only apply to "personal information," which 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,
>
> …
>
> (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;

[40] 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.[15] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[16]

[41] 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 (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[42] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the

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

individual.[17] 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.[18]

Representations

[43] The police submit that the records contain personal information, since they clearly refer to the appellant and the affected party, including information related to the appellant's complaint and the subsequent investigation of the appellant's concerns about the other individual's actions. The police state that pages 9, 37 and 55 "do not reference the requester at all."

[44] The appellant notes that she has previously advised the police that she does not seek access to any personal information about the affected party because her motivation in making the request is "to learn from the records … what was done to investigate." The appellant submits that the affected party's personal information could, and should, be redacted and withheld.

Analysis and findings

[45] In order to determine if section 38(b) applies, or if section 38(a) is engaged, as claimed in this appeal, I must first decide whether the records contain "personal information" and, if so, to whom it relates. Under section 2(1) of the *Act*, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

[46] I have reviewed the responsive records and having done so, I find that they contain the personal information of the appellant and other identifiable individuals, including several members of the appellant's immediate family, the affected party, and other police officers.

[47] I find that the records contain information pertaining to the appellant that qualifies as her personal information within the meaning of paragraphs (a) (sex, marital status), (b) (employment history), (d) (address or phone number), (e) (her personal opinions or views), (g) views or opinions about her and (h) (name, with other personal information) of the definition in section 2(1) of the *Act*. Although the police submit that not all records contain the appellant's personal information, I am satisfied that they do. Page 9 refers specifically to the matter at issue, which in this context is sufficient to render it identifiably about her. Further, the presence of personal information is determined on a record-by-record basis and since the other two pages (37 and 55) are

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

part of the officer's notes, the records as a whole each contain the appellant's personal information.

[48] The records also contain the personal information of other identifiable individuals that fits within the following paragraphs of the definition: (a) (sex, marital or family status), (b) (employment, medical), (c) (identifying number), (d) (address or phone number), (e) (personal views or opinions), (g) (views or opinions about them) and (h) (names, with other personal information relating to these individuals).

[49] There is also information in these records that is about police officers: some of it is about the individual only in their professional capacity, while some of it relates to the individual personally. Where individuals are named or identified as investigating officers, or in the performance of their work duties related to the investigation, in these records, I find that the information about them does not qualify as personal information pursuant to section 2(2.1) of the *Act.* Disclosing the names of these individuals would not reveal something of a personal nature about the individual.[19] Such information cannot be withheld under the personal privacy exemption in section 38(b), since only *personal* information may be. However, the identification of some of these individuals in the records has not occurred as a consequence of the performance of their official duties, but rather because they are incidentally connected in the investigation. For these individuals, I find that the information about them constitutes their "personal information." This conclusion is accounted for in my review of section 38(b).

[50] Some portions of these records can be severed in accordance with section 4(2) of the *Act* to disclose to the appellant her own personal information or information identifying the investigating officers and aspects of their duties. These disclosures could not possibly result in an unjustified invasion of another individual's personal privacy. This will be done. On a related note, the appellant has unequivocally stated that she does not seek access to the affected party's personal information. In many parts of the GOR and the officers' notes, however, the personal information is so intermingled that I conclude that the determination of severance is best conducted in my analysis of section 38(b), with reference to the absurd result principle.

[51] Next, however, I will address the police's claim to section 38(a), together with the law enforcement exemption in section 8(1)(c).

D. Would disclosure of the records reveal investigative information for the purpose of section 38(a), together with section 8(1)(c)?

[52] Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right. Under section 38(a), a head may refuse to disclose an individual's personal information to them if section 8 would apply to the disclosure of

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[19] See Orders MO-3310 and PO-3655-I.

that personal information. Section 38(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.[20]

[53] As stated, the police rely on section 38(a) in conjunction with section 8(1)(c), which states:

> (1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

[54] The term "law enforcement" is used in several parts of section 8, and is defined in section 2(1) of the *Act.* The term "law enforcement" has been found to apply to an investigation into a possible violation of the *Criminal Code*.[21] Accordingly, I am satisfied that the records at issue in this appeal were created in relation to a law enforcement matter.

[55] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[22] However, it is not enough for an institution to take the position that the harms under section 8 are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter.[23] The institution must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative, although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[24]

[56] To meet the "investigative technique or procedure" test, the police were required to show that disclosure of the technique or procedure to the public (as represented by the appellant) could reasonably be expected to hinder or compromise its effective utilization. Typically, the exemption will not apply where the technique or procedure is generally known to the public.[25] The techniques or procedures must be "investigative". The exemption will not apply to "enforcement" techniques or procedures.[26]

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[20] Order M-352.
[21] Orders M-202 and PO-2085.
[22] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[23] Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.
[24] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[25] Orders P-170, P-1487, MO-2347-I and PO-2751.
[26] Orders PO-2034 and P-1340.

Representations

[57] Portions of the representations provided by the police on section 8(1)(c) were withheld as confidential and, consequently, are not set out in this order. In their non-confidential representations, the police describe the withheld technique as an information-gathering technology of the type found exempt under section 8(1)(c) in past IPC orders. The police submit that because the possible possession and use of this particular technology is not publicized, its disclosure to the public through release to the appellant:

> … would degrade the abilities of the institution to conduct effective investigations in the future and undermine its ability to carry out its policing functions if potential investigation subjects were made aware of the institution's ability to conduct such investigations whether prospective or current.

[58] After reviewing the police's non-confidential representations, the appellant disputes the assertion that any technique used in this case is unknown to the public. Specifically, the appellant argues:

> … ***if*** there was a technique or procedure the police used, the public would have access to it by virtue of television and the internet. There is not anything that you cannot access on the internet. Tactics used by the police are no different.
>
> There is also not any technique that the police would have used that they did not already use in their last investigation… which was already disclosed to me as a citizen. …

[59] The latter part of the direct quote from the appellant's representations refers to the specific technique used in the police's last investigation of similar, related incidents. Rhetorically, the appellant asks "what kind of investigative techniques are explained in detail in only a page or two?" In reply, the police do not address this aspect of the appellant's representations. Instead, they challenge the appellant's claim that any techniques used are already public, arguing that the appellant has not provided a specific source for that information.

Analysis and findings

[60] Establishing one of the exemptions in section 8 of the *Act* requires that the expectation of one of the enumerated harms coming to pass, should a record be disclosed, not be fanciful, imaginary or contrived, but rather one that is based on reason.[27] This requirement that the expectation of harm must be based on reason

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[27] Order 188. See also Order PO-2099.

means that there must be some logical connection between disclosure and the potential harm which the police seek to avoid by applying the exemption.[28] The Supreme Court of Canada affirmed in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner),* cited above, that the evidence must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm.

[61] With this standard in mind, I conclude that the police have failed to satisfy me by providing the evidence necessary to connect the disclosure of the information withheld under section 8(1)(c) and the harm that exemption is intended to prevent. As stated, the police were required to show that disclosure of the withheld investigative technique to the public could reasonably be expected to hinder or compromise its effective utilization. However, as Senior Adjudicator John Higgins stated in Order PO-2751:

> The fact that a particular technique or procedure is generally known to the public would normally lead to the conclusion that its effectiveness would not be hindered or compromised by disclosure and, accordingly, that the technique or procedure in question is not within the scope of section 14(1)(c) [of *FIPPA*].[29]

[62] In Order PO-2751, the records contained very detailed information about investigative methods used to investigate child pornography. The senior adjudicator found that section 14(1)(c) – the provincial equivalent to section 8(1)(c) - applied to many of them, explaining that "any information of this nature in the records that has not been clearly identified in the public domain, or is not a sufficiently obvious technique or procedure to clearly qualify as being subject to inference based on a "common sense perception" as referred to in Mentuck, falls under this exemption."[30] I agree that the *Mentuck* principles are relevant in a determination of the application of section 8(1)(c) of the *Act*.

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[28] Orders 188 and P-948.

[29] See also Orders P-170, P-1487 and PO-2470.

[30] Order PO-2751 reviewed *R. v Mentuck* ([2001] 3 S.C.R. 442), where the Supreme Court of Canada dismissed the Crown's appeal of a partial publication ban granted in criminal proceedings in relation to undercover "operational methods." Then Senior Adjudicator Higgins concluded that similar principles ought to be applied in reviewing the law enforcement exemption in section 14(1)(c)/(8(1)(c). The Supreme Court identified the potential risk to be evaluated as one in which:

> … the efficacy of present and future police operations will be reduced by publication of these details. I find it difficult to accept that the publication of information regarding the techniques employed by police will seriously compromise the efficacy of this type of operation. There are a limited number of ways in which undercover operations can be run … While I accept that operations will be compromised if suspects learn that they are targets, I do not believe that media publication will seriously increase the rate of compromise. The media have reported the details of similar operations several times in the past, including this one.

[63] Here, the police argue that possession and use of this particular technology is not publicized and that its disclosure would detrimentally affect the future conduct of effective investigations, as well as compromise policing functions because "potential investigation subjects" would be made aware of that particular technique existing within their investigative arsenal. Although the claim here appears to have been applied to all of the records, only one specific technique is described in the representations. For the most part, the records do not contain any reference to an actual technique, method or procedure. Where a record does contain information about the technique or procedure that may have been considered or used in conducting this law enforcement investigation, I conclude that the particular technique or procedure is generally known to the public. I agree with the appellant that such operational methods as may be disclosed by the withheld information are in such common use in law enforcement investigations, generally, as to render them "sufficiently obvious." As the Supreme Court of Canada stated in *Mentuck*, "there are a limited number of ways in which undercover operations can be run," an observation I find to be relevant in the context of the type of investigation technique or procedure described in these records.

[64] In the circumstances of this appeal, the police have not persuaded me that there is a risk of harm "well beyond the merely possible or speculative" to current law enforcement techniques with disclosure of this particular information. As I am not persuaded that disclosure could reasonably be expected to hinder or compromise the effectiveness of the method, I find that section 8(1)(c) does not apply. Accordingly, the records cannot be withheld under section 38(a) on this basis.

E. Would disclosure of the records constitute an unjustified invasion of personal privacy under section 38(b)?

[65] The police rely on section 38(b), in conjunction with section 14(3)(b), to deny access to the records, in their entirety.

[66] 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 affected party'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 her own personal information against the other individual's right to protection of their privacy. 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.

[67] 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 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. 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.[31]

Representations

[68] The police maintain that the records fit within section 14(3)(b) because they document the gathering of information about, preparing for, and conducting an investigation into, a possible violation of law. The police submit that "since s. 14(3)(b) applies to the records it follows that they fall within the s. 38(b) exemption."

[69] The police refer to orders where this office has upheld the exercise of discretion in withholding law enforcement records, including with regard to the absurd result principle.[32] The police submit that under the balancing of factors required in considering the application of absurd result, protection of an individual's privacy is particularly significant in a law enforcement context. According to the police, the IPC has previously concluded that the privacy interests of affected parties outweigh the access rights of requesters in highly sensitive law enforcement matters, even where the requester has prior knowledge of the information in the records.

[70] The appellant's representations describe in detail the events occurring prior to the specific law enforcement investigation that led to the creation of the records at issue in this appeal. I have reviewed and considered this content, in its entirety, but I have decided not to outline it in this order due to the inherently sensitive nature of the situation. I observe, however, that statements made by the appellant demonstrate not only her knowledge of these events, but an awareness of information contained in the undisclosed records, suggesting the relevance of the absurd result principle.

[71] Furthermore, in her submissions on the issue of whether the records contain personal information, the appellant explains her interest in the records as being to find out what was done to investigate. The appellant questions, for example, "Was surveillance conducted? What avenues were not explored and the reasons why?" She surmises that very little was done to investigate and gives her opinion on the matter. The appellant suggests that the records "would prove how little was done to investigate … and [that is] why the institution does not want the records given. … ." Further, she maintains that "a civil suit should also not preclude the institution from having to disclose the records to me. I was told this was why I was not being provided with them."

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[31] Order MO-2954. 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).
[32] Orders MO-2588, PO-2602-R, MO-1323, MO-1378 and MO-2699.

Analysis and findings

[72] Since the records contain the personal information of the appellant and other identifiable individuals, my review of section 38(b) is conducted in relation to the intertwined personal information of the appellant and these other individuals.

[73] The police rely on section 14(3)(b) to deny access and based on my review of the records, I agree that it applies. Section 14(3)(b) states:

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

[74] The presumption at section 14(3)(b) can apply to a variety of investigations.[33] Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.[34] Therefore, 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 a specified offence under the *Criminal Code* had been committed against the appellant. Even if no criminal proceedings were commenced against the affected party, 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.[35]

[75] The next determination under section 38(b) is what weight to afford section 14(3)(b), recognizing that the types of information set out in section 14(3) are generally regarded as particularly sensitive.[36] The appellant's stated reasons for seeking access to the records include learning what was done in the investigation, thereby shedding light on the matter and promoting greater accountability on the part of the police. 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.

[76] I will now address the possible application of the factors in section 14(2). The

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[33] Order MO-2147.
[34] Orders P-242 and MO-2235.
[35] Orders P-242 and MO-2235.
[36] Order MO-2954.

police did not argue that any of the factors favouring privacy protection in sections 14(2)(e)-(i) apply, and I agree. Although the appellant's representations did not specifically identify any factors favouring disclosure in section 14(2), they suggest the relevance of the public scrutiny factor in section 14(2)(a), due to the manner in which the police denied full access to these records, which detail the investigation of a possible violation of law where the appellant is the alleged victim.[37] Section 14(2)(a) contemplates disclosure in order to subject the activities of the institution to public scrutiny, as opposed to the views or actions of private individuals.[38] In order to support a finding that section 14(2)(a) 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 and that the information sought will contribute materially to the scrutiny of those specific activities. In this appeal, although the appellant has expressed concern about the investigation by the police, her interest – as a party who is personally involved in a proceeding – in disclosure of information in order to ensure that justice is done is of the nature that has typically been viewed as a private interest.[39] In my view, there is insufficient evidence to support a finding that disclosure of the personal information of other individuals in the records at issue would promote the objective of greater scrutiny of police activities by the public at large. Therefore, I find that the factor at section 14(2)(a) does not apply.

[77] In balancing, I have considered that some of the personal information of the affected party is removed from the scope of the appeal following the appellant's indication that she does not seek his personal information. I have also considered that the appellant's description and listing of "personal information" did not mention or contemplate certain types of information about the affected party. Having balanced the competing interests of the appellant's right to disclosure of information against the privacy rights of other individuals, I conclude that the responsive, withheld information of the affected party and several other identifiable individuals is subject to section 38(b), together with the presumption against disclosure in section 14(3)(b).

Absurd result

[78] Importantly, however, the absurd result principle is also 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.[40] The police relied on several orders where the denial of access to records containing the appellant's own information was upheld, even in situations where that individual had some prior awareness of the information.

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[37] Orders M-82, PO-1731, PO-1750, PO-1767 and P-1014.
[38] Order P-1134.
[39] See Order P-1014.
[40] Orders M-757, MO-1323 and MO-1378.

What makes those decisions distinguishable from the circumstances of this appeal, however, is that the denial of access was upheld in situations where the appellant was the alleged perpetrator in the law enforcement matter. In this context, the decision not to apply the absurd result principle dovetailed with the purpose of the personal privacy exemption to protect the victim. That consideration is not present here where it is the alleged victim seeking access.

[79] Again, 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.[41] That basis clearly exists in this appeal. After the appellant brought her appeal of the police's access decision to this office, the police disclosed her own memorandum and witness statement to her. Much of the content of the other withheld records that detail the investigation corresponds with, or was in fact driven by, the appellant's input. In the particular circumstances of this appeal, I find that refusing to disclose this specific information to the appellant would lead to an absurd result, and I will order the police to disclose it, along with the other information that I have found not to be exempt under section 38(b), such as the appellant's own personal information.

[80] 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 only some remaining personal information of other individuals in the records. The exempt information is highlighted in the copy of the records sent to the police with this order.

F. Did the police properly exercise their discretion in applying sections 38(a) and 38(b)?

[81] In claiming sections 38(a) and 38(b), the police had the discretion to disclose the withheld information, even if it qualified for exemption. This is the essence of a discretionary exemption.

[82] In situations where an institution has the discretion under the *Act* to disclose information even though it may qualify for exemption, I may review the institution's decision to exercise its discretion to deny access. In doing so, I may determine whether the police erred in exercising its discretion and whether it considered irrelevant factors or failed to consider relevant ones. I may not, however, substitute my own discretion for that of the institution.

[83] Since I did not uphold the police's decision to deny access under section 38(a), together with section 8(1)(c), no review of the exercise of discretion under section 38(a) is necessary. However, I did uphold the denial of access to certain portions of the records under section 38(b), and I will review the exercise of discretion by the police in doing so.

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[41] Orders MO-1196, PO-1679, MO-1755 and PO-2679.

[84] In the Notice of Inquiry sent to the police, a list of considerations generally viewed as relevant to the exercise of discretion issue was provided to them. The outline notes that not all of the considerations will necessarily be relevant in any given situation, and that it is possible that additional unlisted considerations may be relevant.[42] Relevant considerations include:

- the purposes of the *Act*, including the principles that:
    - ○information should be available to the public;
    - individuals should have a right of access to their own personal information;
    - exemptions from the right of access should be limited and specific; and
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

Representations

[85] The police addressed their exercise of discretion as part of their submissions on section 14(3)(b). After stating that because section 14(3)(b) applies, so too does section 38(b), the police state:

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[42] Orders P-344 and MO-1573.

> Having said this, the institution acknowledges that s. 38(b) is a discretionary exemption and this it must exercise its discretion in the circumstances. The institution has placed significant weight on the sensitivity of the records which clearly pertain to a law enforcement matter to exercise its discretion not to grant access in these circumstances. In addition, the [appellant] has not provided a compelling reason in support of disclosure.

[86] In the appellant's opinion, the records were withheld because:

> the institution felt I was not 'entitled' [to them] …Since my appeal, the institution was forced to provide me with a copy of my memo and alleged witness statement. …
>
> I believe that the institution has acted in bad faith and has further withheld the documents having taken into consideration that there is a civil suit pending, which is not relevant. If there were no civil suit, I would likely have been provided with the documents.
>
> Other members of the public request documents from the institution … on a daily basis whether it be for the purpose of a civil suit or family court, etc. Again, the institution should not be permitted to withhold documents it would otherwise have to disclose, simply because they are the ones named in the civil suit.

[87] The police did not offer additional representations as to what other factors may have been considered in their exercise of discretion. However, in response to their review of the appellant's submissions, the police deny that the appellant's civil suit was a relevant factor in the exercise of discretion. The police also deny that they were "forced" to disclose the records the appellant received upon appeal, implying that this occurred as a result of the exercise of discretion under section 38(b).

Analysis and findings

[88] The onus rested on the police to demonstrate that discretion was properly exercised when denying the appellant access to the information under section 38(b). In particular, the police were required to show that they considered whether the records should be released to the appellant because they contain her personal information. In this appeal, while I have decided to uphold the exercise of discretion in relation to the information to which I found section 38(b) applies, the evidence that the police relied on relevant considerations in exercising their discretion overall is scant.

[89] Of particular note in the list of relevant factors to consider in the exercise of discretion is that a central purpose of the *Act* is to provide individuals with a right of access to their own personal information held by an institution, subject only to limited and specific exemptions. The police denied access to these records in full, until the

matter had been appealed to this office. Although the police acknowledge the discretionary nature of section 38(b) in their submissions, they do not provide a cogent explanation for why severance of the records was not possible under section 4(2), given that the records contain a great deal of the appellant's own personal information and also that most of the information was provided by her to the police. This does not establish the requisite limited and specific application of section 38(b). Nor am I convinced by the position taken by the police that the appellant did not provide compelling reasons for disclosure in these circumstances. In the circumstances, it seems beyond dispute that the information is of great significance to her and that she does have a sympathetic reason for seeking access to it. Finally, the denial of access to law enforcement investigation records in full in this case appears at odds with the usual practice of police forces to release records such as officers' notes and occurrence reports, at least in part, to requesters whose own personal information is contained in them.

[90] On the other hand, I recognize that discretion is properly exercised to claim section 38(b) when the intention is to protect individual privacy, and I accept that the police considered this relevant factor in denying access to the personal information of other individuals in the records.

[91] The appellant asserts that the police told her directly that the records were being withheld because of her pending civil suit. This statement is not independently verifiable; however, the position taken by the police that "the appellant effectively concedes that the records are sought in furtherance of her civil suit against the police," considered along with other indicators, suggests that the police viewed the civil suit as relevant in deciding not to disclose. The legislators did not intend to make section 38(b) available to protect the privacy of the institution, as the circumstances of this exercise of discretion appear to suggest. Moreover, past orders of this office have affirmed that use of the *Act* to seek access to records that may also be relevant in a concurrent civil action is not unfair in and of itself. Section 51 of the *Act* codifies this principle.[43]

[92] Based on my review, I have identified concerns with the manner in which the police exercised their discretion in denying access under section 38(b) in this appeal. The evidence, overall, suggests that the following relevant factors were overlooked:

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[43] Order 48 provides direction to institutions where access decisions must be made in the context of ongoing litigation involving the institution. After quoting section 64 of *FIPPA* (section 51 *MFIPPA*), the former commissioner stated:

> This section makes no reference to the rules of court and, in my view, the existence of codified rules which govern the production of documents in other contexts does not necessarily imply that a different method of obtaining documents under the *Freedom of Information and Protection of Privacy Act, 1987* is unfair. … Had the legislators intended the *Act* to exempt all records held by government institutions whenever they are involved as a party in a civil action, they could have done so through use of specific wording to that effect. No such exemption exists … and section 64 cannot be interpreted so as to exempt records of this type without offending the purposes and principles of the Act.

that individuals should have a right of access to their own personal information; that exemptions from the right of access should be limited and specific; that the appellant has a sympathetic or compelling need to receive the information; and the usual or historic practice of the police with respect to similar records. That said, and as I remarked previously, there were competing privacy interests at stake in this disclosure decision – those of several other individuals identified in the records detailing this law enforcement investigation. Therefore, to the limited extent I upheld section 38(b) with section 14(3)(b) in relation to that particular personal information, above, I will uphold the exercise of discretion by the police.

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.*

   With this order, I provide copies of the records to the police with the exempt information highlighted on pages 2, 3-8, 29, 46-48, 54, 56 and 58. Where I have upheld the severance of non-responsive information, this information is also highlighted, but using a different colour so as to distinguish it from exempt information.

2. I order the police to disclose to the appellant all other withheld responsive and non-exempt portions of the records by **January 9, 2017,** but not before **January 4, 2017**. To verify compliance with this provision, I reserve the right to require the police to provide me with a copy of the records disclosed to the appellant.

Original Signed by: November 30, 2016

Daphne Loukidelis
Adjudicator