Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3873

Appeal MA18-422

London Police Services Board

December 10, 2019

Summary: The appellant submitted a three-part request seeking access to police records relating to an incident in which he was involved. The police issued a decision denying access to certain records under section 38(b) (personal privacy), as well as section 38(a) in conjunction with section 8(1)(d) (confidential source), and refusing to confirm or deny the existence of other records under section 14(5). The police also denied access to some information in the responsive records on the basis that it was not responsive to the appellant's request. In this order, the adjudicator upholds the police's decision to deny access to records under section 38(b), and to refuse to confirm or deny the existence of other records that would, if they exist, be responsive to the appellant's request. She also upholds the police's decision to deny access to information in the records that is not responsive to the appellant's request.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M56, as amended, sections 2(1) (definition of "personal information"), 4(2), 17, 38(b), 14(2), 14(3)(b), and 14(5).

Order Considered: Order M-615.

OVERVIEW:

[1] The London Police Services Board (the police) received a three-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following:

1. All statements made by [named individual #1] to [a named detective] on or about March 1, 2018 with respect to [the requester's] liberty interests;

2. Any and all video and audio recording notes, crib notes of [named individual #2] in March 2018;

3. All phone calls made to the London Police Service by [named individual #1] regarding [the requester].

[2] The police issued an access decision. The police relied on section 14(5) of the *Act* to refuse to confirm or deny the existence of records responsive to parts one and three of the appellant's request. The police also denied access to the records responsive to part two of the request in full. In doing so, the police cited the personal privacy exemption at section 38(b), and the police's discretion to refuse access to the requester's own information at section 38(a), read in conjunction with the law enforcement exemption at section 8(1)(d) (confidential source) of the *Act*. The police also noted that some information was withheld on the basis that it was not responsive to the appellant's request. The police did not notify the individuals named in the appellant's request.

[3] The requester appealed the police's decision to this office.

[4] During the mediation stage of the appeal process, the appellant advised the mediator that he wished to pursue access to all of the withheld information relating to part two of the request, including the information deemed non-responsive. The appellant also confirmed that he takes issue with the police's refusal to confirm or deny the existence of the records responsive to parts one and three of his request.

[5] A mediated resolution was not achieved and the file was transferred to the adjudication stage for an adjudicator to conduct an inquiry under the *Act*. During my inquiry, I sought and received representations from the police and appellant.[1] The parties' representations were shared in accordance with *Practice Direction Number 7* and the IPC's *Code of Procedure*. In particular, portions of the police's representations were withheld from the appellant because they met the confidentiality criteria set out in *Practice Direction Number 7*.

[6] For the reasons that follow, I find that the police have properly denied access to certain information in the records that is not responsive to the appellant's request. I uphold the police's decision to deny access to the records responsive to part two of the request, based on the personal privacy exemption in section 38(b). Finally, I uphold the police's decision to refuse to confirm or deny the existence of records that would, if they exist, be responsive to parts one and three of the appellant's request.

[1] The appellant provided two sets of representations for my consideration.

RECORDS:

[7] The police have refused to confirm or deny the existence of any records responsive to parts one and three of the appellant's request.

[8] The police withheld nine records identified as being responsive to part two of the appellant's request. These records consist of occurrence reports, witness statements, and case summaries.

ISSUES:

A. What is the scope of the request? What records are responsive to the request?

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

C. Does the discretionary exemption at section 38(b) apply to the records responsive to part two of the appellant's request?

D. Does the discretionary exemption at section 38(b), read in conjunction with section 14(5) of the *Act*, apply to parts one and three of the appellant's request?

E. Did the police exercise their discretion under sections 38(b) and 14(5)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A: What is the scope of the request? What records are responsive to the request?

[9] The appellant disputes the police's decision to withhold information as "non-responsive" to his request. Therefore, I must determine the scope of the appellant's request in order to ascertain whether the information withheld as non-responsive is, in fact, not responsive to the request.

[10] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> > (a) make a request in writing to the institution that the person believes has custody or control of the record;

> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record.
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[11] To be considered responsive to the request, records must "reasonably relate" to the request.[2] 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.[3]

[12] The appellant's submissions did not address or clarify the scope of his three-part request. However, the police submit that upon receipt of the appellant's request, they contacted him to clarify parts two and three. At that time, the appellant clarified those parts of his request as follows:

2. Looking for all notes regarding the investigation of [named individual] – both notes she may have provided as well as officer's notes they took while listening to [the named individual's] side of the story.

3. Would like any responsive records/phone calls in a list within the month of March 2018.

[13] The police submit that the above information provided sufficient clarity to enable them to identify the records sought by the appellant. I am satisfied that, based on the initial request and subsequent clarification, the police had sufficient detail to identify records that would be responsive to the appellant's request.

[14] The index provided to this office by the police indicates that information has been withheld from all but one of the records responsive to part two of the appellant's request. Based on my review, I find that records 1, 2, 3, 5, 6, 7, 8 and 9 contain information that does not "reasonably relate" to the appellant's request, as clarified. This includes, for example, information about when the records were printed. I am satisfied that in deciding to withhold these portions of the records, the police correctly interpreted the scope of the appellant's request. I uphold the police's decision to withhold the non-responsive portions of the records and will not consider those portions in the analysis that follows.

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[2] Orders P-880 and PO-2661.
[3] Orders P-134 and P-880.

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

[15] The police rely on exemptions in sections 38(a) and 38(b) of the *Act* to deny access to the records responsive to part two of the appellant's request. These exemptions are only available to the police if the records contain the appellant's personal information, as that term is defined in the *Act*.

[16] The police also rely on section 14(5) to refuse to confirm or deny the existence of records responsive to parts one and three of the appellant's request. This provision is intended to protect the personal privacy of individuals other than the appellant.

[17] Therefore, it is necessary to decide whether the records contain (or would contain, if they exist) "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows, in part:

> "personal information" means recorded information about an identifiable individual, including,
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> > (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,
> >
> > (d) the address, telephone number, fingerprints or blood type of the 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;

[18] 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.[4]

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[4] Order 11.

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

> (2) Personal information does not include information about an individual who has been dead for more than thirty years.
>
> (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.

[20] To qualify as personal information, the information must be about the individual in a personal capacity. Generally, information associated with an individual in a professional, official, or business capacity will not be considered to be "about" the individual.[5]

[21] 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.[6]

[22] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[7]

Representations

[23] The police submit that the records, if they exist, relate to a police investigation into "an allegation of sexual assault that was domestic in nature." The police maintain that if the individuals identified in the appellant's request did call or provide statements to the police, a police report would have been generated, which would contain the names, addresses, phone numbers, and dates of birth of the individuals, which constitutes their personal information. In addition, the police submit that the records do, or would, contain the appellant's personal information, such as his name, address, and the other individuals' views about him. Accordingly, the police maintain that any records responsive to the appellant's three-part request contain or would contain, if they exist, personal information of both the appellant and the two named individuals as

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[5] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[6] Orders P-1409, R-980015, PO-2225 and MO-2344.
[7] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

defined in paragraphs (a), (b), (d), (g), and (h) of the definition in section 2(1) of the *Act*.

[24] The appellant did not make submissions on whether the records responsive to part two, or the records that would be responsive to parts one and three of his request contain, if they exist, personal information as defined in the *Act*.

Analysis and findings

[25] Based on my review of the records before me and the parties' submissions, I find that the records identified by the police as being responsive to part two of the appellant's request contain the personal information of the appellant and another other identifiable individual (named individual #2). In particular, the records contain both the appellant's and the other individual's personal information as described in paragraphs (a), (b), (d), (g), and (h) of the definition in section 2(1) of the *Act*. Moreover, I am satisfied that the records do not contain the type of information described in sections 2(2), 2(2.1), or 2(2.2).

[26] I am also satisfied that any records responsive to parts one and three of the appellant's request would, if they exist, contain personal information. In parts one and three of the request, the appellant seeks records containing statements made about him by a particular individual (named individual #1) to the police. Considering the nature of the information that the appellant seeks and the types of records in which it would be contained, I accept that any responsive records, if they exist, would contain the personal information of identifiable individuals.

[27] Specifically, the responsive records, if they exist, would contain the personal information of the individual named in the appellant's request, which would reveal their involvement in a police complaint or investigation. Any responsive records would therefore contain that individual's personal information as described in paragraphs (b), (g), and (h) of the definition of personal information in section 2(1) of the *Act*. They would also likely contain additional information about the individual, such as that described in paragraphs (a) and (d) of the definition of personal information.

[28] In addition, considering that the appellant has specifically sought access to the named individual's statements about him, any responsive records would also contain his own personal information, as described in paragraphs (g) and (h) of the definition in section 2(1). They would also likely contain information about the appellant as described in paragraphs (a) and (d) of the definition.

[29] Accordingly, I am satisfied that the records responsive to part two and any records that would be responsive to parts one and three of the appellant's request, if they exist, contain, or would contain, the personal information of the appellant and other identifiable individuals, in accordance with the definition of that term in section 2(1) of the *Act*.

Issue C: Does the discretionary exemption at section 38(b) apply to the records responsive to part two of the appellant's request?

[30] Where records contain a requester's own personal information, access to the records is determined under Part II of the *Act* and the discretionary exemptions at section 38 may apply. Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, an institution may refuse to disclose that information to the requester. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.

[31] By contrast, where records only contain the personal information of individuals other than the requester, then access to the records is addressed under Part I of the *Act* and the mandatory exemptions at section 14(1) may apply. Under section 14(1), the institution is prohibited from disclosing the personal information of other individuals unless one of the exceptions in sections 14(1)(a) to (e) applies, or unless disclosure would not be an unjustified invasion of personal privacy under section 14(1)(f).

[32] In this case, I have found that any records responsive to part two of the appellant's request contain both the appellant's and another identifiable individual's personal information. Accordingly, the appellant's right of access to the records will be determined under Part II, having regard to the police's reliance on the personal privacy exemption in section 38(b).

[33] Sections 14(1) to 14(4) provide guidance in determining whether disclosure of the information would be an unjustified invasion of personal privacy under section 38(b). If the information fits within any of paragraphs (a) to (e) of section 14(1) or paragraphs (a) to (c) of section 14(4), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy. In a section 38(b) analysis, any relevant section 14(3) presumptions are weighed with the applicable factors and considerations in section 14(2), which may weigh in favour of, or against, finding that disclosure of personal information would constitute an unjustified invasion of personal privacy. In addition to the factors prescribed in section 14(2), the institution must also consider any unlisted factors that are relevant.[8]

[34] In the context of this appeal, the police have withheld the records responsive to part two of the appellant's request under section 38(b), with reference to the factors in sections 14(2)(e), (f) and (h), and the presumption in section 14(3)(b). These sections

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[8] Order P-99.

state:

> (2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
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> > (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
> >
> > (f) the personal information is highly sensitive;
> >
> > (h) the personal information has been supplied by the individual to whom the information relates in confidence.
>
> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
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> > (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation.

[35] In order for the factor in section 14(2)(e) to apply, the police must provide evidence to demonstrate that the damage or harm envisioned by the clause is present or foreseeable, and that this damage or harm would be "unfair" to the individual involved.

[36] For the information to be considered highly sensitive as contemplated by section 14(2)(f), there must be a reasonable expectation of significant personal distress if the information is disclosed.[9]

[37] For the "supplied in confidence" factor at section 14(2)(h) to apply, both the individual supplying the information and the recipient must have had an expectation that the information would be treated confidentially. That expectation must also have been reasonable in the circumstances.

[38] For the presumption in section 14(3)(b) to apply, there need only have been an investigation into a possible violation of law.[10] The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.[11] Therefore, it is not necessary for criminal proceedings to

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[9] Orders PO-2518, PO-2617, MO-2262 and MO-2344.
[10] Orders P-242 and MO-2235.
[11] Orders MO-2213, PO-1849 and PO-2608.

have been commenced against any individuals for this presumption to apply.

Representations

[39] The police submit that it would be an unjustified invasion of personal privacy if the records responsive to part two of the appellant's request were disclosed to the appellant. In support of this position, the police maintain that the appellant's request relates to an investigation into an alleged violation of law. The police submit that any responsive records, i.e. those generated during the course of the investigation, would fall under the presumption at section 14(3)(b). The police maintain that because section 14(3)(b) only requires there to have been an investigation into a possible violation of law, the presumption in 14(3)(b) applies to the records even though no charges were laid against the appellant.

[40] The police also maintain that the factors described in sections 14(2)(e), (f), and (h) are relevant in the circumstances. All three of the section 14(2) factors cited by the police weigh against disclosing the records to the appellant on the basis that to do so would result in an unjustified invasion of personal privacy.

[41] The police's submissions on section 14(2)(e) are confidential in nature.

[42] Regarding section 14(2)(f), the police submit that because the records were created in relation to an investigation into a possible violation of law, the nature of the personal information in the records is highly sensitive. The police maintain that there is a reasonable expectation of personal distress if the information is disclosed, which stems from the nature of the allegations at issue in the investigation.

[43] With respect to the factor at section 14(2)(h), the police maintain that there is a reasonable assumption by any individual who provides information to the police that they are doing so in confidence and that the police will act responsibly in the manner in which they handle the information. The police stress the importance of maintaining public trust with regard to the manner in which they handle personal information collected in the course of investigations.

[44] The appellant's submissions do not specifically refer to any of the presumptions in section 14(3) or the factors in section 14(2). However, he maintains that the police's submissions are "without merit for the simple reason that the information is about [him], and as such [the police's position] defies common sense."

Analysis and findings

[45] The police rely on section 38(b) to withhold the records responsive to part two of the appellant's request. In doing so, they refer to the presumption in section 14(3)(b), and the factors weighing against disclosure of the records in section 14(2)(e), (f), and (h).

[46] Neither party suggests that paragraphs (a) to (e) of section 14(1) or paragraphs (a) to (c) of section 14(4) apply, and I find that they do not. Therefore, the next step in determining whether the disclosure of records would be an unjustified invasion of personal privacy under section 38(b) is to consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.[12]

[47] Having considered the parties' submissions and the records at issue, I find that disclosure of the records would constitute a presumed unjustified invasion of personal privacy as contemplated by section 14(3)(b). Based on a review of the records, it is clear that they were compiled and are identifiable as being part of an investigation into a possible violation of law. Accordingly, I am satisfied that their disclosure is presumed to be an unjustified invasion of personal privacy under the *Act*.

[48] In a section 38(b) analysis, any relevant section 14(3) presumptions must be weighed with the applicable factors and considerations in section 14(2), while balancing the interests of the parties.[13] Given my finding that the section 14(3)(b) presumption applies, one or more of the listed or unlisted factors favouring disclosure in section 14(2) must be present in order for me to find that disclosure would not be an unjustified invasion of personal privacy. The factors favouring disclosure are listed in paragraphs (a) to (d) of section 14(2).

[49] The police rely on paragraphs (e), (f), and (h) of section 14(2) in support of their position, all of which weigh against disclosure of the records at issue. The appellant has not specifically referred to any of the factors in paragraphs (a) to (d) of section 14(2), nor do his submissions suggest that other relevant but unlisted factors, such as inherent fairness[14] or ensuring public confidence in the police,[15] are relevant in the circumstances. Having considered the parties' submissions and the records at issue, as well as the listed and unlisted factors in section 14(2), I am not satisfied that any factors favouring disclosure are present in this appeal.

[50] Given that none of the factors weighing against the presumption in section 14(3)(b) have been established, I find that disclosure of the records responsive to part two of the appellant's request would be an unjustified invasion of personal privacy under section 38(b). I am satisfied that it is not necessary for me to consider whether the section 14(2) factors relied upon by the police apply in the circumstances, as to do so would only serve to reinforce this finding. Accordingly, subject to my review of the police's exercise of discretion below, I will uphold the police's decision to deny access to the records at issue based on the personal privacy exemption in section 38(b).

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[12] Order MO-2954.
[13] Order P-99.
[14] Orders M-82, PO-1731, PO-1750, PO-1767 and P-1014.
[15] Orders M-129, P-237, P-1014 and PO-2657.

[51] I have also considered the police's obligation under section 4(2) to disclose as much of the responsive records as can reasonably be severed without disclosing material that is exempt. In particular, I have considered whether the records that I have found to be subject to section 38(b) can be severed for the purpose of disclosing portions of the records to the appellant. However, given the appellant's familiarity with matters in the records, I am satisfied that they cannot be severed without disclosing information that I have found to fall within the scope of section 38(b). I am also satisfied that the information relating to the appellant is inextricably intertwined with that of other identifiable individual and cannot be reasonably severed, as an attempt to do so would result in disconnected meaningless snippets being disclosed to the appellant. As identified in previous orders, an institution is not required to sever records for disclosure where to do so would reveal only "disconnected snippets," or "worthless" or "meaningless" information.[16]

[52] Having found that section 38(b) applies to the records responsive to part two of the appellant's request, and that those records cannot reasonably be severed, it is not necessary for me to consider whether the discretionary exemption at section 38(a), in conjunction with the law enforcement exemption at section 8(1)(d), applies.

Issue D: Does the discretionary exemption at section 38(b), read in conjunction with section 14(5) of the *Act*, apply to parts one and three of the appellant's request?

[53] I found, above, that any records responsive to parts one and three of the appellant's request would, if they exist, contain the personal information of the appellant and another identifiable individual. Therefore, as mentioned above, the appellant's right of access to any such records is to be determined under Part II of the *Act*.

[54] The police rely on section 14(5) to refuse to confirm or deny the existence of records responsive to parts one and three of the appellant's request, claiming that disclosure would constitute an unjustified invasion of personal privacy. Section 14(5) is found in Part I of the *Act* and there is no parallel provision in section 38. However, past orders of this office have determined that section 14(5) can apply in the context of a request for one's own personal information, which is otherwise determined under section 38. In Order M-615, for example, Adjudicator John Higgins stated:

> Section 37(2) provides that certain sections from Part I of the *Act* (where section 14(5) is found) apply to requests under Part II (which deals with requests such as the present one, for records which contain the

[16] See Order PO-1663, *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)*, (1997), 192 O.A.C. 71 (Div. Ct.).

> requester's own personal information). Section 14(5) is not one of the sections listed in section 37(2). This could lead to the conclusion that section 14(5) cannot apply to requests for records which contain one's own personal information.
>
> However, in my view, such an interpretation would thwart the legislative intention behind section 14(5). Like section 38(b), section 14(5) is intended to provide a means for institutions to protect the personal privacy of individuals other than the requester. Privacy protection is one of the primary aims of the *Act*.
>
> Therefore, in furtherance of the legislative aim of protecting personal privacy, I find that section 14(5) may be invoked to refuse to confirm or deny the existence of a record if its requirements are met, even if the record contains the requester's own personal information.

[55] This reasoning has since been adopted in a number of subsequent orders.[17] I agree with this approach, and adopt it for the purpose of this appeal. Accordingly, I will consider whether section 14(5) applies in this case. Section 14(5) states:

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

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

[57] A requester in a section 14(5) situation is in a very different position from other requesters who have been denied access under the *Act*. By invoking section 14(5), the institution is denying the requester the right to know whether a record exists, even when one does not. This section provides institutions with a significant discretionary power that should be exercised only in rare cases.[18]

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

1. Disclosure of the record (if it exists) would constitute an unjustified invasion of personal privacy; and

2. Disclosure of the fact that the record exists (or does not exist) would in itself convey information to the requester, and the nature of the information conveyed

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[17] See, for example, Orders MO-2984, MO-3235, MO-3293, and MO-3617.
[18] Order P-339.

> is such that disclosure would constitute an unjustified invasion of personal privacy.

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

> The Commissioner's reading of s. 21(5) requires that in order to exercise his discretion to refuse to confirm or deny the report's existence the Minister must be able to show that disclosure of its mere existence would itself be an unjustified invasion of personal privacy.[19]

Part one: disclosure of the records (if they exist)

[60] Under part one of the section 14(5) test, the police must demonstrate that disclosure of the records, if they exist, would constitute an unjustified invasion of personal privacy. An unjustified invasion of personal privacy can only result from the disclosure of personal information.

[61] Above, I determined that the records, if they exist, would contain the personal information of the appellant and another identifiable individual. The factors and presumptions in sections 14(2), (3) and (4) help in determining whether disclosing this personal information would be "an unjustified invasion of privacy" under section 14(5).

[62] If any of paragraphs (a), (b) or (c) of section 14(4) apply to the records, if they exist, disclosure would not be an unjustified invasion of privacy. The police maintain that section 14(4) has no application in this case, and I agree. Therefore, in determining whether the disclosure of the personal information in the responsive records (if they exist) would be an unjustified invasion of personal privacy under section 38(b), the next step is to consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.[20]

[63] The police submit that it would be an unjustified invasion of personal privacy if the records responsive to parts one and three of the appellant's request, if they exist, were disclosed to the appellant. The police's submissions on the relevance of the presumption in section 14(3)(b) and the factors in sections 14(2)(e), (f), and (h) mirror those set out above[21] regarding the records responsive to part two of the appellant's request (Issue C).

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[19] Orders PO-1809 and PO-1810, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 4813 (C.A.), leave to appeal to S.C.C. dismissed (May 19, 2005), S.C.C. 30802.
[20] Order MO-2954.
[21] With the exception of the police's submissions regarding section 14(2)(e), which are confidential.

[64] The appellant submits that the individual named in parts one and three of his request made false allegations against him to the police, thereby contravening the public mischief section of the *Criminal Code*.[22] He submits that the named individual engaged in "flagrant mischief of a racist kind," which he says is "an assault on the rule of law." As a result of this alleged public mischief, the appellant maintains that the named individual should have a diminished expectation of privacy. The appellant maintains that the police are "attempting to cover up" for the named individual. The appellant also refers me to the "attempts accessories"[23] and "conspiracy"[24] sections of the *Criminal Code*. He maintains that Canada is founded upon principles that recognize the "supremacy" of the *Criminal Code*.

[65] I have considered the parties' submissions and parts one and three of the appellant's request, which describe the nature and content of any records that might be responsive to the request, if they exist. The appellant seeks records documenting communications between the police and a named individual. Based on the evidence before me, I accept that any responsive records, if they exist, would properly be described as personal information compiled and identifiable as being part of an investigation into a possible violation of law. On this basis, I find that disclosure of the records, if they exist, would constitute a presumed unjustified invasion of personal privacy as contemplated by section 14(3)(b).

[66] Therefore, if I am to find that disclosure would not be an unjustified invasion of personal privacy, one or more of paragraphs (a) to (d) of section 14(2), or one or more of the unlisted factors favouring disclosure, must be present to outweigh the section 14(3)(b) presumption.

[67] Although the appellant does not specifically rely on any of the factors in section 14(2), I understand his submissions to most closely align with section 14(2)(a), which states:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny.

[68] This section contemplates disclosure in order to subject the activities of the government (as opposed to the views or actions of private individuals) to public

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[22] RSC 1985, c C-46, section 140(1).
[23] Section 463
[24] Section 465(b).

scrutiny.[25] The appellant maintains that the police are attempting to cover up for an individual who, he maintains, has engaged in mischief, as contemplated by the *Criminal Code*, which he also maintains was motivated by racist beliefs. However, in the absence of further evidence substantiating his position, I am not persuaded that disclosure of the records, if they exist, would be desirable for the purpose of subjecting the activities of the police to public scrutiny. Accordingly, I find that the factor favouring disclosure in section 14(2)(a) does not apply.

[69] I also find, based on my review of the parties' submissions, that there are no other listed or unlisted factors favouring disclosure of the records, if they exist. In making this finding, I considered, for example, whether the information is relevant to a fair determination of the appellant's rights as contemplated by section 14(2)(d); however, I determined that, since no criminal charges were laid against the appellant, there is insufficient evidence before me to support a finding that this factor applies.

[70] As there are no applicable factors favouring disclosure that would weigh against the presumption in section 14(3)(b), it is not necessary for me to consider whether the factors relied upon by the police apply in the circumstances. I find that disclosing the records responsive to parts one and three of the appellant's request, if they exist, would constitute an unjustified invasion of personal privacy. As a result, I find that the first requirement of the section 14(5) test has been met.

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

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

[72] The police provided confidential representations in support of their arguments, which I have considered in arriving at my decision in this matter. In their non-confidential submissions, the police maintain that disclosing whether the records exist would convey personal information about the named individual as defined in section 2(1). Further, the police maintain that the disclosure would amount to an unjustified invasion of that individual's personal privacy. In particular, the police maintain that confirming whether records exist would convey to the appellant whether the individual named in parts one and three of the appellant's request participated in the investigation into the allegations of sexual assault that were made against the appellant. The police maintain that confirming whether the individual was involved in a law enforcement matter would in itself constitute an unjustified invasion of that individual's personal privacy.

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[25] Order P-1134.

[73] In support of their position, the police refer to Order MO-2891, which they maintain dealt with a similar request and "domestic related complaint." In that order, the adjudicator accepted the police's position that disclosing whether records exist would convey whether a named individual made a domestic-related complaint about the appellant in that case. The adjudicator found that disclosing information of this nature would, in itself, be an unjustified invasion of the individual's privacy. The police submit that the same logic and conclusions apply in this case.

[74] The appellant's submissions do not address the second requirement under section 14(5).

[75] Having considered the information before me, I am satisfied that disclosing the existence or non-existence of records responsive to parts one and three of the appellant's request would itself convey personal information to the appellant. Specifically, it would reveal whether the named individual made a domestic-related complaint about the appellant to the police, and whether they participated in the police's investigation. Based on the application of section 14(3)(b) and for the reasons cited above, I find that the nature of the information that would be conveyed is such that its disclosure is presumed to be an unjustified invasion of personal privacy.

[76] Reviewing the circumstances of the request and the parties' submissions, I find that none of paragraphs (a) to (c) of section 14(4) apply to the disclosure of the fact that the records do or do not exist. Further, I find that none of the factors favouring disclosure in section 14(2) apply in this case. Accordingly, I find that disclosing whether responsive records exist would itself constitute an unjustified invasion of personal privacy. As this finding satisfies the second part of the test under section 14(5) of the *Act*, I find, subject only to my review of the police's exercise of discretion, that the police have established both requirements for section 14(5).

Issue E: Did the police exercise their discretion under sections 38(b) and 14(5)? If so, should this office uphold the exercise of discretion?

[77] The exemptions in sections 38(b) and 14(5) 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.

[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.[26] This office may not, however, substitute its own discretion for that of the institution.[27]

[80] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[28]

- 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
    - 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

[81] the historic practice of the institution with respect to similar information.

[82] The police provided confidential representations in support of their exercise of discretion, which I have considered in arriving at my decision in this matter. In their

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[26] Order MO-1573.
[27] Section 43(2).
[28] Orders P-344 and MO-1573.

non-confidential submissions, the police submit that they took into account that the records responsive to part two of the appellant's request, and the records responsive to parts one and three, if they exist, contain or would contain the personal information of the appellant and other identifiable individuals. The police maintain that the personal information is highly sensitive and was, or would have been, obtained during an investigation into a possible violation of law. With these considerations in mind, the police determined that the appellant's right of access is outweighed by the other individuals' privacy interests.

[83] Although the appellant did not specifically address the police's exercise of discretion in his submissions, I interpret his arguments as alluding to allegations of bad faith on the part of the police.

[84] Based on the information before me, I am satisfied that the police have not erred in the exercise of their discretion under the personal privacy exemption in section 38(b) to deny access to the records responsive to part two of the appellant's request. I am also satisfied that the police exercised their discretion properly in claiming the application of section 14(5) with respect to parts one and three of the request. I am satisfied that the police properly considered the appellant's right to access his own personal information, and weighed and balanced it against other individuals' privacy interests. I am also satisfied that the police took into account appropriate considerations, such as the sensitive nature of the records, and did not consider irrelevant factors. Accordingly, I will uphold the police's decision.

ORDER:

I uphold the police's decision and dismiss the appeal.

Original signed by
Jaime Cardy
Adjudicator

December 10, 2019