

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-4125

Appeal PA19-00169

Ministry of the Attorney General

March 24, 2021

**Summary:** The Ministry of the Attorney General (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to a specified Special Investigations Unit (SIU) case involving an allegation of sexual assault by a member of the Hamilton Police Service. The ministry granted partial access to the records, but withheld information pursuant to the exemptions at section 13(1) (advice or recommendations), section 14(2)(a) (law enforcement report), and section 21(1) (personal privacy) of the *Act*. In this order, the adjudicator upholds the ministry's decision to withhold information under sections 13(1) and 14(2)(a). She also upholds the ministry's decision with respect to section 21(1), in part. She finds that one record contains no personal information, and therefore cannot be withheld under section 21(1). The adjudicator orders the ministry to disclose that record to the appellant. She also finds that the exempt personal information in a number of records can be severed in accordance with section 10(2), and orders the ministry to disclose the non-exempt portions of those records.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F 31, sections 2(1) (definition of "personal information"), 10(2), 13(1), 14(2)(a), and 21(1).

**Orders and Investigation Reports Considered:** Orders PO-2524, PO-2633, PO-2854, PO- 3003, PO-3169 and PO-3925-I.

## OVERVIEW:

[1] The Special Investigations Unit (SIU) conducted an investigation into an allegation of sexual assault against an officer of the Hamilton Police Service. Following the SIU's investigation, the Ministry of the Attorney General (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to the investigation. In particular, the requester sought access to the following information:

- SIU Case Number #[a specified case number]
- Sexual incident involving police officer and civilian employee of the Hamilton Police Service [HPS]

[2] In response, the ministry issued a decision in which it granted partial access to the records responsive to the request. The ministry withheld portions of the records pursuant to the exemptions at section 13(1) (advice or recommendations), section 14(2)(a) (law enforcement report), and section 21(1) (personal privacy) of the *Act*.

[3] The requester, now the appellant, appealed that decision to the Information and Privacy Commissioner of Ontario (the IPC).

[4] During the mediation stage of the appeal process, the ministry confirmed that no additional records would be disclosed. The appellant advised that he is seeking access to all of the records, but that he is not seeking access to individuals' names, birth dates, addresses, or other personal identifiers.

[5] A mediated resolution was not achieved and the appeal was transferred to the adjudication stage of the appeal process during which an adjudicator may conduct an inquiry under the *Act*. I began my inquiry by inviting the police and three affected parties to provide written representations for my consideration. I then invited the appellant to provide representations. The parties' submissions were shared in accordance with the IPC's *Code of Procedure and Practice Direction Number 7*.<sup>1</sup>

[6] For the reasons that follow, I uphold the ministry's decision to withhold information under sections 13(1) and 14(2)(a). I also uphold the ministry's decision with respect to section 21(1), in part. However, I find that one record contains no personal information, and therefore cannot be withheld under section 21(1). I order the ministry to disclose that record to the appellant. I also find that the exempt personal information in a number of records can be severed in accordance with section 10(2), and I order the ministry to disclose the non-exempt portions of those records to the appellant.

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<sup>1</sup> The non-confidential portions of the ministry's representations, and a summary of the affected parties' positions, were shared with the appellant.

**RECORDS:**

[7] The ministry located numerous responsive records relating to the specified SIU file. The ministry explains that the records were obtained or generated by the SIU during its investigation into a sexual assault allegation against a member of the Hamilton Police Service.

[8] The records at issue are described in the following table:

<b>Rec #</b>	<b>Document/Description</b>	<b>Withheld in full or in part</b>	<b>Exemption Claimed</b>
1	<i>Intake Report</i> – describes information received when SIU was notified of the incident	In Full	21, 21(3)(b)
3	<i>Director's Decision Letter to Attorney General</i> (last paragraph only) – cover letter enclosing Director's Report	Part	13
5	<i>Director's Report</i> – report containing summary of investigation/evidence and the Director's decision.	In Full	14, 14(2)(a) 21, 21(3)(b)
6	<i>Investigation File Report</i> – report containing summary of investigation/evidence, investigator's observations and the Director's Decision.	In Full	14, 14(2)(a) 21, 21(3)(b)
7-18	<i>12 Follow Up Reports/Synopsis</i> – summaries of evidence	In Full	21, 21(3)(b)
19-33, 35-36	<i>Correspondence and Designation Forms</i> – correspondence to HPS officers, requests for evidence	In Full	21, 21(3)(b)
37-44	<i>Police agency documents</i> – records prepared by HPS as a result of the allegation, including correspondence, officer notes/statements and scene drawings	In Full	21, 21(3)(b)
45-47, 60	<i>Scene Evidence</i> – scene measurements, drawings and photographs	In Full	21, 21(3)(b)
48, 58, 61	<i>Cellphone evidence</i> – text messages and cellphone data-download	In Full	21, 21(3)(b)

49	<i>SIU Transmittals</i> – transfer receipts and emails related to evidence	In Full	21, 21(3)(b)
50	<i>Witness List</i>	In Full	21, 21(3)(b)
52-53, 53a, 54-56	<i>SIU Investigator Notes</i>	In Full	21, 21(3)(b)
57, 59	<i>Interviews</i> – 9 audio and 1 video interviews of witnesses	In Full	21, 21(3)(b)

**ISSUES:**

- A. Does the discretionary advice or recommendations exemption at section 13(1) apply to the withheld portion of record 3?
- B. Does the discretionary law enforcement exemption at section 14(2)(a) apply to records 5 and 6?
- C. Do records 1, 7-33, 35-50, and 52-61 contain “personal information” as defined in section 2(1) and, if so, to whom does it relate?
- D. Does the mandatory exemption at section 21(1) apply to the personal information at issue?
- E. Did the institution exercise its discretion under sections 13 and 14? If so, should this office uphold the exercise of discretion?

**DISCUSSION:**

**Issue A: Does the discretionary advice or recommendations exemption at section 13(1) apply to the withheld portion of record 3?**

[9] The ministry withheld a portion of record 3 based on the exemption in section 13(1), which states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

[10] The purpose of section 13 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly

advise and make recommendations within the deliberative process of government decision-making and policy-making.<sup>2</sup>

[11] “Advice” and “recommendations” have distinct meanings. “Recommendations” refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred.

[12] “Advice” has a broader meaning than “recommendations”. It includes “policy options”, which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant’s identification and consideration of alternative decisions that could be made. “Advice” includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.

[13] “Advice” involves an evaluative analysis of information. Neither of the terms “advice” or “recommendations” extends to “objective information” or factual material.<sup>3</sup>

[14] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations;
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.<sup>4</sup>

[15] The application of section 13(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 13(1) does not require the institution to prove that the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section 13(1) to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant.<sup>5</sup>

[16] Section 13(1) covers earlier drafts of material containing advice or recommendations. This is so even if the content of a draft is not included in the final

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<sup>2</sup> *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

<sup>3</sup> See *John Doe*, above, at paras. 26 and 47.

<sup>4</sup> Orders PO-2084, PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff’d [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

<sup>5</sup> *John Doe v. Ontario (Finance)*, cited above, at para. 51.

version. The advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by section 13(1).<sup>6</sup>

[17] Examples of the types of information that have been found not to qualify as advice or recommendations include factual or background information;<sup>7</sup> a supervisor's direction to staff on how to conduct an investigation;<sup>8</sup> and information prepared for public dissemination.<sup>9</sup>

### ***Sections 13(2) and (3): exceptions to the exemption***

[18] Sections 13(2) and (3) create a list of mandatory exceptions to the section 13(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 13.

### ***Representations***

[19] In the non-confidential portion of the ministry's representations,<sup>10</sup> the ministry notes that the only information that was withheld under section 13(1) is the last paragraph of record 3, which is a portion of the Director's Decision Letter to the Attorney General.<sup>11</sup> The ministry explains that the SIU Director is a public servant appointed pursuant to an Order-in-Council to head the SIU, which is an agency of the ministry.

[20] According to the ministry, the withheld paragraph constitutes the Director's recommendation because it "implicitly recommends two courses of action," which the Attorney General could accept or reject. Alternatively, the ministry maintains that the withheld paragraph constitutes advice, because it contains the SIU Director's opinions about policy options to be considered by the Attorney General in exercising his decision-making power. The ministry submits that, in either case, the paragraph was appropriately withheld pursuant to section 13(1) of the *Act*.

[21] The ministry submits that none of the mandatory exceptions to the exemption apply.

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<sup>6</sup> *John Doe v. Ontario (Finance)*, cited above, at paras. 50-51.

<sup>7</sup> Order PO-3315.

<sup>8</sup> Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.).

<sup>9</sup> Order PO-2677.

<sup>10</sup> I have only summarized the non-confidential portions of the ministry's submissions in this order, but I have taken the entirety of its submissions into account in reaching my findings.

<sup>11</sup> Enclosed with this Letter was the Director's Report (record 5), which the ministry withheld pursuant to sections 14 and 21.

[22] The appellant's representations do not address the ministry's decision to withhold a portion of record 3 based on the advice or recommendations exemption in section 13(1).

### ***Analysis and findings***

[23] Based on my review of the record, I find that the information that the ministry has identified as containing advice or recommendations does consist of advice or recommendations for the purpose of section 13(1) of the *Act*.

[24] In particular, I find that the information consists of a communication between a public servant (the SIU Director) and the Attorney General in which the SIU Director provided advice or recommendations to the Attorney General regarding two courses of action, one of which would ultimately be chosen at the Attorney General's discretion. I am satisfied that if the information were disclosed, it would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations that the SIU Director provided to the Attorney General.<sup>12</sup>

[25] I am also satisfied that the information for which section 13(1) is claimed is not factual or background information, but is the actual advice or recommendations of the SIU Director, as described above.

[26] I find that the exceptions to section 13(1) in sections 13(2) and (3) do not apply. Therefore, subject to my review of the ministry's exercise of discretion (Issue E), I find that the information in the SIU Director's Decision Letter (record 3) for which section 13(1) has been claimed is exempt under that section.

### **Issue B: Does the discretionary law enforcement exemption at section 14(2)(a) apply to records 5 and 6?**

[27] The ministry has withheld records 5 and 6, the Director's Report and Investigation File Report, respectively, based on the law enforcement exemption in section 14(2)(a). This section states:

- (2) A head may refuse to disclose a record,
  - (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law

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<sup>12</sup> Orders PO-2084, PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

[28] The term "law enforcement" is used in several parts of section 14, and is defined in section 2(1) as follows:

"law enforcement" means,

- (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).

[29] The term "law enforcement" has covered the following situations:

- a municipality's investigation into a possible violation of a municipal by-law that could lead to court proceedings.<sup>13</sup>
- a police investigation into a possible violation of the *Criminal Code*.<sup>14</sup>
- a children's aid society investigation under the *Child and Family Services Act* which could lead to court proceedings.<sup>15</sup>
- Fire Marshal fire code inspections under the *Fire Protection and Prevention Act, 1997*.<sup>16</sup>

[30] This office has stated that "law enforcement" does not apply to an internal investigation by the institution under the *Training Schools Act* where the institution lacked the authority to enforce or regulate compliance with any law;<sup>17</sup> or a Coroner's investigation or inquest under the *Coroner's Act*, which lacked the power to impose sanctions.<sup>18</sup>

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<sup>13</sup> Orders M-16 and MO-1245.

<sup>14</sup> Orders M-202 and PO-2085.

<sup>15</sup> Order MO-1416.

<sup>16</sup> Order MO-1337-I.

<sup>17</sup> Order P-352, upheld on judicial review in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (1993), 102 D.L.R. (4th) 602, reversed on other grounds (1994), 107 D.L.R. (4th) 454 (C.A.).

<sup>18</sup> Order P-1117.



[31] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.<sup>19</sup>

[32] 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.<sup>20</sup> 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.<sup>21</sup>

***Section 14(2)(a): law enforcement report***

[33] In order for a record to qualify for exemption under section 14(2)(a) of the *Act*, the institution must satisfy each part of the following three-part test:

1. the record must be a report; and
2. the report must have been prepared in the course of law enforcement, inspections or investigations; and
3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.<sup>22</sup>

[34] The word "report" means "a formal statement or account of the results of the collation and consideration of information." Generally, results would not include mere observations or recordings of fact.<sup>23</sup>

[35] The title of a document does not determine whether it is a report, although it may be relevant to the issue.<sup>24</sup>

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<sup>19</sup> Ontario (*Attorney General*) v. *Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

<sup>20</sup> Order PO-2040 and Ontario (*Attorney General*) v. *Fineberg*, cited above.

<sup>21</sup> Ontario (*Community Safety and Correctional Services*) v. Ontario (*Information and Privacy Commissioner*), 2014 SCC 31 (CanLII) at paras. 52-4.

<sup>22</sup> Orders 200 and P-324.

<sup>23</sup> Orders P-200, MO-1238 and MO-1337-I.

<sup>24</sup> Order MO-1337-I.

## ***Representations***

### *The ministry's representations*

[36] The ministry explains that the Director's Report and Investigation File Report (records 5 and 6) were prepared based on the materials collected or generated by the SIU during its investigation into a sexual assault allegation against a member of the Hamilton Police Service. According to the ministry, both of the records contain a summary of the material information obtained during the investigation, together with the Director's analysis of that information, and the decision that the Director made regarding whether criminal charges should be laid against the officer in question. The ministry submits that both records are reports that were prepared in the course of a law enforcement investigation by an agency tasked with enforcing and regulating compliance with the law, and have therefore been properly withheld under section 14(2)(a).

[37] Regarding part 1 of the section 14(2)(a) test, the ministry maintains that both records contain "a formal statement or account of the results of the collation and consideration of information" because they provide an overview of the incident and a description of the events prior to, during, and after the incident that was investigated. According to the ministry, both records compile information into a "cohesive narrative of the incident under investigation and analyze the evidence gathered to determine if it was enough to support criminal charges." The ministry claims that, as a result, the records extend "well beyond" a mere observation or recording of fact.

[38] The ministry notes that section 113(8) of the *Police Services Act*<sup>25</sup> (PSA) requires the Director of the SIU to provide the Attorney General with a report of the results of its investigations, which the SIU satisfied in this case with the Director's Report in question. The ministry explains that Director's Reports were historically treated as confidential, but the ministry began releasing them to the public in 2017, following the *Report of the Independent Police Oversight Review* by the Honourable Michael H. Tulloch, which recommended increased transparency in the civilian oversight process.<sup>26</sup> As a result, Director's Reports are now drafted with public release in mind – meaning that personal identifiers and information that was obtained in confidence have already been removed. The ministry notes that while Director's Reports are typically made public to ensure transparency in the SIU's decision-making process, there are times when these reports are not made public, such as when the contents are particularly sensitive because they involve allegations of sexual assault. The ministry submits that it is for this reason that the Director's Report at issue has not been publicly released.

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<sup>25</sup> RSO 1990, c P 15.

<sup>26</sup> Report of the Independent Police Oversight Review, The Honourable Michael H. Tulloch (the Tulloch Report): [https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/police\\_oversight\\_review/](https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/police_oversight_review/). See also Order PO-3925-I at paras 52-58, where Senior Adjudicator Gillian Shaw discusses the significance of the recommendations found in the Tulloch Report, in the context of an appeal regarding a request for records relating to an SIU investigation.

[39] The ministry explains that the two records are distinguishable from one another because the Investigation File Report is an internal document that has not been “redacted for privacy or policy reasons.” The ministry explains that the Investigation File Report is an “expanded version” of the Director’s Report, and was prepared before the Director’s Report. According to the ministry, Investigative File Reports are always treated as confidential.

[40] The ministry also submits that parts 2 and 3 of the section 14(2)(a) test are satisfied, as both records were prepared by a law enforcement agency (the SIU) in the course of an investigation. In support of this position, the ministry explains that the SIU is statutorily mandated to investigate “the circumstances of serious injuries and death that may have resulted from criminal offences committed by police officers.”<sup>27</sup> The ministry submits that once all reasonable investigative steps have been completed, the information is compiled and reviewed by the Director, who is required by section 113(7) of the *PSA* to lay charges if there are reasonable grounds to believe that an officer has committed a criminal offence. The Director then reports the results of the investigation to the Attorney General, pursuant to section 113(8) of the *PSA*.

[41] Based on this statutory regime, the ministry maintains that both the Investigation File Report and Director’s Report were prepared in the course of a law enforcement investigation by an agency with the function of enforcing and regulating compliance with the law.

[42] Finally, the ministry submits that neither of the exceptions in sections 14(4) and 14(5) apply in the circumstances of this appeal.

### *The appellant’s representations*

[43] The appellant’s representations do not specifically address the ministry’s decision to deny access to records 5 and 6 pursuant to section 14(2)(a). However, he notes that the incident in question was investigated by the SIU, which reported its results to the Attorney General. He says that it seems “that this entire incident was removed from public scrutiny on the SIU website, which is in stark contrast to other [SIU] investigations.” The appellant explains that it was this lack of accountability about the investigation into the incident in question that led him to file a request with the ministry under the *Act*, and to ultimately appeal the ministry’s access decision to this office. The appellant maintains that the Attorney General is “failing” in its mandate and that “to improve the present, the past must be addressed.”

### ***Analysis and findings***

[44] In my view, the 11-page Director’s Report (record 5) and 20-page Investigation File Report (record 6) fall squarely within the definition of a “law enforcement report” for the

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<sup>27</sup> *Police Services Act*, cited above, section 113(5).

purposes of section 14(2)(a). In reaching this conclusion, and for the reasons that follow, I am satisfied that all three parts of the section 14(2)(a) test are satisfied in the circumstances of this appeal.

[45] As noted by the ministry, the records consist of similar information regarding the SIU's investigation, with the difference being that the Investigation File Report contains more detail because it was not prepared with public disclosure in mind. I am satisfied that both records consist of a formal account of the results of the collation and consideration of information about the circumstances surrounding the sexual assault allegation in question. The two records consist not merely of observations of fact, but also reflect a formal, evaluative account of the SIU's investigation into the alleged sexual assault. I am satisfied that they both contain facts, analysis, and evaluative elements that demonstrate an exercise of judgment by the SIU. Accordingly, I find that both records meet this office's definition of a "report,"<sup>28</sup> as required for the first part of the section 14(2)(a) test.

[46] The second part of the section 14(2)(a) test requires that the reports were prepared in the course of law enforcement, inspections or investigations. As set out above, the definition of "law enforcement" in section 2(1) of the *Act* includes investigations that could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings. In the case before me, both reports relate to the SIU's investigation into an allegation of sexual assault by a police officer. I find that this investigation had the potential to lead to proceedings respecting a possible violation of the *Criminal Code*, and am therefore satisfied that the second requirement is also met.

[47] Finally, regarding the final part of the section 14(2)(a) test, I note that in previous orders, such as Orders PO-2854, PO-3169, and PO-3925-I, this office has determined that the SIU is an agency that has the function of enforcing and regulating compliance with the law, in the sense contemplated by the exemption.<sup>29</sup> I agree, and find that both records were prepared by an agency with the function of enforcing and regulating compliance with the law, and in compliance with its obligations under the PSA, such that the third requirement is also met.

[48] Before concluding my analysis on this issue, I note that in Order PO-3868-I, former Commissioner Brian Beamish found that of a 317-page document detailing the results of an OPP investigation, the only parts that qualified as a "report" for the purposes of section 14(2)(a) were pages 1-46. Commissioner Beamish found that the first 46 pages contained facts, analysis, and evaluative elements that demonstrated an exercise of judgment carried out by the OPP investigative team. He found, however, that the remainder of the record, which consisted of appendices of witness statements, did not form part of the "report" itself. In coming to this conclusion, he relied on previous orders of this office that have

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<sup>28</sup> See Orders P-200, MO-1238 and MO-1337-I.

<sup>29</sup> See Orders P-1336, PO-2934-I, PO-2935-I, for example.

found that appendices or attachments to a report, such as interview notes, will not necessarily form part of the report.<sup>30</sup>

[49] Having reviewed records 5 and 6 in detail, I am satisfied that they are distinguishable from the record at issue in Order PO-3868-I, as they both consist of a continuous account of the SIU's investigation and conclusions, and contain no appendices or other recordings of fact. Therefore, subject to my review of the ministry's exercise of discretion (Issue E), I find that records 5 and 6 are exempt in full under section 14(2)(a). As a result, it is not necessary for me to consider whether the personal privacy exemption in section 21(1) also applies to these records.

**Issue C: Do records 1, 7-33, 35-50, and 52-61 contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?**

[50] The ministry relies on the mandatory personal privacy exemption at section 21(1) of the *Act* to withhold records 1, 7-33, 35-50, and 52-61.

[51] In order to determine whether the personal privacy exemption applies, first it is necessary to decide whether those records contain "personal information" and, if so, to whom that information relates. The term "personal information" is defined in section 2(1) of the *Act* as, "recorded information about an identifiable individual," including information that fits within the list of examples provided in paragraphs (a) to (h). The list of examples under section 2(1) is not exhaustive; information that does not fall under paragraphs (a) to (h) may still qualify as personal information.<sup>31</sup>

[52] Exceptions to the definition of personal information exist for information about individuals that have been deceased for more than 30 years,<sup>32</sup> and information that would identify an individual in a business, professional, or official capacity.<sup>33</sup> However, even when information relates to an individual in a business, professional, or official capacity, it may

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<sup>30</sup> For example, in Order PO-1959, Assistant Commissioner Sherry Liang found that certain information forming part of a SIU investigation file did not qualify as a "report" for the purposes of section 14(2)(a). While the SIU Director's Decision qualified as a report, as it consisted of a formal statement of the results of the collation and consideration of information, Assistant Commissioner Liang found that other records such as incident reports, supplementary reports and police officers' notes did not meet the definition of a "report," because they consisted of observations and recordings of fact rather than formal, evaluative accounts.

<sup>31</sup> Order 11.

<sup>32</sup> Section 2(2) of the *Act*.

<sup>33</sup> Sections 2(3) and 2(4) of the *Act*. 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. See, for example, Orders MO-1550-F and PO-2225.

still qualify as personal information if it reveals something of a personal nature about the individual.<sup>34</sup>

[53] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.<sup>35</sup>

### ***Representations***

[54] The ministry maintains that the records withheld pursuant to the personal privacy exemption contain personal information within the meaning of section 2(1) of the *Act* that relates to persons other than the appellant. In particular, the ministry submits that the records contain personal information of the complainant, the officer who was subject to an investigation, and a number of civilian and officer witnesses. The ministry submits that the information is "highly detailed" and it is reasonable to expect that individuals will be identified if it is disclosed, even if personal identifiers are withheld.

[55] The ministry says that it is "difficult to assess whether the appellant already knows the names of one or more of the parties to the incident." However, it maintains that it is "reasonable to suspect that he knows the identity of at least one of the affected parties" because he was able to cite the SIU case number in his request, which was not publicly released. The ministry says that even if the appellant does not have a personal connection to the case, it is concerned that he may have knowledge of one or more of the parties, given the amount of public interest and media coverage the case received.

[56] The ministry further submits that the personal information in the records is not associated with individuals in their professional or official capacity. The ministry maintains that the records at issue consist predominantly of information provided by witnesses, including the complainant and subject officer, during the course of a law enforcement investigation into an allegation of sexual assault. Given the nature of the circumstances in which the information was collected, the ministry claims that it is inherently personal in nature. According to the ministry, the witnesses were expressing their personal, not professional or organizational, recollections, views and opinions regarding the incident under investigation.

[57] Three affected parties were invited to provide representations regarding the ministry's reliance on the personal privacy exemption. One of the affected parties opposed the disclosure of any of the records relating to the investigation to the appellant, on the basis that they are highly sensitive and their disclosure would cause emotional distress. The Hamilton Police Association provided representations on behalf of the other two affected parties. The representations that I received from the Hamilton Police Association

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<sup>34</sup> Orders P-1409, R-980015, PO-2225, and MO-2344.

<sup>35</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v Pascoe*, [2002] ON NO 4300 (CA).

were withheld from the other parties according to the IPC's confidentiality criteria in the IPC's *Code of Procedure and Practice Direction Number 7*. In sum, however, the affected parties claim that the records contain personal information as that term is defined in paragraphs (a), (b), and (h) of the definition in section 2(1) of the *Act*, and they maintain that the exception in section 2(2) is not applicable.

[58] The appellant's submissions do not address the issue of whether the records contain personal information, but his submissions indicate that he is aware of the identities of at least some of the affected parties involved.

[59] As mentioned above, during mediation, the appellant advised the mediator that he is not seeking access to names, birth dates, addresses, or other personal identifiers (which I interpret to include information such as individuals' telephone numbers and email addresses). Therefore, that information is not within the scope of the appellant's request, and I will not consider it in my analysis below.

### ***Analysis and findings***

[60] Personal information is defined in section 2(1) of the *Act* as recorded information about an identifiable individual, including:

- information relating to the [...] age, sex, sexual orientation or marital or family status of the individual (paragraph (a));
- information relating to the [...] employment history of the individual (paragraph (b));
- any identifying number [...] assigned to the individual (paragraph (c));
- the address, telephone number [...] of the individual (paragraph (d)),
- the personal opinions or views of the individual (paragraph (e)),
- the views or opinions of another individual about the individual (paragraph (g)), and
- 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 (paragraph (h)).

[61] Based on my review of the records at issue, I find that the majority of them contain the personal information of the following identifiable individuals: the complainant, the subject officer, civilian witnesses, and one specific officer witness. However, I find that some of the information, in particular that of the police officer witnesses involved in the SIU investigation, amounts to their professional information rather than personal information as these individuals provided the information contained in the records in the context of their employment.

[62] As set out above, all of the records at issue relate to an SIU investigation into an allegation of sexual assault against an officer of the Hamilton Police Service. I find that the majority of the records contain the complainant and/or subject officer's personal information as defined in section 2(1) including, information relating to their sex, sexual orientation and marital or family status (paragraph (a)); employment history (paragraph (b)); identifying numbers assigned to the individuals, such as the officer's badge number and the SIU file number<sup>36</sup> (paragraph (c)); as well as other identifying information, as described in the introductory wording of section 2(1). I also find that witness statements describing the witnesses' views or opinions of the subject officer and/or complainant amounts to the subject officer and/or complainant's personal information as defined in paragraphs (g) and (h) of section 2(1). Therefore, I find that the large majority of the records contain information about the complainant and/or subject officer that meets the definition of "personal information."

[63] Notably, I find that all of the information relating to the subject officer qualifies as his personal information and not his professional information for the purposes of this appeal, despite the fact that the SIU investigation was examining the subject officer's conduct at his place of work. As stated above, even if information relates to an individual in their professional capacity, it may be considered to be personal information if it reveals something of a personal nature about them. Prior IPC orders, such as Orders PO-2524, PO-2633, PO-3003, and PO-3169, have held that records relating to an investigation into a police officer's conduct while on duty reveal something of a personal nature about the officer and, as such, qualify as their "personal information" within the meaning of the *Act*. I agree.

[64] Similarly, I find that all of the information relating to the complainant qualifies as her personal, and not professional, information. Again, while the incident occurred during working hours at the complainant's place of employment, I am satisfied that if the information relating to the complainant was disclosed, it would reveal something of a personal nature about her.<sup>37</sup>

[65] Some of the records at issue also include information about civilian witnesses, which qualifies as their personal information within the meaning of section 2(1) of the *Act*. This information includes the civilian witnesses' employment history (paragraph (b)), their personal opinions or views (paragraph (e)), and other identifying information, as described in the introductory wording of section 2(1).

[66] Other records contain the information of police officers who were identified as witnesses, including their employment information and their views or opinions of the incident in question. All of the officer witnesses are clearly identified in the records as witnesses, and were not themselves the subject of the SIU's investigation. There are also

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<sup>36</sup> SIU file numbers are the personal information of the subject officer(s): see orders PO-1959 and PO- 2425.

<sup>37</sup> Order PO-2225.



some records that contain information about individuals who were involved in conducting the SIU investigation. In Order PO-3169, Adjudicator Catherine Corban held that information relating to witness officers involved in SIU investigations is those officer's professional, not personal, information.<sup>38</sup> I agree. In my view, with only one exception which I discuss below, the information relating to the officer witnesses and the individuals involved in conducting the SIU investigation indicates that they were acting strictly in their professional, as opposed to personal, capacities. I find that, with the exception of one witness officer, there was nothing inherently personal about these individuals included in the records that would take the information from the professional to the personal sphere.

[67] The one exception to my finding above relates to an officer witness who, although not directly involved in the incident in question, had a tangential connection to the actions of the subject officer. Based on my review of the records, I am satisfied that the information relating to this specific officer witness reveals something of a personal nature about the officer such that it qualifies as their "personal information" within the meaning of the *Act*.

[68] Therefore, I am satisfied and I find that the records contain personal information of the subject officer, complainant, one specific officer witness, and civilian witnesses as described above, even when names, birth dates, addresses, or other personal identifiers are removed from the scope of the appeal in accordance with the appellant's wishes. In making this finding, I have taken into consideration that it appears the appellant is familiar with at least some of the parties involved in the investigation, which, in my view, makes it reasonable to expect that they may be identifiable from the information remaining in the records.

[69] Finally, I find that the record identified by the ministry as record 60, which consists of 23 photographs of the scene, does not contain any personal information as defined in section 2(1) of the *Act* because it is not "recorded information about an identifiable individual." Therefore, record 60 cannot be exempt from disclosure under the personal privacy exemption in section 21(1).

**Issue D: Does the mandatory exemption at section 21(1) apply to the personal information at issue?**

[70] Where a requester seeks access to the personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies. The sections 21(1)(a) to (e) exceptions are relatively straightforward. The information at issue in this appeal does not fit within any of paragraphs (a) to (e) of section 21(1).

[71] The section 21(1)(f) exception, allowing disclosure if it would not be an unjustified invasion of personal privacy, is more complex, and requires a consideration of additional

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<sup>38</sup> See also Orders PO-1959 and PO-3925-I.

parts of section 21. Sections 21(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy, while section 21(4) lists situations that would not be an unjustified invasion of personal privacy.

[72] If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21. Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the “public interest override” at section 23 applies.<sup>39</sup> None of the section 21(4) paragraphs are relevant in this appeal, and the public interest override has not been raised by the parties.

[73] If no section 21(3) presumption applies, section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.<sup>40</sup> In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances favouring disclosure in section 21(2) must be present. In the absence of such a finding, the exception in section 21(1)(f) is not established and the mandatory section 21(1) exemption applies.<sup>41</sup>

[74] The list of factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2).<sup>42</sup>

### ***Section 21(3) presumptions***

#### *The parties' representations*

[75] The ministry maintains that none of the section 21(1)(a) to (e) exceptions to the mandatory exemption apply in this case. Further, the ministry submits that disclosure is presumed to be an unjustified invasion of personal privacy under section 21(3)(b), such that section 21(1)(f) is also not applicable. Section 21(3)(b) states:

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

(b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation[.]

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<sup>39</sup> *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

<sup>40</sup> Order P-239.

<sup>41</sup> Orders PO-2267 and PO-2733.

<sup>42</sup> Order P-99.

[76] In support of its reliance on section 21(3)(b), the ministry says that it is “well settled” that the fact that no criminal proceedings are commenced as a result of an investigation does not negate the applicability of the presumption in section 21(3)(b). According to the ministry, the records at issue were gathered and are identifiable as part of the SIU’s investigation into an alleged sexual assault, and while the SIU Director ultimately concluded that criminal charges were not warranted, the investigation was nevertheless into an possible violation of the *Criminal Code*. The ministry points to Orders P-1462, PO-2524, and PO-2215 in support of its claim that SIU records obtained or created during an investigation fall within the scope of section 21(3)(b).

[77] The ministry notes that a section 21(3) presumption can only be overridden if the personal information falls within the scope of section 21(4) or if the public interest override in section 23 applies. The ministry maintains that neither section 21(4) nor section 23 are relevant in this appeal.

[78] The affected parties maintain that the presumptions at sections 21(3)(b) and 21(3)(d) (educational or employment history) apply in the context of this appeal.

[79] The appellant does not specifically address the ministry’s reliance on section 21(3)(b). However, in support of his request to obtain access to the information at issue, he explains that he became aware of the allegations of sexual assault against a member of the Hamilton Police Service through his former position of employment. In his former job, he says that he was “witness to many instances of a complete lack of accountability from [police] management and the police union.” The appellant explains that in the months that followed the incident, “it became clear that there would be no accountability,” and that since that event, “many other instances transpired which showed that the management team at the Hamilton Police Service weren’t interested in accountability.” He notes that the SIU website has no publicly available information relating to the incident in question, and he claims that disclosure of the requested information is desirable because, “public scrutiny [...] is necessary when those who govern are unable to govern themselves.”

### ***Analysis and findings***

[80] Based on my review of the records at issue, I accept the ministry’s position that the personal information in the records was compiled as part of an SIU investigation into a possible violation of law under the *Criminal Code*. The fact that no criminal proceedings were commenced as a result of the SIU investigation has no bearing on the issue, since section 21(3)(b) only requires that there be an investigation into a possible violation of law.<sup>43</sup> Accordingly, I find that disclosure is presumed to be an unjustified invasion of personal privacy pursuant to section 21(3)(b).

[81] As stated above, a presumed unjustified invasion of personal privacy in section 21(3) can only be overcome if the personal information is found to fall under section 21(4)

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<sup>43</sup> Order PO-1849.

of the *Act* or if a finding is made under section 16 of the *Act* that a compelling public interest exists in the disclosure of the records that clearly outweighs the purpose of the section 21 exemption.<sup>44</sup> None of the parties relied on sections 16 or 21(4) in the context of this appeal, nor would these provisions appear to apply in the circumstances.

[82] Therefore, I find that the personal information of the subject officer, complainant, one specific officer witness, and civilian witnesses is exempt from disclosure under section 21(1), on the basis that its disclosure would be a presumed unjustified invasion of those individuals' personal privacy.

### ***Severance***

[83] Section 10(2) of the *Act* obliges institutions to disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt.

[84] The key question raised by section 10(2) is one of reasonableness. Where a record contains exempt information, section 10(2) requires a head to disclose as much of the record as can reasonably be severed without disclosing the exempt information. A head will not be required to sever the record and disclose portions where to do so would reveal only "disconnected snippets", or "worthless", "meaningless" or "misleading" information. Further, severance will not be considered reasonable where an individual could ascertain the content of the withheld information from the information disclosed.<sup>45</sup>

[85] The ministry explains that it considered whether the records could be severed for the purpose of disclosing non-exempt information, but determined that no reasonable severance was possible due to the "intertwining, amalgamation and collation of highly detailed information," including the personal information of individuals other than the appellant.

[86] Above, I found that a number of records contain the professional information of officer witnesses and SIU investigators that were involved in the SIU's investigation, which is not exempt under section 21(1). Therefore, with the section 10(2) principles in mind, and considering the information that the appellant removed from the scope of the appeal, I have arrived at several conclusions, which I explain below.

[87] Some of the personal information exempt from disclosure under 21(1) is readily severable from non-exempt information in records 1, 8, 9, 13, 14, 19, 20, 22, 23, 25, 26, 27, 32, 33, 35, 36, 37, 39, 41, 42, 45, 46, 47, 49, and 50. Where this is the case, I am satisfied that the remaining responsive information is not personal information (and is therefore not exempt under section 21(1)), and that it does not consist of "disconnected snippets," or "worthless," "meaningless," or "misleading" information. I find that these

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<sup>44</sup> *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.

<sup>45</sup> Order PO-1663, *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.).

portions of records 1, 8, 9, 13, 14, 19, 20, 22, 23, 25, 26, 27, 32, 33, 35, 36, 37, 39, 41, 42, 45, 46, 47, 49, and 50 must be disclosed to the appellant.

[88] In the circumstances of this appeal, however, I find that it is not practicable to sever the exempt personal information in records 7, 10, 11, 12, 15, 16, 17, 18, 21, 24, 28, 29, 30, 31, 38, 40, 43, 44, 48, 52, 53, 53a, 54, 55, 56, 57, 58, 59, and 61. This is either because the non-exempt information in those records is inextricably intertwined with the personal information of the subject officer, complainant, specific witness officer, and/or civilian witnesses, or because severing the personal information from the records would result in the disclosure of “disconnected snippets,” or “worthless,” “meaningless,” or “misleading” information only. I find that these records are, therefore, exempt in their entirety under section 21(1).

**Issue E: Did the institution exercise its discretion under sections 13 and 14? If so, should this office uphold the exercise of discretion?**

[89] The sections 13 and 14 exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. The ministry must exercise its discretion, having regard to the principles of the *Act* and considerations that are relevant in this particular appeal. For example, the ministry must have considered the following: whether disclosure will increase public confidence in the operation of the institution; whether the requester has a sympathetic or compelling need to receive the information; the wording of the exemptions and the interests they seek to protect; and 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.

[90] This office 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. This office may also find that the institution failed to exercise its discretion at all. In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>46</sup> This office may not, however, substitute its own discretion for that of the institution.<sup>47</sup>

[91] The ministry submits that it exercised its discretion under sections 13 and 14 appropriately and in good faith. It maintains that in deciding to withhold information under sections 13 and 14, it considered the purpose of those exemptions together with the *Act's* overall purpose of making information available to the public, together with its goal of protecting the privacy of individuals. The ministry maintains that it also considered the appellant's interest in the withheld information, including the fact that the records do not contain the appellant's personal information, and there is no indication that the appellant

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<sup>46</sup> Order MO-1573.

<sup>47</sup> Section 54(2).

has a compelling need to receive the information. On balance, the ministry explains that it decided to withhold the information because it clearly fell within the wording and purpose of the exemptions, and the appellant's interest in the information "appeared marginal."

[92] The appellant did not provide representations on the ministry's exercise of discretion.

[93] In this review, I only consider the ministry's exercise of discretion in relation to the information that I found exempt under sections 13(1) and 14(2)(a), above. Based on the evidence before me, I am satisfied that the ministry exercised its discretion to deny access to a portion of the Director's Letter to the Attorney General (record 3), and the entirety of the Director's and Investigative File Reports (records 5 and 6), in a proper manner, taking into account relevant considerations and without taking into account irrelevant considerations. Accordingly, I uphold the ministry's exercise of discretion under sections 13(1) and 14(2)(a).

## **ORDER:**

1. I order the ministry to disclose information in the records that I have found is not exempt under section 21(1) of the *Act* by **April 28, 2021** but not before **April 21, 2021**

For the sake of clarity, a highlighted copy of records 1, 8, 9, 13, 14, 19, 20, 22, 23, 25, 26, 27, 32, 33, 35, 36, 37, 39, 41, 42, 45, 46, 47, 49, and 50 is provided to the ministry with its copy of this order. The ministry is to withhold the highlighted portions of the records, which consists of exempt information and information that has been removed from the scope of this appeal. The ministry is also to disclose record 60 in its entirety.

2. I uphold the ministry's decision to withhold the remaining information.
3. In order to verify compliance with this order, I reserve the right to require the ministry to provide me with a copy of the records that are disclosed to the appellant pursuant to order provision 1.
4. The timeline noted in order provision 1 may be extended if the ministry is unable to comply in light of the current COVID-19 situation, and I remain seized to consider any resulting time extension request.

Original Signed by: \_\_\_\_\_

Jaime Cardy  
Adjudicator

March 24, 2021 \_\_\_\_\_