Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4378

Appeal MA21-00610

York Regional Police Services Board

May 23, 2023

Summary: In 1992, the appellant was wrongly convicted of the 1984 murder of a young girl. He was exonerated in 1995 on the basis of fresh evidence. In 2020, a different individual was identified through DNA analysis as being the actual perpetrator of the murder.

During York Police's initial investigation into the girl's disappearance, police interviewed the wife of the actual perpetrator, but did not interview the actual perpetrator himself. After the identity of the actual perpetrator became known in 2020, the appellant made an access request for a copy of the wife's witness statement. The police denied access on the basis of the personal privacy exemption in section 14(1).

In this order, the adjudicator finds that the statement is not exempt under section 14(1), because disclosure is desirable for subjecting the investigation of the police to public scrutiny. The adjudicator also finds that the public interest override in section 16 of the *Act* would apply in any event to the statement if it were exempt under section 14(1). She orders the respondent York Regional Police Services Board to disclose the statement to the appellant, with the exception of small portions whose disclosure is not required for public accountability.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c M.56, sections 2(1) (definition of "personal information"), 2(2), 14(1), 14(1)(d), 14(2), 14(3)(d) and 16; *Public Inquiries Act, 2009,* SO 2009, c 33, Sch 6, sections 8(1), 10(1) and 14; *Public Inquiries Act,* 1990 c P.41, sections 4, 7 and 10.

Orders and Investigation Reports Considered: Order MO-4222.

Cases Considered: *R. v Stinchcombe*, [1991] 3 S.C.R. 326.

BACKGROUND:[1]

[1] The appellant seeks access under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to a witness statement taken by the York Police in 1984. In this decision, I explain why the respondent York Regional Police Services Board must provide the statement to the appellant.

The appellant's wrongful conviction and subsequent exoneration

[2] The appellant was wrongfully convicted in 1992 of the murder of a young girl. The girl had disappeared in 1984 and was found deceased a few months later. In 1995, on the basis of fresh evidence tendered jointly by the Crown and the defence, the Ontario Court of Appeal set aside the conviction and entered a verdict of acquittal.[2]

[3] Questions were raised about the administration of justice in Ontario, and in 1996 the Lieutenant Governor in Council directed that a public inquiry be held regarding the circumstances of the appellant's wrongful conviction. The Honourable Fred Kaufman, Q.C., a former judge of the Quebec Court of Appeal (Justice Kaufman), was appointed as Commissioner under the designation "The Commission on Proceedings Involving Guy Paul Morin" (the Kaufman Commission or the Kaufman Inquiry). Public hearings began on February 10, 1997, and continued for 146 days. One hundred and twenty witnesses were called. The Commission also considered the transcripts of evidence and exhibits from both trials,[3] as well as documents filed with the Ontario Court of Appeal, all of which totalled over 100,000 pages. At the conclusion of the inquiry, Justice Kaufman issued a report with 119 recommendations for change.

[4] In 2020, through DNA analysis, the Toronto Police Service publicly identified a different individual, a friend of the girl's family, as the actual perpetrator of the murder. He had died a few years previously.

[5] The murder, the appellant's wrongful conviction and the eventual identification of the actual perpetrator garnered significant media attention.

The initial investigation

[6] After the girl disappeared, the York Regional Police Service (York Police) carried out the initial investigation, which was treated as a missing child investigation. The York Police interviewed a number of individuals, but did not interview the man who in 2020 would eventually be identified as the perpetrator of the murder (the perpetrator). They did interview the perpetrator's wife (the witness) and took a statement (the statement)

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[1] Background is taken from the parties' representations and the *Report of the Kaufman Commission on Proceedings Involving Guy Paul Morin* referred to in the parties' representations.
[2] *R. v. Morin* 1995 CanLII 8944 (ONCA).
[3] The appellant was initially acquitted, but after a series of appeals and a retrial, was (as noted above, wrongly) convicted.

which is the subject of this appeal. After the girl was found deceased in Durham Region, the Durham Regional Police Service (Durham Police) investigated the homicide, and after the appellant was exonerated in 1995, the Attorney General's office transferred the case to the Toronto Police Service (Toronto Police).

[7] The appellant and the York Regional Police Services Board (the respondent) agree that the statement was not referred to during the Kaufman Commission, though the respondent says the statement would have been part of the police's file provided to the Commission.

[8] The appellant also says that the statement was not provided to him at either of his trials, while the respondent says that if the Crown did not disclose it, it would be because the Crown did not find it relevant to the prosecution.

The appellant learns of the statement and makes an access request for it

[9] According to the appellant, after the Toronto Police identified the actual perpetrator in 2020, the girl's family and the witness both publicly revealed the existence of the statement at issue. This was the first time the appellant learned of the existence of this statement.

[10] The appellant then made an access request to the York Regional Police Services Board (the respondent) for the following:

> A copy of the interview with [the witness] conducted by Constable Bunce of the York Regional Police on or about October 4, 1984 from the York Regional Police Services investigation of the murder of [the girl], who disappeared from her home in York Region on October 3, 1984, and whose body was found in Durham Region, on ~December 31, 1984.

[11] The respondent denied access to the statement, relying on the personal privacy exemption in section 14(1) of the *Act*.[4]

[12] The appellant appealed the respondent's decision to the Information and Privacy Commissioner of Ontario (IPC) and a mediator was assigned to the matter. The respondent and the appellant's representative attempted but were unable to obtain consent from the witness to allow her statement to be disclosed to the appellant. The appellant raised the application of the public interest override in section 16 of the *Act*, but the respondent maintained its decision to deny access to the statement.

[13] The appeal then moved to the adjudication stage of the appeals process and I

[4] The respondent also relied on the law enforcement exemptions at sections 8(1)(a), (b) and (f) to deny access to the statement, on the basis that the Toronto Police's investigation was, at that time, still an open investigation. However, during mediation at the IPC, and after consultation with the Toronto Police, the respondent withdrew its reliance on section 8, based on a determination that the disclosure of the statement would have no bearing on the Toronto Police's ongoing investigation of the murder.

conducted an inquiry. I invited representations from the respondent, the appellant, the witness, the girl's family and another party whose interests may be affected by the release of the statement. All parties provided representations except for the girl's family. Parts of the representations of both the appellant and the respondent have been withheld from the other parties in accordance with the confidentiality criteria in IPC's *Practice Direction 7*. Neither the witness's nor the other affected party's representations were shared with the other parties, but I have taken them into consideration in coming to my decision.

[14] In this order, and for the reasons that follow, I find that the personal privacy exemption in section 14(1) does not apply to the statement, because its disclosure is desirable for public scrutiny of the police's investigations into the girl's disappearance and murder.[5] I also find in any event that the public interest override in section 16 would apply to the statement if it were exempt by reason of section 14(1). I order the respondent to disclose the statement to the appellant.

RECORD:

[15] The record at issue is a statement the witness gave to the York Police in October 1984.

ISSUES:

A. Does the statement contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

B. Does the mandatory personal privacy exemption at section 14(1) apply to the statement?

C. Is there a compelling public interest in disclosure of the statement that clearly outweighs the purpose of the section 14(1) exemption?

DISCUSSION:

[16] The respondent maintains that the statement is exempt from disclosure under the mandatory personal privacy exemption found at section 14(1) of the *Act.* The section 14(1) exemption can only apply if the record contains personal information. I will address that issue first.

[5] With the exception of discrete bits of demographic and contact information whose disclosure would not promote public scrutiny of the police.

Issue A: Does the record contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

[17] For the following reasons, I find that the statement contains the personal information of the witness and other individuals. It does not contain any information, personal or otherwise, about the appellant.

[18] Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual." Information is "about" the individual when it refers to them in their personal capacity, which means that it reveals something of a personal nature about the individual. Generally, information about an individual in their professional, official or business capacity is not considered to be "about" the individual.[6]

[19] Section 2(1) of the *Act* gives a list of examples of personal information, the relevant ones here being:

> "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,
> >
> > (d) the address, telephone number, fingerprints or blood type of the individual,
> >
> > (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.

[20] The list of examples of personal information under section 2(1) is not a complete list; other kinds of information that reveal something personal about an individual are also "personal information."[7]

[21] The statement, in its entirety, is the personal information of the witness. It reveals her name together with various types of information about her, including her address, marital status, employment status, her activities on certain dates and her relationship with the girl and the girl's family.

[22] The statement also contains the personal information of other individuals. Without going into detail, it stands to reason that, given the circumstances under which the statement was taken, it contains the personal information of members of the girl's

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[6] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, P-1409 MO-2344 and PO-2225. In some situations, even if information relates to an individual in a professional, official or business capacity, it may still be "personal information" if it reveals something of a personal nature about the individual.
[7] Order 11.

family. The statement also contains the personal information of another individual.[8]

[23] I conclude, therefore, that the statement contains the personal information of the witness, certain members of the girl's family, and another individual.[9]

[24] I must next consider, then, whether the personal information of the witness and other individuals is exempt under the personal privacy exemption at section 14(1), which I address under Issue B.

Issue B: Does the mandatory personal privacy exemption at section 14(1) apply to the statement?

[25] The respondent has relied on the section 14(1) personal privacy exemption to withhold the statement in its entirety. One of the purposes of the *Act* is to protect the privacy of individuals with respect to personal information institutions hold about them. Section 14(1) of the *Act* creates a general rule that an institution cannot disclose personal information about another individual to a requester. This general rule is subject to a number of exceptions.[10]

[26] If any of the five exceptions covered in sections 14(1)(a) to (f) applies, the institution must disclose the information.[11] The appellant argues that the exceptions in sections 14(1)(d) and (f) apply.

The section 14(1)(d) exception

[27] The appellant argues that the exception in section 14(1)(d) applies. It reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
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> > under an Act of Ontario or Canada that expressly authorizes the disclosure[.]

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[8] The appellant argues that since the girl's family and the witness gave statements to the media after the true perpetrator was identified, any information about them in the statement at issue is not their personal information. However, the statute places no such limit on the definition of personal information. I will consider the appellant's argument under Issue B in addressing whether disclosure of the personal information of these individuals would be an unjustified invasion of their personal privacy.

[9] Under section 2(2), personal information does not include information about an individual who has been deceased for more than 30 years. The statement, therefore, does not contain the girl's "personal information." By acknowledging this provision and its application here, I do not wish to be seen as discounting the worth of this young girl, "who loved life, her family, school and sports." Source: Ministry of the Attorney General, "Report of the Kaufman Commission on Proceedings Involving Guy Paul Morin: Executive Summary."

[10] I have reproduced section 14 in its entirety in an appendix to this decision.

[11] The section 14(1)(a) exception does not apply because the witness did not consent to the release of the statement.

[28] The appellant argues that he was entitled to the statement at his trials as a result of the Supreme Court of Canada's judgment on the Crown's disclosure obligations in *R. v. Stinchcombe*.[12] He also says he was entitled to it under the *Public Inquiries Act*[13] (*PIA*) which, along with the mandate of the Kaufman Commission, authorized Justice Kaufman, as the Commissioner presiding over the inquiry, to obtain the statement.

[29] Previous IPC orders have held that in order for section 14(1)(d) to apply, there must be either

- a specific authorization in another act of Ontario or Canada that allows for the disclosure of the type of personal information at issue, or
- a general reference in the other act to the possibility of disclosure together with a specific reference in a regulation to the type of personal information at issue.[14]

[30] The *Stinchcombe* decision is not "an Act of Ontario or Canada", and for that reason I do not find persuasive the appellant's argument on this point.

[31] With respect to the *PIA*, the appellant does not specify what provision or provisions, either of the current statute or that in force at the relevant time, authorize the disclosure of the statement. The *PIA*'s current provisions[15] refer in general terms to evidence that a commission can receive. Hearings are generally open but the public can be excluded in certain circumstances. A commission may also impose conditions on the disclosure of information to protect its confidentiality.[16] Similar provisions are found in the version of the *PIA* that was in force at the time of the Kaufman Commission.[17]

[32] These general provisions likely authorized the statement to be admitted into evidence as part of the Kaufman Commission. However, given that the *PIA* expressly allows for a commission to exclude the public, I am not satisfied based on the evidence before me that it specifically authorized or authorizes the disclosure of the statement. Therefore, the exception in section 14(1)(d) does not apply.

The section 14(1)(f) exception

[33] The section 14(1)(f) exception to the section 14(1) personal privacy exemption requires the institution to disclose another individual's personal information to a requester if disclosure would not be an "unjustified invasion of personal privacy." Determining whether disclosure is an unjustified invasion of personal privacy requires

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[12] [1991] 3 S.C.R. 326.
[13] The appellant does not include a citation. The current citation is *Public Inquiries Act, 2009*, SO 2009, c 33, Sch 6. The version in force at the relevant time was *Public Inquiries Act*, 1990 c P.41.
[14] Orders M-292, MO-2030, PO-2641 and MO-2344.
[15] The *Public Inquiries Act*, 1990 c P.41 was repealed and replaced with the current version in 2011.
[16] *Public Inquiries Act*, 2009, SO 2009, c 33, Sch 6, sections 8(1), 10(1) and 14.
[17] *Public Inquiries Act*, 1990 c P.41, sections 4, 7 and 10.

an assessment of the various factors and presumptions found in sections 14(2) and (3).[18]

[34] For the following reasons, and with the exception of some discrete demographic and contact information that I address separately at the end of this discussion, I find that disclosure of the statement would not be an unjustified invasion of personal privacy of any of the individuals whose personal information is in the statement.

[35] I begin with section 14(3). Sections 14(3)(a) to (h) outline several situations where disclosing personal information is presumed to be an unjustified invasion of personal privacy. The Divisional Court has found that if one of these presumptions applies, the personal information is exempt from disclosure under section 14(1) unless the information falls within one of the paragraphs in section 14(4) (or unless the public interest override at section 16 applies; I address this under Issue C below).[19] The parties did not raise any of the circumstances listed in section 14(4) and I find that none applies.

[36] The respondent argues that the presumption at section 14(3)(b) applies. This provision states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
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> > 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[.]

[37] The presumption requires only that there be an investigation into a *possible* violation of law.[20] Even if criminal proceedings were never started against any individual, section 14(3)(b) may still apply.[21]

[38] On this point, the respondent notes that the York Police's investigation was a missing child investigation, but that once the girl's body was found in Durham Region, the Durham Police investigated the murder. The respondent says, therefore, that the statement was obtained as part of an investigation into a possible violation of the *Criminal Code of Canada.*

[39] The statement was obtained ("compiled") by the York Police as part of their investigation. The issue, therefore, is not whether the Durham Police conducted an investigation "into a possible violation of law", but whether the York Police did.

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[18] Section 14(4) list some situations in which disclosure would not be an unjustified invasion of personal privacy, but none of those situations is present here.
[19] *John Doe v. Ontario* (*Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767 (Div.Ct.).
[20] Orders P-242 and MO-2235.
[21] The presumption can also apply to records created as part of a law enforcement investigation where charges were laid but subsequently withdrawn (Orders MO-2213, PO-1849 and PO-2608).

[40] According to the Kaufman Report Executive Summary, the York Police appear not to have initially considered the girl's disappearance to be a potential crime:

> The problem here was not that the [York Police] characterized their initial involvement as a missing person investigation. The problem was that the officers did not conduct themselves mindful of the possibility that they were dealing with a serious crime.[22]

[41] Based on the evidence before me, I do not find that the York Police's investigation was "into a possible violation of law" at the time the statement was taken. Neither the respondent nor the appellant made detailed representations on this point and although they both referred to the Kaufman Inquiry, neither filed the final report, although an Executive Summary (which contains the above quote from the report itself) is available online.[23]

[42] Even if the presumption did apply, I would find, as I have under Issue C, that the public interest override applies.

[43] Given the absence of any presumption of unjustified invasion of privacy under section 14(3), I next consider the section 14(2) factors. As I explain below, there are competing factors present here, but on balance, I find that the importance of public scrutiny of the actions of the police through disclosure of the statement outweighs the factors in favour of withholding the statement.

[44] Section 14(2) lists several factors that may be relevant in determining whether disclosure of personal information would be an unjustified invasion of personal privacy.[24] Some of the factors, if established, weigh in favour of disclosure, while others weigh against disclosure.[25] If there are factors weighing both for and against disclosure, it must be determined whether the factors favouring disclosure outweigh those favouring non-disclosure or vice versa.

[45] The list of factors under section 14(2) is not a complete list. The institution must also consider any other circumstances that are relevant, even if these circumstances are not listed under section 14(2).[26]

[46] Each of the first four factors, found in sections 14(2)(a) to (d), if established, would tend to support disclosure of the personal information in question, while the remaining five factors found in sections 14(2)(e) to (i), if established, would tend to support non-disclosure of that information.

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[22] Executive Summary - Report of the Kaufman Commission on Proceedings Involving Guy Paul Morin - Ministry of the Attorney General (archive-it.org)
[23] *Ibid.*
[24] Order P-239.
[25] If no factors favouring disclosure are present, the section 14(1) exemption applies because the exception in section 14(1)(f) has not been proven: Orders PO-2267 and PO-2733.
[26] Order P-99.

Factor weighing in favour of disclosure of the statement

[47] I find that the public scrutiny factor weighs in favour of the disclosure of the statement. That factor is listed in 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,
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> > the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny[.]

[48] According to the appellant, he has been told that none of the three police services that investigated the girl's disappearance and homicide (York, Durham and Toronto) interviewed the perpetrator, despite York Police's having been in possession of the statement of the witness (the perpetrator's wife) and, presumably, through it, having gained information as to the perpetrator's activities in the days surrounding the girl's disappearance.

[49] The police's failure to interview the perpetrator is already publicly known. However, what is not publicly known is whether and what information in the witness's statement could or should have prompted the police to investigate him at an earlier stage.

[50] According to the Executive Summary of the Kaufman Report,[27] Justice Kaufman concluded that the investigation by York Police was "flawed," resulting in "missed opportunities, an inadequate investigation, at times, of potentially significant leads, and a failure to document important information." He could not determine whether the true perpetrator of the crime would have been apprehended if the investigation had been differently conducted.

[51] The Kaufman Report did recognize that "there have been significant changes in the [York Police] and conduct of an investigation since then," but that further improvement is possible.

[52] The respondent argues that the police's actions have already been scrutinized through the Kaufman Inquiry, though it agrees that the inquiry did not refer to the statement at issue. The appellant argues that the police never produced the statement during the inquiry, while the respondent says that the statement would have been turned over to the inquiry and that Justice Kaufman may not have referred to it because he felt it was of limited relevance.

[53] The Kaufman Inquiry was conducted in 1997 – before the true perpetrator was identified in 2020. No matter how thorough the inquiry was, it was undertaken before

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[27] Supra note 22.

the identity of the actual perpetrator was known and therefore would not have been expected to scrutinize, in particular, any investigation or lack thereof into his activities.

[54] A young girl was murdered. The appellant, who was not guilty of the crime, was convicted and jailed for murder while the actual perpetrator was never apprehended and was only identified after his death. The York Police interviewed the wife of the actual perpetrator, but not the perpetrator himself.

[55] In my view, it is desirable for the purposes of public scrutiny of the police that the witness statement be made public. Regardless of whether the witness statement does or does not lead to a suggestion that the police ought to have interviewed the witness's husband (the perpetrator), disclosure will promote public scrutiny of the investigation by the York Police. It will also promote public scrutiny of the Durham Police, who took over the investigation when the girl's body was found in Durham Region, and the Toronto Police, who took over the investigation after the Court of Appeal exonerated the appellant.[28]

[56] I acknowledge that the statement was taken in 1984 and that the police's investigative methods may have evolved since that time, thanks at least in part to the recommendations of the Kaufman Inquiry. This does not diminish the public interest in disclosure of the statement in the circumstances to shed light on aspects of the investigation that the Kaufman Inquiry may not have particularly examined. As such, I find that disclosure of the statement is desirable for public scrutiny of the police, and for the police to maintain accountability to the public for their actions and inactions.

Factors weighing against disclosure of the statement

[57] The respondent relies on a number of factors that it argues support the non-disclosure of the statement. Specifically, they rely on sections 14(2)(e), (f), (h) and (i), which read as follows:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
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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; and

[28] According to the respondent, York Police's entire original investigative file was provided to the Toronto Police. Presumably the file (or copies of it) was also handed over to the Durham Police after the missing child investigation turned into a homicide investigation.

> (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

[58] Significant portions of the respondent's representations on these factors have been withheld from the appellant, but I have taken them into account and will refer to the public portions in this order. I have also taken into account the representations of the witness and the other affected party, both of whom oppose disclosure of the statement.[29]

[59] The identity of the perpetrator is publicly known and the witness, his ex-wife (his wife at the time of the murder), has given a public statement about her shock upon learning that he was the perpetrator of the murder. The stress upon her as a result of being publicly identified as the perpetrator's wife is undeniable. I accept that the release of the statement to the appellant and, presumably, into the public forum will cause her further stress which, in the circumstances, is unfair to her. I find, therefore, that section 14(2)(e) is relevant in the circumstances.

[60] For similar reasons, I find that section 14(2)(f) is relevant. To be considered "highly sensitive," there must be a reasonable expectation of significant personal distress if the information is disclosed.[30] For example, personal information about witnesses, complainants or suspects in a police investigation may be considered highly sensitive.[31] Having reviewed her representations and considering the circumstances, I accept that the release of the witness's statement will cause her significant distress.

[61] I am not convinced, however, that the statement was given to the police in confidence [section 14(2)(h)]. The police were investigating the disappearance of a young girl and in my view, the witness could have expected that the information she provided to police might be shared with others if needed in order to locate the child. I see nothing in the statement itself or the surrounding circumstances to suggest that the witness reasonably expected that her statement would remain confidential.

[62] Finally, the respondent argues that disclosure of the statement may unfairly damage the reputation of the witness [section 14(2)(i)]. While this is not something that the witness herself has raised, I accept that such an outcome is possible, given that she was married to the perpetrator at the time of the murder.

[63] As I noted above, I notified the girl's family, as well as another affected party; the latter provided representations. I cannot refer to their arguments in detail without revealing the content of the record at issue, the statement. I accept, however, that the information about the girl's family and the other affected party in the statement is highly sensitive because disclosure of the statement will likely cause them significant distress as well.

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[29] The girl's family were notified of the appeal but did not make representations.
[30] Orders PO-2518, PO-2617, MO-2262 and MO-2344.
[31] Order MO-2980.

[64] I have also taken into account that the statement as a whole is highly sensitive information about the young girl, given the later discovery that she had been murdered. This is notwithstanding the fact that information relating to her is not "personal information" as defined in the *Act* given that more than thirty years have passed since her death [section 2(2)].

Balancing the factors

[65] In deciding whether disclosure of the statement would be an unjustified invasion of personal privacy, I must consider and weigh the factors for and against disclosure.

[66] In my view, the public scrutiny factor favouring disclosure ought to be given significant weight. The respondent argues in its discussion of this factor that the appellant intends to use the statement for a potential civil suit. While that may be (and I make no finding in that regard), that fact does not negate the interest in public scrutiny of the police's investigations.

[67] The factors weighing against disclosure are also significant. The witness and the other affected party, understandably, do not want these tragic events to be rehashed in the public realm indefinitely. I am mindful of the distress that disclosure of the statement will cause them and the girl's family. As for the appellant's argument that the witness's privacy interests are diminished because she gave statements to the media after her husband was identified as the perpetrator, I do not entirely accept this. Although she has already been publicly identified as the perpetrator's wife at the time of the murder, there is no evidence before me that she recounted the entire contents of the statement to the media or that the details in the statement are otherwise in the public realm. Indeed, the appellant himself argues that the statement will reveal something new to the public that is not already in the public domain. That the witness offered some of her personal details to the media does not automatically make the entire statement fair game for disclosure.

[68] I am also mindful, however, of the fact that the statement does not reveal any particularly intimate information about the witness, the girl or the other affected party. This is in contrast to, for example, the intimate personal information that was at issue in Order MO-4222, another order addressing a request for information about a renowned killer.[32]

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[32] In that order, the IPC found that the personal privacy exemption in section 14(1) applied to the video of a police interview of an individual who had murdered three men and went on to murder several more after he was released after the interview. The adjudicator also found that there was no compelling public interest in disclosure of the video that outweighed the purpose of the personal privacy exemption in that case. The adjudicator found that the video had already been scrutinized by Justice Gloria J. Epstein in the context of her detailed review of (and subsequent public report on) the police's handling of that murder investigation: Independent Civilian Review into Missing Person Investigations by Toronto Police Services. The adjudicator also stressed the intimate nature of much of the information the appellant provided to the police about the victims and other individuals.

[69] Having regard to the serious miscarriage of justice that occurred in this case, I am of the view that the public scrutiny factor must prevail over the factors favouring non-disclosure. As a result, disclosure of the statement would not be an unjustified invasion of personal privacy and the statement is not exempt from disclosure under section 14(1). The respondent must therefore disclose it.

[70] However, there is a small amount of demographic and contact information of various individuals in the statement. In my view, disclosure of these portions of the record will not assist in subjecting the police to public scrutiny. Since there are no other factors favouring disclosure of this particular information, I find that it is exempt from disclosure under section 14(1).

[71] I will next address the application of the public interest override to the statement.

Issue C: Is there a compelling public interest in disclosure of the statement that clearly outweighs the purpose of the section 14(1) exemption?

[72] Above, I have found that the statement (except for some demographic and contact information) is not exempt under section 14(1). However, even if it were,[33] I find for the following reasons that there is a compelling public interest in disclosure that clearly outweighs the purpose of the section 14(1) exemption.

[73] Section 16 of the *Act*, the public interest override, provides for the disclosure of records that would otherwise be exempt under another section of the *Act*. It states:

> An exemption from disclosure of a record under sections 7, 9, 9.1, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[74] For section 16 to apply, two requirements must be met:

- there must be a compelling public interest in disclosure of the records, and
- this interest must clearly outweigh the purpose of the exemption.

[75] The *Act* does not state who bears the onus to show that section 16 applies. The IPC reviews a record with a view to determining whether there could be a compelling public interest in disclosure that clearly outweighs the purpose of the exemption.[34]

There is a compelling public interest in disclosure

[76] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s

[33] For example, if a section 14(3) presumption applied to it.
[34] Order P-244.

central purpose of shedding light on the operations of government.[35] In previous orders, the IPC has stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has in order to express public opinion or to make political choices.[36]

[77] A public interest does not exist where the interests being advanced are essentially private in nature.[37] However, if a private interest raises issues of more general application, the IPC may find that there is a public interest in disclosure.[38]

[78] The IPC has defined the word "compelling" as "rousing strong interest or attention".[39]

[79] The IPC must also consider any public interest in not disclosing the record.[40] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling."[41]

[80] A compelling public interest in disclosure has been found to exist where, for example, the integrity of the criminal justice system is in question;[42] or where the records show whether or not the supervision of a probationer convicted of assault was adequate, in light of the fact that he went on to murder several men.[43]

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

- another public process or forum has been established to address public interest considerations,[44]
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations,[45]
- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding,[46]

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[35] Orders P-984 and PO-2607.
[36] Orders P-984 and PO-2556.
[37] Orders P-12, P-347 and P-1439.
[38] Order MO-1564.
[39] Order P-984.
[40] *Ontario Hydro v. Mitchinson,* [1996] O.J. No. 4636 (Div. Ct.).
[41] Orders PO-2072-F, PO-2098-R and PO-3197.
[42] Order PO-1779.
[43] Order PO-4375.
[44] Orders P-123/124, P-391 and M-539.
[45] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[46] Orders M-249 and M-317.

- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter,[47] or
- the records do not respond to the applicable public interest raised by the appellant.[48]

[82] For the same reasons set out in my discussion above of the public scrutiny factor, I conclude that there is a compelling public interest in disclosure of the statement. In my view, the information in the statement will serve the purpose of adding to the information the public knows about the police investigation, enabling them to express public opinion on a matter that has roused strong interest by the public, due in large part to the wrongful conviction of the appellant and the identification of the actual perpetrator some 25 years later.

[83] The perpetrator was never interviewed, even though his wife was. In my view, there is a compelling public interest in the disclosure of the statement to understand whether the statement should have prompted follow-up with the witness's husband. As I said above, it may be that there is nothing in the statement, over and above what is already known,[49] that suggests the police ought to have interviewed the witness's husband (the perpetrator). Or it may be that there is. In either case, disclosure will serve the purpose of informing the public about what turns out to have been a pivotal point in the police's investigation.

[84] The respondent argues that there is no public interest in the disclosure of the statement because the matter has already been covered extensively by the media and through the Kaufman Inquiry, and the statement is not going to reveal anything new that has not already been revealed to the public. It argues again that the appellant's interest is a private one. The respondent argues that the appellant:

> [seeks] access to the record to know whether the York Regional Police Service and the Durham Regional Police Service failed to follow up on investigative leads, which if they had been properly pursued, would have pre-empted the investigation, arrest and wrongful conviction of [the appellant]. There has already been wide public coverage or debate of the issues of activities of the police in relation to the investigations…[A] royal commission appointed by the Government of Ontario to address the wrongful conviction of the appellant by inquiring into the conduct of the investigation into the death of [the girl] and … the commissioner released a report with 119 recommendations. In the [public's] eyes, the knowledge of how the police failed to properly investigate the murder of [the girl] has

[47] Order P-613.
[48] Orders MO-1994 and PO-2607.
[49] According to the appellant, the perpetrator was one of a few people named by the girl's mother as being permitted to be in the girl's home without either parent present.

> already been addressed by way of the 119 recommendations that were made in the Kaufman report.

[85] Although the appellant may have a private interest in the disclosure of the statement to him, that does not negate the strong public interest in the disclosure of this record. Moreover, as I noted earlier, the Commission's inquiry and report pre-date the identification of the witness's husband as the real perpetrator of the murder. The appellant says that the statement was not disclosed during the inquiry and the respondent admits it does not have an explanation for why it was not, but merely speculates that the statement was not seen as relevant to the issues explored in the inquiry.

[86] In my view, the subsequent identification of the actual perpetrator casts a new light on the investigation. It appears likely, or at the very least possible, that the reason the statement was not mentioned during the inquiry is that its relevance was not appreciated at the time.

[87] The respondent argues that there is a compelling public interest in the *non*-disclosure of the statement, since if there is no protection from disclosure of these types of statements to the general public, the public will be reluctant to cooperate with the police in future investigations.

[88] I do not accept this submission. I accept that the public's cooperation with police in investigations of this sort is critical. However, it is not the case that witness statements would have "no protection" from disclosure if I find that the public interest override applies here. Rather, an application of the public interest override in this case shows only that in certain specific circumstances, where there is a compelling reason to do so, a statement might have to be disclosed. I am not convinced that the prospect of such disclosure in compelling circumstances would have any meaningful impact on the public's cooperation with police in future.

[89] I find, therefore, that there is a compelling public interest in disclosure of the statement, except for the same demographic and contact information I referred to above.[50]

The public interest clearly outweighs the purpose of the exemption

[90] The existence of a compelling public interest is not enough to require disclosure under section 16. This public interest must also clearly outweigh the purpose of the exemption in the specific circumstances. An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the

[50] The appellant does not seek access to the witness's date of birth. There are some additional small portions of demographic and contact information that I will order withheld.

exemption.[51]

[91] The respondent argues that any compelling public interest in the release of the statement does not clearly outweigh the purpose of the personal privacy exemption, which is to protect the privacy of individuals. The respondent argues that disclosing the statement will negatively affect the witness and others, all of whom have already been exposed to significant stress.

[92] In the circumstances of this case, I find that the compelling public interest in disclosure of the statement clearly outweighs the purpose of the personal privacy exemption.

[93] I acknowledge that disclosure of the statement to the appellant has the strong potential to bring the affected parties' tragedies to the forefront yet again. After almost forty years since the murder, they would reasonably hope to try to put this matter behind them to the extent possible and not have to relive it time and again.

[94] In the circumstances, however, I give greater weight to the public interest. The police's investigation in this case resulted in a serious miscarriage of justice, with one man wrongly convicted and incarcerated, while the real killer was never brought to justice. The appellant spent a decade in the public eye as the purported murderer of the girl. The Kaufman Inquiry took place years before the actual perpetrator was identified; understandably, the statement at issue before me would not have figured prominently in that Commission. The parties agree that it was not even mentioned. As a result, it cannot be said that all public interest considerations have already been addressed in that inquiry.[52] I find that the public interest override applies to require the disclosure of this statement.

ORDER:

1. I order the respondent to disclose the statement to the appellant. Certain demographic and contact information is to be withheld. I have highlighted the information that is to be withheld in the copy of the statement I am providing to the respondent with its copy of this order.

2. I order the respondent to disclose the statement by **June 27, 2023** but not before **June 22, 2023**. The respondent is to copy me on its letter disclosing the statement to the appellant.

Original Signed by: May 23, 2023
Gillian Shaw

[51] Order P-1398, upheld on judicial review in *Ontario v. Higgins,* 1999 CanLII 1104 (ONCA), 118 OAC 108.
[52] Again, this is in contrast to the Epstein review referred to in Order MO-4222, which carefully reviewed, and publicly reported on, the very record at issue in Order MO-4222.

Senior Adjudicator

APPENDIX

14. (1) A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

a. upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;

b. in compelling circumstances affecting the health or safety of an individual, if upon disclosure notification thereof is mailed to the last known address of the individual to whom the information relates;

c. personal information collected and maintained specifically for the purpose of creating a record available to the general public;

d. under an Act of Ontario or Canada that expressly authorizes the disclosure;

e. for a research purpose if,

    i. the disclosure is consistent with the conditions or reasonable expectations of disclosure under which the personal information was provided, collected or obtained,

    ii. the research purpose for which the disclosure is to be made cannot be reasonably accomplished unless the information is provided in individually identifiable form, and

    iii. the person who is to receive the record has agreed to comply with the conditions relating to security and confidentiality prescribed by the regulations; or

f. if the disclosure does not constitute an unjustified invasion of personal privacy.

(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,

a. the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;

b. access to the personal information may promote public health and safety;

c. access to the personal information will promote informed choice in the purchase of goods and services;

d. the personal information is relevant to a fair determination of rights affecting the person who made the request;

e. the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;

f. the personal information is highly sensitive;

g. the personal information is unlikely to be accurate or reliable;

h. the personal information has been supplied by the individual to whom the information relates in confidence; and

i. the disclosure may unfairly damage the reputation of any person referred to in the record.

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

a. relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

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;

c. relates to eligibility for social service or welfare benefits or to the determination of benefit levels;

d. relates to employment or educational history;

e. was obtained on a tax return or gathered for the purpose of collecting a tax;

f. describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

g. consists of personal recommendations or evaluations, character references or personnel evaluations; or

h. indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

(4) Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,

a. discloses the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution; or

b. discloses financial or other details of a contract for personal services between an individual and an institution.

c. discloses personal information about a deceased individual to a spouse or close relative of the deceased individual, and the head is satisfied that, in the circumstances, the disclosure is desirable for compassionate reasons.

(5) 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.