Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3999

Appeals PA18-7, PA18-181, PA18-182, PA18-183 and PA18-295

Ministry of the Solicitor General

October 21, 2019

Summary: The appellants are seeking access to records relating to the death of their minor child. They made five access requests to the Ministry of the Solicitor General (the ministry). The ministry denied access to the records in whole, claiming the application of the law enforcement exemption in section 14(1)(b) of the *Freedom of Information and Protection of Privacy Act*, as well as the discretionary personal privacy exemption in section 49(b). In this order, the adjudicator finds that all of the records are exempt from disclosure under section 14(1)(b) (law enforcement investigation) on its own, or section 49(a) (discretion to refuse requester's own information), in conjunction with section 14(1)(b). The ministry's exercise of discretion is upheld and the adjudicator dismisses all of the appeals.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) (definition of "personal information"), 14(1)(b) and 49(a).

Orders and Investigation Reports Considered: Orders M-1027, MO-2909-I, MO-3224 and PO-3117.

Cases Considered: *Ontario (Attorney General) v. Information and Privacy Commissioner* 2009 CanLII 9740.

OVERVIEW:

[1] This order disposes of the issues raised as a result of five appeals filed with this office in response to five access requests made by the requesters under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of the Solicitor General[1] (the ministry) for records relating to the tragic death of their minor child.

[2] In response to the requests, the ministry advised the requesters that it was denying access to all of the information they requested. The ministry advised the requesters that access was denied "as the records concern a matter that is currently under investigation." The ministry claimed the application of the discretionary exemptions in section 49(a) (discretion to refuse requester's own information), in conjunction with sections 14(1)(a) (law enforcement matter), 14(1)(b) (law enforcement investigation), 14(1)(f) (right to fair trial), 14(1)(l) (facilitate commission of an unlawful act), 14(2)(a) (law enforcement report), as well as section 49(b) (personal privacy) of the *Act*.

[3] The requesters (now the appellants) subsequently appealed all five of the ministry's decisions to this office.

[4] The requests to the ministry are as follows:

PA18-295

[5] Copies of preliminary information provided to the Office of the Chief Coroner (the Coroner) by the Strathroy-Caradoc Police Service and the Ontario Provincial Police (the OPP), as well as notes from all individuals present at any case conference relating to the investigation.

PA18-7

[6] Copies of videos of interviews conducted by named police officers involving the requesters, as well as the related notes and reports from named officers pertaining to the death of the requesters' child.

PA18-181

[7] A copy of a video of a polygraph interview of one of the requesters with the OPP.

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[1] Formerly referred to as the Ministry of Community Safety and Correctional Services. The Strathroy-Caradoc Police Service (the police) also received five access requests under the *Municipal Freedom of Information and Protection of Privacy Act*. The police denied access to all of the records. The police's access decisions were appealed to this office and are addressed in Interim Order MO-3847-I.

PA18-182

[8] Copies of videos of two polygraph interviews of the other requester with the OPP.

PA18-183

[9] Information the police provided to the Coroner indicating that the death investigation into the child was no longer under investigation and/or closed. In particular, the date the information was provided, the name of the officer who provided the information, as well as the statements/correspondence provided by the police to the Coroner regarding this information.

[10] During the mediation of the appeals, the appellants raised the possible application of the compassionate grounds exception to the personal privacy exemption in section 21(4)(d) to the records, which was then added as an issue in these appeals. Also during mediation, the ministry advised that some of the information at issue is not responsive to the requests. The appellants advised the mediator that they are not seeking information that is not responsive to their requests. Consequently, this information is no longer at issue in these appeals.

[11] The appeals then moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. I sought and received representations from the ministry. I then sought and received representations from the appellants and further representations from both parties, including further affidavit evidence from the ministry. Representations were shared between the parties in accordance with this office's *Practice Direction 7*.

[12] During the inquiry, the ministry issued a supplementary decision letter to the appellants, disclosing some records to them. These records consist of a Coroner's Investigation Statement, a postmortem report, an autopsy report, preliminary autopsy findings, Coroner's case log notes, family meeting notes, and emails. As a result of the disclosure of these records, they are no longer at issue in these appeals.

[13] For the reasons that follow, I find that sections 14(1)(b) standing alone, and 49(a), in conjunction with section 14(1)(b) of the *Act* apply to exempt all of the records at issue from disclosure. I uphold the ministry's exercise of discretion and I dismiss the appeals.

RECORDS:

[14] The voluminous records consist of audio recordings, search warrants, a sudden death report, a report prepared by the Forensic Identification service of the OPP, third party statements, photographs, supplementary reports, meeting minutes, emails, officers' notes and other correspondence.

ISSUES:

A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

B. Does the discretionary exemption at section 14(1)(b) or section 49(a), in conjunction with section 14(1)(b), apply to the information at issue?

C. Did the ministry exercise its discretion under sections 14(1)(b) or 49(a)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Background

[15] The ministry provided background information concerning the records that are the subject matter of the requests. In particular, the ministry submits that the records relate to the tragic death of a young child. The death was initially investigated by the Strathroy-Caradoc Police Service (the Strathroy police). However, it is now being investigated solely by the Ontario Provincial Police (the OPP). The ministry further submits that, as a provincial law enforcement agency, the OPP frequently becomes involved in major investigations, which may have been initially investigated by a municipal police service.

Issue A: Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[16] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> > (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
> >
> > (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
> >
> > (c) any identifying number, symbol or other particular assigned to the individual,

> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name 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;

[17] 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.[2]

[18] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[3]

[19] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[4]

Representations

[20] The ministry submits that the records contain the personal information of several identifiable individuals, including statements made by these individuals to the OPP. The ministry relies on the findings made in Order PO-3544, in which Adjudicator John Higgins found that records relating to an OPP investigation of a death were found to contain personal information because they linked third party individuals to a police investigation. In addition, Adjudicator Higgins also found that it is a principle that personal information remains personal information, even if it is known to others,

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[2] Order 11.

[3] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

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

including the general public, and that severing personal identifiers would not render individuals non-identifiable.

[21] The ministry further submits that the exceptions to the definition of personal information in sections 2(2) and 2(3) do not apply, as none of the individuals who are subject to the investigation have been deceased for thirty years or more, and the investigation does not relate to individuals in a business, professional or official capacity.

[22] The appellants submit that the records contain their personal information, as well as the personal information of their children, and that it is likely that there is the personal information of other individuals in the records. The appellants submit that they give permission for their personal information to be disclosed, and that they are not seeking other personal information, such as telephone numbers or banking information.

Analysis and findings

[23] I find that, based on the ministry's representations, the appellants' representations and my review of the most recent records, the records in their entirety qualify as personal information as defined in section 2(1) of the *Act*. The records are clearly identified as relating to the OPP's investigation into the death of the appellants' child. Therefore, the records contain recorded personal information about the deceased child. In addition, as the ministry notes, the records also contain recorded personal information about other identifiable individuals contained in their statements made to the OPP. Lastly, as the appellants note, the records also contain their own personal information, as well as the personal information of their family members.

[24] Before assessing whether the records have been properly withheld under the exemptions claimed by the ministry, I note that the *Act* contains different provisions for addressing the application of exemptions to records. Requests for general records (including those containing the personal information of individuals other than the requester) must be addressed under Part II of the *Act*, which includes the discretionary exemption in section 14(1) and the mandatory exemption in section 21(1). Requests for one's own personal information must be addressed under Part III of the *Act* which includes the exemptions in sections 49(a) and (b).

[25] For records not containing the appellant's personal information or that of their other children, it must be determined whether they qualify for exemption under sections 14(1) or 21(1). For the records containing the appellants' personal information or that of any of their children, it must be determined whether they qualify for

exemption under sections 49(a) or (b).[5]

Issue B: Does the discretionary exemption at section 14(1)(b) or section 49(a), in conjunction with section 14(1)(b), apply to the information at issue?

[26] Section 47(1) gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right.

[27] Section 49(a) reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > where section 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

[28] Section 49(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.[6]

[29] Where access is denied under section 49(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

[30] In this case, the ministry relies on section 49(a), in conjunction with section 14(1(b) or section 14(1)(b) on its own.

[31] Section 14(1)(b) states:

> (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
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> > interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

[32] The term "law enforcement" is used in several parts of section 14, and is defined

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[5] I note the applicability of section 66(c) of the *Act*, which provides that any right or power conferred on an individual by the *Act* may be exercised by a person who has lawful custody of an individual under the age of sixteen. In other words, the appellants' right of access to the personal information of their children is considered under Part II of the Act.
[6] Order M-352.

in section 2(1) as follows:

> "law enforcement" means,
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> > (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, or
> >
> > (c) the conduct of proceedings referred to in clause (b).

[33] The term "law enforcement" includes a police investigation into a possible violation of the *Criminal Code*.[7]

[34] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[8]

[35] It is not enough for an institution to take the position that the harms under section 14 are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter.[9] The institution must provide detailed 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.[10]

[36] The law enforcement investigation in question must be a specific, ongoing investigation. The exemption does not apply where the investigation is completed, or where the alleged interference is with "potential" law enforcement.

Representations

The ministry's representations

[37] The ministry submits that the records it has withheld from disclosure are "law enforcement records" because they were created by the OPP for the purpose of conducting an investigation. The ministry also submits that previous orders of this office have confirmed that the OPP is an agency which has the function of enforcing and

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[7] Orders M-202 and PO-2085.

[8] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

[9] Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

[10] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

regulating compliance with the law, and that the term "law enforcement" applies to a police investigation into a possible violation of the *Criminal Code of Canada*.[11]

[38] The ministry further submits that there is a statutory mandate prescribed in the *Police Services Act*, which requires the police to investigate the death of a child, and to resolve whether or not a crime has occurred. The ministry goes on to state that the death was initially investigated by the Strathroy police, but is now being investigated solely by the OPP. The ministry argues that the investigation is currently taking place, is active and is ongoing.

[39] The ministry states:

> Law enforcement investigations take time, but the interests of justice [require] that they be allowed to take place and be completed. The Ministry has opposed the disclosure of all of the records that form part of the law enforcement investigation because of the strong likelihood that disclosure will cause irreparable harm.

[40] The ministry goes on to argue that the exemption in section 14(1)(b) applies to exempt the records from disclosure because there is a specific, active and ongoing investigation in existence, and that it is especially difficult to predict future events in the circumstances of this appeal, given that the investigation is still taking place. In particular, the ministry submits that OPP investigators have been assigned to the investigation, led by a Detective from the OPP Criminal Investigations Branch. The investigation, which commenced in 2015, has involved 33 police officers from both the police and the OPP. The ministry goes on to argue that the OPP is continuing to pursue leads and is conducting law enforcement activities consistent with an active and ongoing investigation.

[41] The ministry states:

> . . . We can advise that our law enforcement investigation will continue until the OPP concludes who or what may have caused the fatal injury to the appellants' [child].
>
> The law enforcement investigation has taken place over nearly 3 years, which we acknowledge is a significant period of time. But law enforcement investigations can be *far* lengthier, depending on the nature and circumstances of the investigation. In Order PO-3117, the OPP investigation related to a death that had occurred 13 years before, in 1999. In Order MO-2909-I, the police investigation related to a missing

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[11] Order PO-3117.

> person who had disappeared 50 years earlier, and whose whereabouts remained unknown to the police. Yet, in both orders, the Adjudicators had no hesitation in finding that section 14(1)(b) applied to the records. We submit the same finding should be made in this appeal.

[42] The ministry also submits that in order for section 14(1)(b) to apply, it must provide evidence that the disclosure of the records could "reasonably be expected to interfere with the law enforcement investigation." The ministry argues that disclosing the records would interfere with the OPP investigation for the following reasons:

- it could reveal suspects and persons of interest who are still being investigated which could lead these individuals to take steps to cover their tracks, intimidate potential witnesses or otherwise hinder the investigation;[12]
- police investigators will have no way of knowing when an individual comes forward with information whether that individual learned of the information through the release of the records, or because of what they learned first-hand, thereby tainting the reliability of future evidence;
- because the investigation is ongoing, the OPP cannot necessarily determine the relevance of a record to the investigation. What appears to be insignificant during one part of an investigation may be much more significant at a later point, when the police obtain new evidence;
- the disclosure of the records and their potential publication in the media or on the Internet would make it much more difficult to find an unprejudiced jury, should the investigation eventually proceed to trial; and
- if records containing third party personal information are disclosed, individuals in the future would be hesitant to come forward, out of concern that their personal information would also be disclosed, which would interfere with future law enforcement investigations.

The appellants' representations

[43] The appellants submit that there is a compelling public interest in the disclosure of the information at issue because the operation of the publicly-funded justice system is at the centre of this case, and is subject to public scrutiny.

[44] The appellants further submit that there is no ongoing investigation, and that even if there is some slight monitoring activity of the investigation by police (either the Strathroy police or the OPP), there is no need to withhold the information at issue. They

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[12] See Order PO-3117.

argue that the ministry has not met its burden of proof under section 53 of the *Act* to prove that there is an active, ongoing investigation. The appellants' position is that the investigation concluded almost two years ago. In particular, the appellants submit that the investigation is not ongoing for the following reasons:

- the Detective leading the investigation has had no contact with them, and did not respond to emails sent to him by the appellants;

- if the investigation was truly ongoing, the ministry could have stated at the very least, for example, that the Detective has interviewed a certain number of witnesses, or requested additional forensic testing, or has gone before a Judge to request a number of new search warrants;

- a search of Court records showed no activity on the file for the past almost two years;

- a reporter from the Toronto Star brought an application for, and obtained, in the Ontario Court of Justice, the Informations to Obtain (ITO's) related to a series of search warrants and production orders obtain by the police in relation to the investigation of their child's death;

- during the above-referenced proceeding, the Crown Attorney stated to Justice J. Skowronski that "there's no investigation that the Crown has now carriage of the prosecution of;"[13]

- the above-named Justice stated that the "police did an investigation and determined that there were no charges to be laid;"

- the police and the ministry did not oppose the release of the ITO's;

- Canadian jurisprudence holds that search warrants and ITO's are not disclosed to the public and the media if a case is ongoing;[14] and

- all of the ITO's and search warrants in this case were completed and filed almost four years ago.

[45] The appellants further argue that should I find that there is an ongoing investigation, the disclosure of the information at issue would not interfere with an ongoing investigation. In particular, the appellants submit that due to the disclosure of the ITO's, a significant amount of information has already been disclosed to the public,

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[13] The appellants provided this office with a copy of the transcript of that proceeding.

[14] The appellants refer to a high-profile double homicide in which the Toronto Star unsuccessfully applied to access to ITO's and search warrants.

including synopses of interviews with "dozens" of people, and no harm has ensued. The appellants attached to their representations a sample ITO, and transcripts of two Court appearances relating to the seeking of the ITO's. The appellants also submit that the ministry's representations are "boiler plate" and not specific enough to meet its burden of proof.

[46] The appellants also submit that there is a public interest in the disclosure of the information at issue, in order to subject the activities of the police, pathologists, doctors, coroners, children's aid officials and others, to public scrutiny, with a view to correcting mistakes, avoiding future deaths and improving future investigations. Lastly, the appellants argue that there is a public, rather than a private, interest in the records because it is their intention to share any information they obtain with the Toronto Star "in the hope that sunlight will be focused on these important public issues."

The ministry's reply representations

[47] In reply, the ministry reiterates that there is an ongoing investigation into the death of the appellants' child, regardless of the appellants' position to the contrary. The ministry submits that it does not close investigations, especially serious ones such as where a death has occurred, simply because of the passage of time. In particular, the ministry states:

> As part of their law enforcement investigation, OPP investigators are *presently* seeking an additional medical opinion to assist in determining the means by which the death of the appellants' [child] occurred. The OPP have sought out the expertise of a clinician at The Hospital for Sick Children in Toronto, and we are waiting for that process to conclude. We believe that this medical opinion is a critical part of the investigation because it may yield clues as to the manner of death. The outcome of this medical opinion could result in charges being laid. We point it out as evidence that there is in fact an ongoing and active law enforcement investigation.

[48] With respect to the appellants' statements that there have not been any new Court documents, the ministry submits that the alleged lack of new Court records is not determinative as to whether there is an active and ongoing investigation, and an investigation does not need to result in the creation of Court records in order for the records to be subject to section 14(1)(b).[15] In this instance, the ministry argues, seeking a medical opinion from a clinician at The Hospital for Sick Children is a specific example of there being an ongoing and active law enforcement investigation.

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[15] See, for example, Order MO-2909-I.

[49] Concerning the Court proceedings and transcripts that the appellants included in their representations, the ministry submits that the appellants have interpreted the transcripts to mean the investigation has concluded, but this is not the case. The ministry further states that it will not comment on the Court transcripts any further because it does not know if the Court considered all scenarios at issue in this appeal, such as the possibility of the OPP seeking an additional medical opinion.

[50] The ministry goes on to argue the following:

> . . . There are different legal processes and pre-requisites to meet for obtaining records, depending on whether the process is an access request under [the *Act*] or by some other means, such as a judicial application. Records obtainable by one means may not be obtainable by another. In Order PO-3117 (at paragraph 79), records obtained by the appellant in that appeal during a Coroner's inquest were nevertheless upheld as being exempted under section 14(1)(b) for the purpose of [the *Act*]. In other words, the merits of an access request under [the *Act*] must be assessed based on the requirements of [the *Act*], and not what has been disclosed pursuant to another legal mechanism or process.
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> The transcripts were created over a year ago. Regardless of how the Court transcripts are interpreted by the appellants, it is the position of the OPP that as of the date of the [appellants'] request for records under [the *Act*] up to the present time, and the for foreseeable future, there is an ongoing and active law enforcement investigation. In Order PO-3117 (at paragraph 63), the IPC accepted that the lack of a limitation period for serious crimes, the application of new technologies and the discovery of new evidence supported the application of section 14(1)(b). The Ministry submits that this same reasoning should be applied in this appeal, given the fact the we are seeking evidence by obtaining an additional medical opinion.

The appellants' sur-reply representations

[51] In sur-reply, the appellants submit that the exact language the ministry used in its reply representations was that the ministry "was of the view" that there is an active and ongoing investigation. The appellants infer from the use of this language that the ministry is not able to state declaratively or categorically that there is an active, ongoing investigation into their child's death, and that the ministry's statements are speculative.

[52] With respect to the ministry seeking an additional medical opinion, the appellants note that it did not refer to seeking this opinion in its original representations. If the ministry requested this opinion after making its first representations, the appellants are concerned that it was done so to help the police maintain a seal on the records at issue. Even if the opinion was requested before the ministry submitted its original representations, the appellants submit that a request for a further additional medical

opinion is not evidence of an ongoing investigation.

[53] The appellants state:

> On this issue, we also want to raise the importance of public scrutiny being brought to bear on this case. If the police have recently requested an additional opinion concerning our [child's] death, which the ministry notes in its representations is a "critical part of the investigation," we believe the records should be released so that we can understand why this was not done three years earlier.

[54] With respect to the ministry's position that it properly applied the exemptions under the *Act*, the appellants submit that it did not properly exempt the audio/video recordings of police's interviews with the appellants and their other children. The appellants submit that in Order MO-2909-I, I ordered the police to disclose the appellant's statement to the police, finding that "it would be absurd to withhold this statement from the appellant, as she provided the information to the police and would be aware of its contents." The appellants submit that this is the same issue in this case.

[55] Lastly, the appellants refer to the case of Ontario (Attorney General) v. Information and Privacy Commissioner,[16] in which the Divisional Court upheld this office's decision to order the disclosure of a video statement, the video of a search warrant execution and other information. The appellants' position is that this appeal is similar to the one referred to above, and that they would be successful at Divisional Court, as this precedent would apply.

The ministry's affidavit

[56] After receiving all of the representations, I wrote to the ministry providing it with the opportunity to provide further representations regarding its position that there is an ongoing investigation relating to the death of the appellants' child. In particular, I requested sworn affidavits from individuals who are in charge of the investigation within the OPP, explaining how and why there is an ongoing investigation. The ministry subsequently provided a sworn affidavit.

[57] The ministry's affidavit was sworn by a Detective Inspector with the Criminal Investigations Branch of the OPP, who is the Case Manager in charge of the investigation into the death of the appellants' child. The affiant states that the OPP is still investigating the death, because the manner of death still remains undetermined, and the OPP is attempting to ascertain who and what caused the fatal injury to the child, and whether or not a criminal offence has occurred in relation to the death.

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[16] See 2009 CanLII 9740.

[58] The affiant goes on to state that he being assisted by five members of the OPP in this investigation, and they are currently conducting investigative strategies and techniques which are consistent with conducting a death investigation. In addition, the affiant swears that the OPP are currently seeking further medical interpretation from a paediatrician at The Hospital for Sick Children in Toronto. The paediatrician will use police/OPP information and reports, as well as medical records, to produce a clinical report that the OPP hopes will assist with the law enforcement investigation. Lastly, the affiant submits that as of July 4, 2019, the paediatrician informed the OPP that the clinical report has not yet been completed.

The affidavit of the appellants

[59] I then provided the appellants with the opportunity to provide representations in response to the above-referenced affidavit. The appellants provided representations, including an affidavit sworn by one of the appellants.

[60] Concerning the ministry's affidavit, the appellants submit that it stretches the imagination that no progress has been made since the current Detective Inspector/Case Manager of the investigation took over the case. In addition, the appellants' position is that the language in the affidavit is vague, because the five OPP members assisting the Detective have not been identified, nor has the paediatrician been identified, nor the exact date when the paediatrician was asked to provide an opinion.

[61] One of the appellants provided a sworn affidavit. The affiant swears that they contacted a staff member of the Office of Patient and Family Experience at The Hospital for Sick Children, and was subsequently advised that the staff member had "checked with the appropriate people at the Hospital" and was informed that no records regarding the affiant's child had come in to the "appropriate" sections of the hospital. The affiant then swears that it is their belief that these alleged requests for medical opinions are an attempt to stymie the appellants' attempts to gain access to the information that is the subject matter of the appeals.

[62] Lastly, the appellants reiterate that the onus is on the ministry to demonstrate that there is an ongoing investigation. The appellants refer to Order MO-3224, which involved records relating to the death of the requester's son. This office found that despite the police's claim that the investigation was ongoing and unsolved, the police had failed to show that there was an ongoing investigation. The appellants further submit that even if a medical report has been requested, that is not sufficient to satisfy the ongoing investigation criteria. In support of their position, the appellants refer to Order M-1027 in which this office found that the police were incorrect in stating that by disclosing two witness statements, there would be interference in the administration of justice, and the investigation itself.

Analysis and findings

[63] As previously stated, to the extent that the records contain the personal

information of individuals other than the appellants and their children, I consider the possible application of section 14(1)(b). The records that contain the personal information of the appellants or any of their children are considered under section 49(a), in conjunction with section 14(1)(b). For the reasons that follow, and subject to my findings regarding the ministry's exercise of discretion, I find that the records at issue in all of these appeals are exempt from disclosure under section 14(1)(b) alone, or section 49(a), in conjunction with section 14(1)(b) of the *Act.*[17]

[64] First, I find that the OPP's investigation was undertaken with a view to bringing charges under the *Criminal Code of Canada* and proceedings in court where a penalty or sanction, such as imprisonment, could be imposed against an individual or individuals relating to the death of the appellants' child. As a result, I find that the records relate to "an investigation undertaken with a view to a law enforcement proceeding . . ." as set out in section 14(1)(b).

[65] In order for section 14(1)(b) to apply, two requirements must be met. The first requirement is that the law enforcement investigation must be a specific, ongoing investigation. The second requirement is that the ministry must prove that disclosing the records could reasonably be expected to interfere with the investigation.

[66] With respect to the first requirement, based on my review of the parties' representations, their affidavit evidence, and my review of the most recent records generated by the OPP, I am satisfied that there is an active, ongoing OPP investigation into the death of the appellants' child. I reviewed communications between the OPP and the paediatrician it has engaged at The Hospital for Sick Children. These communications took place fewer than two months ago. The paediatrician has been engaged to conduct a review of records relating to the child, and to then provide a medical opinion to the OPP regarding the manner of death. I also saw the voluminous records that were provided to the paediatrician by the OPP. I accept the ministry's argument that the outcome of the medical opinion could result in charges being laid. While the appellants' position is that there is not an ongoing investigation taking place, I find that is simply not the case. Therefore, I conclude that there is a specific, active and ongoing investigation being conducted by the OPP into the death of the child, which has not concluded.

[67] Turning to the second requirement, I find that the disclosure of the records at issue could reasonably be expected to interfere with the investigation into the death of the appellants' child, and I make this finding taking into account the particular facts of this case, both parties' representations, and the nature of the records at issue, which contain sensitive information about the death of the child. This office has found in

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[17] For records containing only the personal information of other individuals, I find that section 14(1)(b) applies to exempt those records.

previous orders that disclosing records to a requester under the access scheme of the *Act* is deemed to be disclosure to the world,[18] because the *Act* does not impose any restrictions or limits on what a requester can do with records they receive. As a result, disclosing the records to the appellants would move them into the public domain where they can be freely disseminated.

[68] In Order PO-3117, Adjudicator Colin Bhattacharjee found that disclosure of records held by the OPP relating to an ongoing murder investigation could reasonably be expected to interfere with that investigation. He stated the following:

> I find that such disclosure could reasonably be expected to interfere with the murder investigation because it could make the suspects aware of the evidence that the OPP has collected against them. This awareness could lead these individuals to take steps to further cover their tracks, intimidate potential witnesses who have not yet come forward, or otherwise hinder the investigation.
>
> Similarly, I find that disclosing the records could taint the quality of new evidence that can be gathered. As the ministry points out, if an individual approaches the OPP and presents information about the murder, the investigators have no way of knowing whether that individual learned of the information from murder investigation records that came into the public domain or if that individual had firsthand knowledge of the information. . .

[69] I agree with and adopt the findings of Adjudicator Bhattacharjee, and find that they are equally applicable to the circumstances of these appeals. I have been persuaded by the arguments made by the ministry that the disclosure of the records could reasonably be expected to interfere with the investigation. The fact that some information stemming from this investigation has been obtained by a member of the media by way of application to the Ontario Court of Justice, does not mean that the exemption in section 14(1)(b) does not apply to the records at issue.

[70] The appellants have relied on three orders of this office, as well as a decision of the Divisional Court, to support their position that there is not an ongoing investigation or that, if there is an ongoing investigation, the ministry has not provided sufficient evidence to support its position that the disclosure of the records could reasonably be expected to interfere with the investigation. I will address each in turn.

[71] In Order M-1027, the records at issue were two witness statements provided to the Toronto Police. Former Adjudicator Holly Big Canoe found that, while she was

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[18] Orders MO-1719 and MO-1721-F.

satisfied that there was an ongoing investigation (into an armed robbery), the Metropolitan Toronto Police Services Board (the Toronto police) had not provided sufficient evidence to establish how the disclosure of the witness statements could reasonably be expected to interfere with either a law enforcement matter or investigation, and she ordered two witness statements to be disclosed to the appellant.[19] In these appeals, I find that the ministry has provided sufficient evidence that the disclosure of any of the records, including witness statements, could reasonably be expected to interfere with the ongoing and active investigation.

[72] In Order MO-2909-I, the appellant sought access to records held by the Durham Regional Police Services Board (the Durham police) relating to the disappearance of the appellant's sister almost fifty years ago. I found that most of the records were exempt under the law enforcement investigation exemption, as there was an ongoing investigation and the disclosure of the records, which contained sensitive information such as evidence gathered by the Durham police, as well as the identity of potential suspects, could reasonably be expected to interfere with the investigation. I also found that two types of records were not exempt under section 8(1)(b).[20] The first types were press releases and publicly-available articles. The second was a summary of the appellant's brief statement to the Durham police. The press releases had been released and the articles had been published. In the present appeals, the witness statements made by the appellants are anything but brief, and I find that their disclosure could reasonably be expected to interfere with this investigation. In addition, in the present case, while the Toronto Star has obtained ITO information from the Courts, there is no evidence before me that the information in the ITO's has been published.

[73] In Order MO-3224, the appellant sought access to records held by Hamilton Police Services Board (the Hamilton police) relating to the death of the appellant's son. In that appeal, the Hamilton police claimed the application of the law enforcement matter exemption in section 8(1)(a) of the municipal equivalent of the *Act*. Adjudicator Justine Wai found that there was insufficient evidence to support the Hamilton police's claim that the law enforcement matter was ongoing or active. Adjudicator Wai made her finding, in part, due to her review of the most recent records. She found that the records did not demonstrate that the investigation was ongoing, and that, in fact, there had been no activity on the investigation for nearly eight years. In the present case, as previously stated, I have found that there is evidence, on the face of the records, themselves, that this investigation is ongoing and active.

[74] In *Ontario (Attorney General) v. Information and Privacy Commissioner,*[21] the

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[19] The witnesses had provided consent to disclose their witness statements. As a result, the personal privacy exemption was not at issue.
[20] The municipal equivalent of section 14(1)(b) of the *Act*.
[21] See note 16.

Ministry of the Attorney General (MAG), brought applications for judicial review of two decisions of this office, ordering the ministry to disclose certain records arising out of criminal investigations. At issue in this case was the application of section 19 (solicitor-client privilege) of the *Act*, and whether it exempted from disclosure records in the hands of the police, when copies of the same records are found in the Crown brief. The Court held that section 19 is not means to cover police records still in police protection, and that there are other exemptions in the *Act* to directly address the interests in protecting police records from disclosure, such as sections 14(1), 20 and 21(1). In that case, at the time of the access request, the ministry had claimed a number of law enforcement exemptions in section 14, but then later withdrew them. I find that this order has no relevance to these appeals, because section 14 was not at issue before the adjudicator; only the solicitor-client privilege exemption in section 19 (which was not claimed in these appeals) was at issue.

[75] The appellants' representations go on to argue that there is a public interest in disclosure of this information, which relates to the public interest override found in section 23 of the *Act*. However, section 23 does not include section 14 as an exemption that can be overridden by a compelling public interest in disclosure. The appellants have also raised the absurd result principle with regard to their witness statements, as well as the witness statements of their other children. The absurd result principle[22] has been applied by this office in the context of the possible application of the personal privacy exemptions in sections 49(b) and 21(1) of the *Act*, and not in the context of section 14(1)(b). In any case, I find that releasing these statements to the appellant would be inconsistent with the purpose of the section 14 exemption, noting that disclosure of these statements to the appellants amounts to disclosure to the world.

[76] As I have found that the records are exempt from disclosure under section 49(a), in conjunction with section 14(1)(b) of the *Act*, or section 14(1)(b) on its own, I am not required to consider the application of the other exemptions claimed by the ministry, or the application of the public interest override found at section 23 of the *Act*.

Issue C: Did the ministry exercise its discretion under sections 14(1)(b) and 49(a)? If so, should this office uphold the exercise of discretion?

[77] The sections 14(1)(b) and 49(a) exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

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[22] Under the personal privacy exemption in section 49(b), the absurd result principle may apply to not exempt information where the requester originally supplied the information or is otherwise aware of it, if withholding the information would be absurd and inconsistent with the purpose of the exemption. See, for example, Orders M-444, MO-1323 and P-1414.

[78] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example, it does so in bad faith or for an improper purpose, it takes into account irrelevant considerations, or it fails to take into account relevant considerations.

[79] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[23] This office may not, however, substitute its own discretion for that of the institution.[24]

[80] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[25]

- 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 and exemptions from the right of access should be limited and specific;
- 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; and
- the historic practice of the institution with respect to similar information.

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[23] Order MO-1573.
[24] See section 54(2).
[25] Orders P-344 and MO-1573.

Representations

[81] The ministry submits that it has exercised its discretion correctly in not disclosing the majority of the records that are the subject matter of these appeals. The ministry further submits that it took into consideration the strong public policy interest in protecting the integrity of investigative records, to ensure that the evidence in the records can be used in the future, as required, to apprehend and prosecute offenders who are brought to justice. The ministry also submits that it took the privacy interests of third party individuals into consideration, as the information at issue is highly sensitive.

[82] The ministry also submits that the records it has disclosed to the appellants from the Office of the Chief Coroner provide information about the medical cause of their child's death. Lastly, the ministry argues that it has balanced the appellants' need to understand the cause of their child's death, with the need to conduct a fair and complete law enforcement investigation.

[83] The appellants submit that the ministry "erred" by not exercising its discretion. They further submit that past orders of this office have found that "institutions should consider the broader interests of public accountability" when deciding whether to disclose information,[26] and that public scrutiny of an institution is very important in holding it to account.[27]

[84] The appellants go on to state:

> It is our submission that the Respondents are trying to avoid scrutiny of their actions, including their focus on the wrong people as suspects in the death; shoddy police work; conflict of interest in police work (connections to a person of interest); and general concern that it would lower the estimation of two police forces in the eyes of the public if information regarding their (at times) ineptitude was released. We submit that the decision to deny access to the information that is subject to this appeal was done for an improper purpose – to save the [force] [sic] from scrutiny and embarrassment.

[85] In reply, the ministry submits that while it understands that the appellants have a compelling need to make sense of their child's tragic death, the fact remains that there is a public interest in protecting records subject to an ongoing and active law enforcement investigation; a fundamental principle, which has consistently been upheld on past orders of this office.

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[26] Order P-256.
[27] Order PO-2789.

[86] In sur-reply, the appellants state that in interim Order MO-2909-I, I ordered the Durham Regional Police Service Board to re-exercise their discretion with respect to certain records, finding that the police did not take into consideration "the fact that exemptions from the right of access should be limited and specific." The appellants then argue that if this office does not order full access to the records, it should order the ministry to re-exercise its discretion, as there are most likely vast amounts of information that could be disclosed, if discretion was properly applied.

Analysis and findings

[87] An institution's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law.[28] It is my responsibility to ensure that this exercise of discretion is in accordance with the *Act*. If I conclude that discretion has not been exercised properly, I can order the institution to reconsider the exercise of discretion.[29] Having found that the records at issue are exempt from disclosure under the law enforcement exemption in section 14(1)(b) and section 49(a) (in conjunction with section 14(1)(b)), my findings regarding the ministry's exercise of discretion is in relation to these two exemptions.

[88] In interim Order MO-2909-I, while I accepted the Durham Regional Police's argument that there was an ongoing investigation into the disappearance of a young woman many years prior, I ordered them to re-exercise their discretion. I found that they had taken an irrelevant factor into consideration in exercising their discretion to not disclose the records, and did not take into consideration the age of the information in the records (almost 50 years old), the fact that exemptions from the right of access should be limited and specific, and the nature of the relationship between the appellant and the affected parties.

[89] In this instance, I am satisfied that the ministry properly exercised its discretion in not disclosing the records that I have found to be exempt from disclosure under the law enforcement exemption. I find that the ministry took relevant factors into consideration, including the purpose of the law enforcement exemption in section 14(1)(b), which is to protect the integrity of an ongoing investigation.

[90] The extent to which law enforcement information should be protected under freedom of information legislation was discussed in Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980, vol. 2 (Toronto: Queens Printer, 1980) pp. 294 - 295 (the Williams Commission Report):

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[28] Order MO-1287-I.
[29] Order 58.

> The need to exempt certain kinds of law enforcement information from public access is reflected in all of the existing and proposed freedom of information laws we have examined. This is not surprising; if they are to be effective, certain kinds of law enforcement activity must be conducted under conditions of secrecy and confidentiality.
>
> Interviews with law enforcement personnel conducted by our research staff indicate concerns similar to those manifested in typical exemptions for law enforcement information. Interviewees stressed the need to protect confidential informants and to ensure the continued flow of information from other law enforcement agencies. Concerns were expressed to the effect that disclosure of law enforcement techniques would reduce their effectiveness.
>
> Additionally, ... public access to investigative files would do much to frustrate the conduct of investigations, and premature disclosures prior to trial would impair the ability of the prosecution to effectively present its case.

[91] Further, I find that other relevant factors were taken into consideration in the exercise of discretion. Based on the ministry's representations, I am satisfied that it took into consideration that the appellants are individuals who are seeking their own information, the relationship between the appellants and their deceased child, the age of the information and the historic practice of the ministry with respect to similar information. I also find that the ministry did not take any irrelevant factors into consideration in exercising its discretion, nor did it exercise its discretion in bad faith. Lastly, I note that, by way of a supplementary decision letter, the ministry further exercised its discretion to disclose certain records from the Office of the Chief Coroner to the appellants.

[92] In sum, I uphold the ministry's exercise of discretion to not disclose the records to the appellants under section 49(a), in conjunction with section 14(1)(b) or under section 14(1)(b) alone.

ORDER:

I uphold the ministry's application of section 49(a) and/or 14(1)(b) to the records, I uphold its exercise of discretion and dismiss the appeals.

Original signed by	October 21, 2019
Cathy Hamilton Adjudicator	