

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4474

Appeal MA17-716

City of Kawartha Lakes Police Services Board

December 21, 2023

Summary: The appellant is the father of Soleiman Faqiri, an inmate who died after an altercation with correctional officers at Central East Correctional Centre on December 15, 2016. The Kawartha Lakes Police Service (KLPS), which investigated the inmate's death, disclosed some records to the appellant in response to his access request under the *Act*. However, it denied access to other records under a number of exemptions, including sections 8(1)(e) (endanger life or safety), 9(1) (relations with other governments), 13 (threaten safety or health), 14(1) (personal privacy) and 38(a)/(b) (discretion to refuse access to requester's own personal information). The appellant raised the public interest override in section 16 of the *Act* and claimed that there is a compelling public interest in disclosing these records that clearly outweighs the purposes of the exemptions claimed by the KLPS.

In this order, the adjudicator finds that the main contents of a significant number of records that qualify for exemption under section 14(1) of the *Act* must be disclosed to the appellant because the public interest override in section 16 applies to them. These records include 41 typewritten brief synopses of video witness statements that correctional staff provided to the KLPS, a typewritten witness statement provided by a correctional staff person, and 15 handwritten notes prepared by KLPS officers. He orders the KLPS to disclose these records to the appellant but to sever some personal information of correctional staff and other inmates.

The adjudicator also finds that the public interest override in section 16 does not apply to records relating to an Institutional Crisis Intervention Team that was put on standby at the correctional centre on the day the inmate died and the video witness statements of correctional staff and other inmates. He upholds the KLPS's decision to withhold those records under sections 9(1)(b) and 14(1) respectively.

Finally, the adjudicator finds that the discretionary exemptions in sections 8(1)(e) and 13 do not apply to any information of correctional staff in the records. However, he finds that some information that was found to be exempt from disclosure under section 14(1)(k) (security) of the *Freedom of Information and Protection of Privacy Act* in Order PO-4428 must also be found exempt from disclosure in the records at issue in this appeal under the equivalent provision in section 8(1)(k) of the *Act*.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of "personal information"), 2(2.1), 8(1)(e), 8(1)(k), 9(1)(b), 13, 14(1), 14(3)(b), 14(3)(d), 14(4)(c), 16, 38(a), 38(b) and 54(a); *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 14(1)(k); *Coroner's Act*, R.S.O. 1990, c. C.37, sections 31(1) and (2).

Orders Considered: Orders P-1137, PO-4269-I, PO-4428 and MO-2237.

Cases Considered: *Duncanson v. Fineberg* 1999 CanLII 18726 (ON SCDC); *Ontario (Ministry of Community and Social Services) v. John Doe* 2015 ONCA 107 (CanLII); *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII).

OVERVIEW:

[1] On December 15, 2016, Soleiman Faqiri (the inmate or the deceased inmate) died after an altercation with correctional officers in a segregation cell at Central East Correctional Centre (the correctional centre) in Lindsay. His death was covered widely in the media and triggered a criminal investigation by the Kawartha Lakes Police Service (KLPS). The KLPS later announced that there were no grounds for bringing criminal charges against the correctional officers involved in the altercation with the inmate.¹

Access request

[2] The deceased inmate's father (the appellant) submitted an access request on behalf of the family to the KLPS² for all general records and personal information relating to his son's death and provided a list of the types of records that he was seeking.

[3] In response to his access request, the KLPS located a number of records relating to its criminal investigation into the inmate's death, which can be broken down into two broad categories:

- (1) records created by the KLPS, such as witness statements taken from various individuals, including correctional staff and other inmates (both

¹ www.cbc.ca/news/canada/toronto/soleiman-faqiri-criminal-charges-inmate-death-1.4377327

² The definition of "institution" in paragraph (b) of section 2(1) of the *Act* includes a "police services board." Consequently, the institution in this appeal is formally the City of Kawartha Lakes Police Services Board. However, the KLPS processes access-to-information requests on behalf of the Board.

video statements and typewritten brief synopses of some of those statements); and

(2) records that the KLPS obtained from the correctional centre, including an inmate incident report, occurrence reports, use of force occurrence reports, surveillance videos, and records prepared by the Institutional Crisis Intervention Team (ICIT).³

[4] The KLPS then notified a number of correctional staff about the access request and asked for their views as to whether disclosing the information about them would constitute an unjustified invasion of their personal privacy under the *Act*. It also notified the Ministry of the Solicitor General (the ministry)⁴ about the access request and asked for its views about whether the records should be disclosed to the appellant. Both the ministry and some correctional staff objected to any records being disclosed to the appellant.

[5] The KLPS then issued an access decision to the appellant and denied access to the responsive records in full because disclosing them may interfere with an internal ministry investigation into the inmate's death. It cited the discretionary exemption in section 38(a) (discretion to refuse access to requester's own personal information), read with various exemptions in section 8 (law enforcement), and the discretionary exemption in section 38(b) (personal privacy) of the *Act*. However, it further stated that once the ministry's internal investigation was concluded, the records might be disclosed.

Appeal

[6] The appellant appealed the KLPS's access decision to the Information and Privacy Commissioner of Ontario (IPC), and a mediator was assigned to assist the parties in resolving the issues in dispute.

[7] During mediation, the KLPS issued three revised access decisions to the appellant and disclosed a number of records to him, including photos of the deceased inmate and the written synopses of the video statements made by several inmates, with their names redacted. It also disclosed the video witness statements of two paramedics and five inmates who consented to their statements being disclosed to the appellant. The revised access decisions stated that these records were being disclosed to the appellant for compassionate reasons under section 14(4)(c) of the *Act*.⁵

³ An ICIT is responsible for controlling violent or potentially violent inmates as well as removing and escorting these inmates within the institution or transferring them to another institution.

⁴ At that time, that ministry was known as the the Ministry of Community Safety and Correctional Services. The ministry manages provincial correctional institutions in Ontario, including Central East Correctional Centre, and employs most of their staff, such as correctional officers.

⁵ The head of an institution must consider section 14(4) in assessing whether the mandatory personal privacy exemption in section 14(1) of the *Act* applies to personal information. Section 14(4)(c) states that despite section 14(3), a disclosure does not constitute an unjustified invasion of personal privacy if it

[8] The KLPS did not disclose other records, including the video witness statements made by correctional staff, the typewritten brief synopses of those video statements, and the remaining video witness statements provided by other inmates. It also did not disclose any of the records that it obtained from the correctional centre. It denied access to these remaining records under section 38(a), read with sections 8(1)(e) (endanger life or safety) and 13 (threaten safety or health), and under section 38(b) of the *Act*.

Adjudication

[9] This appeal was not resolved during mediation and was moved to adjudication for an inquiry. The adjudicator initially assigned to this appeal sought representations on the issues to be resolved from the KLPS and more than 100 affected parties, including the ministry and those individuals whose information is in the records, such as correctional staff and other inmates. He received representations from the KLPS, the ministry, three correctional staff, and a lawyer representing 19 correctional officers and nurses. None of the inmates submitted representations.

[10] In its representations, the KLPS made a new exemption claim. It claimed that the records that it obtained from the correctional centre are exempt from disclosure under the mandatory exemption in section 9(1) (relations with other governments) of the *Act*. These records include an inmate incident report, occurrence reports, use of force occurrence reports, surveillance videos, and ICIT records.

[11] This appeal was transferred to me to continue the inquiry. As this appeal moved through adjudication, there were a number of external developments. The family of the deceased inmate filed a \$14.3 million civil suit against the ministry, the superintendent of the correctional centre, and seven correctional staff.⁶ In addition, the Ontario Provincial Police (OPP) re-opened the criminal investigation into the inmate's death that had been previously conducted by the KLPS.⁷

[12] This appeal was put on hold while the OPP investigation took place. The OPP later announced that no criminal charges would be laid against any correctional staff.⁸

[13] I took this appeal off hold and sought and received representations from the appellant on the issues to be resolved. In his representations, the appellant cited the public interest override in section 16 of the *Act*, claiming that there is a compelling public interest in disclosing the records that clearly outweighs the purposes of the

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

⁶ www.cbc.ca/news/canada/toronto/soleiman-faqiri-lawsuit-sues-eye-witness-1.4997830

⁷ www.thepeterboroughexaminer.com/news/peterborough-region/opp-reopen-investigation-into-soleiman-faqiris-death-at-the-lindsay-superjail/article_b485c89b-42d1-593b-bb8e-5037423c4e4e.html?

⁸ <https://www.cbc.ca/news/canada/toronto/soleiman-faqiri-ontario-jail-charges-1.5674400>

exemptions claimed by the KLPS.

[14] There was then another external development relating to the inmate's death. The Ontario Chief Pathologist released a new report that cited the following reasons for his death: "Prone position restraint and musculocutaneous injuries sustained during struggle, exertion and pepper spray exposure in the setting of cardiomegaly and worsening symptoms of schizophrenia."⁹

[15] As a result of this report, the OPP revisited its criminal investigation into the inmate's death. However, it later advised the family that although it had reviewed and considered the Ontario Chief Pathologist's report, there were insufficient grounds to lay criminal charges against any correctional staff.¹⁰

[16] I then continued my inquiry under the *Act* and asked the ministry to provide me with updated contact information for the correctional staff and inmates who are affected parties in both this appeal and related appeal PA18-267. With respect to this related appeal, the same appellant had filed a separate access request to the ministry under the *Freedom of Information and Protection of Privacy Act (FIPPA)*¹¹ for "all records and personal information" about his son held by the ministry. The ministry decided to disclose some records to him but denied access to others, and he appealed its access decision to the IPC, which opened appeal PA18-267. The correctional staff and some of the inmates are affected parties in both appeals (PA18-267 and MA17-716) because there is information about them in the records at issue in each appeal.

[17] The ministry initially agreed to provide me with updated contact information for these affected parties, but later changed its position and refused.¹² As a result, I issued Interim Order PO-4269-I, in which I ordered the ministry to provide me with updated contact information for the affected parties in appeals PA18-267 and MA17-716 (this appeal). The ministry complied with this interim order and provided me with updated contact information for these individuals.

[18] I then sent a copy of the appellant's representations to the KLPS and all of the affected parties and invited them to reply to the appellant's representations, including his claim that the records should be disclosed because the public interest override in section 16 applies to them. In response, I received reply representations from the ministry, one correctional staff person, and the lawyer representing 19 correctional officers and nurses.

[19] After receiving all representations from the parties, I identified an additional issue. In appeal PA18-267, the ministry claimed that some records are excluded from

⁹ www.newswire.ca/news-releases/ontario-s-chief-forensic-pathologist-ascertains-cause-of-death-in-case-of-soleiman-faqiri-814789312.html

¹⁰ www.cbc.ca/news/canada/toronto/soleiman-faqiri-no-charges-1.6558485

¹¹ R.S.O. 1990, c. F.31.

¹² The ministry's reasons for changing its position are cited in paragraph 17 of Interim Order PO-4269-I.

FIPPA by section 65(6). This provision excludes certain records held by an institution that relate to labour relations or employment matters. If the exclusion applies, a record is not subject to the access scheme in *FIPPA*.¹³ Some of those same records are also at issue in this appeal because the KLPS obtained them from the correctional centre during its criminal investigation into the inmate's death.

[20] None of the parties in this appeal, including the KLPS, the ministry and the correctional staff who are affected parties, claimed that any of the records at issue are excluded from the *Act* by section 52(3), which is the equivalent to section 65(6) of *FIPPA*. During my inquiry in appeal PA18-267, I asked all of the parties the following question:

If the ministry records, such as the surveillance videos and use of force occurrence reports, are excluded from [*FIPPA*] in this appeal (PA18-267) under section 65(6), would copies of the same records in the hands of the [KLPS] in appeal MA17-716 also be excluded under the equivalent provision in section 52(3) of [the *Act*]?

[21] Only the ministry provided representations on this issue. The ministry claimed that any records that are excluded from *FIPPA* by section 65(6) in appeal PA18-267 would also be excluded from the *Act* by section 52(3) in this appeal.

[22] On August 18, 2023, I issued Order PO-4428, which disposed of appeal PA18-267. I found that some records were excluded from *FIPPA* by section 65(6), but others, such as the use of force occurrence reports and surveillance videos, are not. As it turns out, none of the records that I found to be excluded from *FIPPA* under section 65(6) are at issue in this appeal. As a result, the issue of whether any such records would also be excluded from the *Act* under section 52(3) in this appeal is moot and it is not necessary to address it in this order.

[23] Finally, I informed the appellant that in order to narrow the large number of records at issue in this appeal, I would be removing from its scope any records that were already addressed in Order PO-4428. In response, the appellant stated that he had no objection to this approach. This means that many of the records that the KLPS obtained from the correctional centre are no longer at issue, including an inmate incident report, occurrence reports, use of force occurrence reports, and surveillance videos.

[24] In this order, I find that:

- The records at issue contain the "personal information," as that term is defined in section 2(1) of the *Act*, of the deceased inmate, correctional staff and other inmates.

¹³ Order PO-2639.

- The discretionary exemptions in sections 38(a) and (b) of the *Act* cannot apply to the records at issue because they do not contain the requester's (appellant's) own personal information.
- The records relating to the ICIT that the KLPS received from the correctional centre are exempt from disclosure under the mandatory exemption in section 9(1)(b) of the *Act* because disclosing them could reasonably be expected to reveal information that the KLPS received in confidence from the Government of Ontario.
- The personal information of the deceased inmate, correctional staff and other inmates in the records is exempt from disclosure under section 14(1) of the *Act*, because disclosing it to the appellant would constitute an unjustified invasion of these individuals' personal privacy.
- The discretionary exemptions in sections 8(1)(e) and 13 of the *Act* do not apply to those records that identify correctional staff by name because disclosure could not reasonably be expected to endanger their lives or physical safety or seriously threaten their safety or health.
- The ministry, which is an affected party in this appeal, is not permitted to raise the other discretionary exemptions in section 8 of the *Act* not claimed by the KLPS. However, some information which was found to be exempt from disclosure under section 14(1)(k) (security) of *FIPPA* in Order PO-4428, is also exempt from disclosure in the records at issue in this appeal under section 8(1)(k) of the *Act*, because disclosing it could reasonably be expected to jeopardize the security of a centre for lawful detention. This information includes the hourly schedule of correctional staff and a specific procedure that staff follow when responding to an emergency code.
- The public interest override in section 16 of the *Act* applies to most of the contents of the typewritten brief synopses of witness statements that correctional staff provided to the KLPS, a typewritten witness statement provided by a correctional staff person, and the handwritten notes prepared by KLPS officers. However, section 16 does not apply to the video witness statements that correctional staff and other inmates provided to the KLPS and the ICIT records that the KLPS received from the correctional centre.

[25] I therefore order the KLPS to disclose to the appellant severed versions of the following records: the typewritten brief synopses of witness statements that correctional staff provided to the KLPS, a typewritten witness statement provided by a correctional staff person, and the handwritten notes prepared by KLPS officers. I uphold the KLPS's decision to deny access to the ICIT records that it received from the correctional centre and the video witness statements of correctional staff and other inmates.

RECORDS:

[26] The records remaining at issue in this appeal include:

- 28 video witness statements that correctional staff provided to KLPS officers investigating the inmate's death;
- 41 typewritten brief synopses of the video witness statements that correctional staff provided to KLPS officers;
- 1 typewritten witness statement that a correctional staff person provided to the KLPS;
- 15 handwritten notes prepared by KLPS officers, including lists of questions for specific witnesses;
- 16 video witness statements that other inmates provided to KLPS officers investigating the inmate's death;
- 9 ICIT activation reports that the KLPS obtained from the correctional centre;
- 1 SMEAC (Situation, Mission, Execution, Administration and Communication) briefing note prepared by ICIT that the KLPS obtained from the correctional centre; and
- 1 set of photos taken by ICIT that the KLPS obtained from the correctional centre.

[27] The records are summarized in a chart, which is attached as Appendix A to this order.

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?
- B. Do the discretionary exemptions in sections 38(a) and (b) apply to the personal information in the records?
- C. Does the mandatory exemption at section 9(1) for information received from other governments apply to the records?
- D. Does the mandatory personal privacy exemption at section 14(1) apply to the personal information in the records?

- E. Do the discretionary exemptions at sections 8(1)(e) and 13 regarding endangering life or physical safety or threatening safety or health apply to the records?
- F. Do any of the other discretionary law enforcement exemptions at section 8 raised by the ministry apply to the records?
- G. Under section 16, is there a compelling public interest in disclosure of the records that clearly outweighs the purposes of the section 9(1)(b) and 14(1) exemptions?

DISCUSSION:

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

[28] In order to decide which exemptions in the *Act* may apply to the records at issue, I must first decide whether these records contain "personal information," and if so, to whom the personal information relates.

[29] Section 2(1) of the *Act* gives a list of examples of personal information:

"personal information" means recorded information about an identifiable individual, including,

(a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

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

(e) the personal opinions or views of the individual except if they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to

that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(h) the individual's name 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.

[30] The list of examples of personal information under section 2(1) is not a complete list. This means that other kinds of information could also be "personal information."¹⁴

[31] 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.¹⁵ In addition, section 2(2.1) of the *Act* states:

(2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

[32] 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.¹⁶

Summary of parties' representations

KLPS

[33] The KLPS submits that the records contain the personal information of the appellant and correctional staff.

[34] It states that its officers spoke to the appellant and correctional staff during the investigation into the inmate's death. They collected information such as these individuals' addresses, telephone numbers, dates of births, gender and places of employment and also statements from them. It submits that the records at issue clearly contain the personal information of several identifiable individuals, including the appellant's "close relative."

[35] The KLPS further submits that although the correctional staff were working in a professional capacity, the nature of the incident will affect them in a personal capacity,

¹⁴ Order 11.

¹⁵ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

¹⁶ Orders P-1409, R-980015, PO-2225 and MO-2344.

which brings the information about them into the realm of “personal information.”

Ministry

[36] The ministry states that because a law enforcement investigation took place involving the death of an inmate, a substantial amount of personal information relating to various individuals would have been collected by the KLPS and would be at issue in this appeal. It submits that this personal information could belong to the individual who provided it, or it could be about another individual.

[37] The ministry further submits that the records contain the personal information of correctional staff. In particular, it cites previous IPC orders that have found that 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.¹⁷ It claims that this principle applies to the information about correctional staff in the records.

[38] The ministry also cites Order PO-3053 and submits that the personal information provided by correctional staff as part of the KLPS investigation would consist of their personal information, because it would reveal something of a personal nature about them, namely their involvement as a witness or suspect in a law enforcement investigation.

Correctional staff

[39] The correctional staff, which includes correctional officers and nurses, submit that the records contain their personal information, as that term is defined in section 2(1) of the *Act*.

[40] In particular, they claim that the video witness statements contain images of them, allowing them to be identified outside of the correctional centre. They further submit that the audio track in these statements identifies them by name and contains their voices.

[41] The correctional staff state that this information is their personal information because it is about “identifiable individuals.” Moreover, they submit that such information is their personal information in accordance with paragraph (h) of the definition of personal information in section 2(1), because their names appear with other personal information relating to them.

[42] The correctional staff further submit that the records include details of their employment history, involvement in any prior incidents, and past training. They submit that such information is their personal information in accordance with paragraph (b) of the definition of personal information in section 2(1).

¹⁷ *Ibid.*

[43] They further assert that the records include reports that contain their views about the involvement of other staff and medical records that contain health care assessments and opinions. They submit that such information is their personal information in accordance with paragraph (g) of the definition of personal information in section 2(1).

[44] Finally, they submit that they do not, in their official capacity, release their full name to inmates or the families and friends of inmates. In performing their duties, they take steps to prevent the release of their full names. They submit that the exception in section 2(2.1) should not be applied to give members of the public more information through a request under *Act* than they would receive if dealing with correctional staff in their official capacity.

Appellant

[45] The appellant submits that the KLPS has failed to identify with any specificity that there is personal information in the records.

[46] With respect to the video witness statements provided by correctional staff and written synopses of those interviews, he states that the correctional staff were interviewed by the KLPS with respect to work done in their professional capacity as employees. He submits that the exception in section 2(2.1) of the *Act* provides that personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity. He further submits that it is not apparent that any of the information in the records goes beyond information related to the correctional staff in their professional capacity.

[47] The appellant states that while it is understandable that the correctional staff involved in the events that led to the death of the inmate may not wish their name and the nature of their involvement to be publicly connected to the event, that is not the test to be met to establish whether the records contain personal information. He submits that information does not become "personal information" just because it may reflect poorly on the individuals involved, and may result in a negative response from the public.

[48] With respect to the video witness statements provided by other inmates, the appellant concedes that they contain the inmates' personal information but submits that such information can be severed and the balance of these records disclosed.

Analysis and findings

[49] The records at issue include the video witness statements that correctional staff and other inmates provided to the KLPS, the typewritten brief synopses of the correctional staff's video witness statements, a typewritten witness statement provided by a correctional staff person, the handwritten notes prepared by KLPS officers, and

ICIT records.

[50] For the reasons that follow, I find that these records contain the “personal information” of numerous individuals, including the deceased inmate, correctional staff, and other inmates. However, they do not contain the “personal information” of the appellant.

Deceased inmate

[51] There is a substantial amount of information about the deceased inmate in all of the records. His name appears with other information relating to him in the various witness statements of correctional staff and inmates, and the handwritten notes of KLPS officers. This other information includes his race, religion, sex, medical history, and the views or opinions of other individuals about him.

[52] I find that the information about the deceased inmate in these records is clearly his “personal information.” In particular, it is “recorded information about an identifiable individual” that is personal in nature that falls within paragraphs (a), (b), (c), (g) and (h) of the definition of “personal information” in section 2(1).

Correctional staff

[53] At first glance, the records appear to be about correctional staff in their professional capacity rather than their personal capacity. None of the records contain the home addresses, birth dates or personal telephone numbers of these individuals. Instead, these records identify correctional staff by their name and job title, such as correctional officer or nurse. Such information is excluded from the definition of “personal information” by section 2(2.1) of the *Act*. In addition, these records also describe the conduct of these correctional staff on the day the inmate died when they were acting in their professional capacity.

[54] As noted above, however, 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.¹⁸ Consequently, the names and job titles of the correctional staff, coupled with information about their conduct, might still qualify as their personal information if it reveals something of a personal nature about them.

[55] The IPC has found in numerous orders that information in records about individuals that is collected and used for a law enforcement purpose, such as a criminal investigation, is their “personal information,” as that term is defined in section 2(1) of the *Act*.¹⁹

¹⁸ *Supra* note 16.

¹⁹ E.g., Orders PO-2604, PO-4336, PO-4411-F, MO-4274, and MO-4409.

[56] I agree with this finding from these previous orders and I find it relevant to the circumstances of this appeal. All of the information about the correctional staff in the records was collected as part of a criminal investigation by the KLPS into the death of the inmate. Even though these correctional staff are identified in a professional capacity in the records, the information about them reveals that they are witnesses or even possibly the subjects of a criminal investigation. In my view, this information reveals something of a personal nature about these individuals, which causes it to cross over from professional information into the realm of "personal information."

[57] Based on my review of the records, I find that there are also other types of personal information about correctional staff in these records. For example, in their video witness statements, some correctional staff describe their previous jobs in the correctional system, which qualifies as their "employment history." Such information falls within paragraph (b) of the definition of personal information in section 2(1). These records also contain images of the faces and bodies of correctional staff and the audio of their voices. Although not specifically listed in paragraphs (a) to (h) of the definition of personal information in section 2(1), I find that such information is personal in nature and hence qualifies as their personal information.

[58] In other records, correctional staff refer to the fact that they or other staff were suspended from their positions after the incident that led to the inmate's death. In my view, the information about a correctional employee's suspension from their position reveals something of a personal nature about them and causes it to cross over from professional information into the realm of "personal information." I find that this information falls within paragraph (h) of the definition of "personal information" in section 2(1) because the correctional employee's name appears with other personal information relating to that individual.

[59] Some parts of the records also reveal the emotional state of correctional staff, particularly in relation to the incident that led to the inmate's death. This information reveals something of a personal nature about them and it is, therefore, their "personal information." In particular, I find that this information falls within paragraph (h) of the definition of "personal information" in section 2(1) because the correctional employee's name appears with other personal information relating to that individual.

[60] In summary, I find that the records contain "recorded information about an identifiable individual" that qualifies as the "personal information" of correctional staff, as that term is defined in section 2(1) of the *Act*. This includes the video witness statements that correctional staff and other inmates provided to the KLPS, the typewritten brief synopses of the correctional staff's witness statements, a typewritten witness statement provided by a correctional staff person, and the handwritten notes prepared by KLPS officers.

Other inmates

[61] The records at issue include video witness statements that other inmates provided to the KLPS about the incident that led to the inmate's death. Some of the witness statements provided by correctional staff also identify these other inmates by name.

[62] These records reveal that these other inmates were incarcerated in the correctional centre and that they provided witness statements to the KLPS in a criminal investigation. In my view, this information is clearly "recorded information about an identifiable individual" that is personal in nature. I find, therefore, that the names and other information of each of these other inmates in the records falls within paragraph (h) of the definition of "personal information" in section 2(1) because each inmate's name appears with other personal information relating to that individual.

[63] In addition, the video witness statements provided by these inmates to the KLPS contain images of their faces and bodies and audio of their voices. I find that such information is personal in nature and hence qualifies as their personal information.

Appellant

[64] The appellant is the father of the deceased inmate. Although the records contain some indirect references to the deceased inmate's family, I find that they do not contain the appellant's "personal information," as that term is defined in section 2(1) of the *Act*.

Summary

[65] I find that the records contain the "personal information" of the deceased inmate, correctional staff and other inmates. However, they do not contain the "personal information" of the appellant.

B. Do the discretionary exemptions in sections 38(a) and (b) apply to the personal information in the records?

[66] The KLPS claims that the records contain the appellant's personal information and the discretionary exemptions in sections 38(a) and (b) of the *Act* therefore apply to these records. In particular, it claims that there is information in the records that is exempt from disclosure under section 38(a), read with sections 8 and 9. Moreover, it submits that the personal information of various individuals is exempt from disclosure under section 38(b).

[67] For the reasons that follow, I find that the sections 38(a) and (b) exemptions cannot apply to the records at issue because they do not contain the requester's (appellant's) own personal information.

[68] Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 provides some exemptions from this general right of access to one's own personal information. In particular, sections 38(a) and (b) state:

A head may refuse to disclose to the individual to whom the information relates personal information,

(a) if section 6, 7, 8, 8.1, 8.2, 9, 9.1, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information;

(b) if the disclosure would constitute an unjustified invasion of another individual's personal privacy;

[69] It is evident from the opening wording of sections 38(a) and (b) that they apply to records that contain the requester's own personal information. However, the requester (appellant) in this matter is the father of the deceased inmate and his personal information does not appear to be in any of the records that remain at issue in this appeal.

[70] An additional factor that must be considered in determining whether sections 38(a) and (b) apply to the personal information in the records is the appellant's argument that he can step into the shoes of his deceased son under the narrow circumstances in section 54(a) of the *Act*. This provision states:

Any right or power conferred on an individual by this Act may be exercised,

(a) if the individual is deceased, by the individual's personal representative if exercise of the right or power relates to the administration of the individual's estate;

[71] Under section 54(a), the appellant can exercise his deceased son's right of access under the *Act* if he can demonstrate that:

- he is the personal representative of his deceased son, and
- the right he wishes to exercise relates to the administration of his deceased son's estate.

[72] If the appellant meets the requirements of this section, then he is entitled to have the same access to the personal information of his deceased son as his son would have had. In other words, his request for access to the personal information of his deceased son would be treated as though the request came from the son himself.²⁰

²⁰ Orders M-927 and MO-1315.

This would mean that the right of access to one's own personal information in section 36(1) and the exemptions from that right in sections 38(a) and (b) would be at issue.

[73] The appellant states that he received a certificate of appointment to be the trustee for his deceased son's estate. He submits that he is therefore entitled to "step into the shoes" of his deceased son for the purposes of accessing his son's personal information in the records. In other words, his access request should be treated as if it came from his deceased son.

[74] I am not persuaded by this argument. A requirement to establish the application of section 54(a) with respect to an access request is that the exercise of that right must relate to the administration of the deceased individual's estate. It is evident from his arguments in the remainder of his representations that he is not seeking access to the information in the records held by the KLPS to administer his deceased son's estate. Rather, he is seeking such records to shed light on both the incident that led to his son's death and the KLPS's criminal investigation that took place.

[75] In these circumstances, I find that section 54(a) does not apply to the appellant's access request. As a result, his request for access to the personal information of his deceased son cannot be treated as though the request came from his son. Given that the records do not contain the appellant's personal information, this means that the right of access to one's own personal information in section 36(1) and the exemptions from that right in sections 38(a) and (b) are not at issue.

[76] In summary, I find that the discretionary exemptions in sections 38(a) and (b) cannot apply to any of the personal information in the records. Instead, it must be determined:

- whether the personal information of individuals other than the requester (appellant) are exempt from disclosure under the mandatory personal privacy exemption in section 14(1) of the *Act*, and
- whether there is information in the records that is exempt from disclosure under the discretionary exemptions in section 8 and the mandatory exemption in section 9(1) of the *Act*.

C. Does the mandatory exemption at section 9(1) for information received from other governments apply to the records?

[77] In its access decisions to the appellant in response to his request for records, the KLPS did not claim that the mandatory exemption in section 9(1) applies to any records. However, at the end of its representations, it claimed, for the first time, that the following records that its officers received from the correctional centre in the course of their criminal investigation into the inmate's death are exempt from disclosure under the mandatory exemption in section 9(1) of the *Act*: an inmate incident report, occurrence reports, surveillance videos, ICIT records and use of force occurrence

reports.

[78] However, almost all of these records are no longer at issue in this appeal because they were previously addressed in Order PO-4428 and the appellant agreed to remove them from the scope of this appeal. Consequently, the only records that the KLPS officers received from the correctional centre that remain at issue in this appeal are the ICIT records, which include nine ICIT activation reports, a SMEAC briefing note and photographs taken by ICIT.

[79] For the reasons set out below, I find that these ICIT records are all exempt from disclosure under section 9(1)(b) of the *Act*.

[80] Section 9 states, in part:

(1) A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,

...

(b) the Government of Ontario or the government of a province or territory in Canada;

...

(d) an agency of a government referred to in clause (a), (b) or (c);

...

(2) A head shall disclose a record to which subsection (1) applies if the government, agency or organization from which the information was received consents to the disclosure.

[81] The purpose of the section 9(1) exemption is to ensure that institutions under the *Act* can continue to receive information that other governments might not be willing to provide without some assurance that it will not be disclosed.²¹

[82] In his representations, the appellant claims that there is no evidence to show that the KLPS received the above records from the correctional centre "in confidence."

[83] I do not find this argument to be persuasive. In my view, disclosing the ICIT records could reasonably be expected to reveal information that the KLPS received in confidence from the Government of Ontario, because the correctional centre is part of the ministry. Given that the KLPS officers were conducting a criminal investigation into the inmate's death, I find that the ICIT records were received, at a minimum, with an

²¹ Order M-912.

implicit expectation of confidentiality.

[84] In summary, I find that the nine ICIT activation reports, a SMEAC briefing note and photographs taken by ICIT are exempt from disclosure under section 9(1)(b). In addition, I find below that the public interest override in section 16 of the *Act* does not apply to these records. As a result, they will not be ordered disclosed to the appellant.

D. Does the mandatory personal privacy exemption at section 14(1) apply to the personal information in the records?

[85] I have found that the records at issue contain the personal information of the deceased inmate, correctional staff and other inmates but not the requester (appellant).

[86] Where a requester seeks records containing the personal information of another individual, the mandatory exemption in section 14(1) prohibits an institution from disclosing this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies. In the circumstances, it appears that the only exception that could apply is section 14(1)(f), which states:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

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

[87] Sections 14(2), (3) and (4) help in deciding whether disclosing the personal information of another individual to the requester would or would not be an unjustified invasion of that individual's personal privacy.

[88] For the reasons that follow, I find that the personal information of the deceased inmate, correctional staff and other inmates is exempt from disclosure under section 14(1).

Summary of parties' representations

KLPS

[89] The KLPS submits that the exception in paragraph (f) of section 14(1) does not apply because disclosing the personal information of correctional staff and other inmates in the records to the appellant would constitute an unjustified invasion of their personal privacy.

[90] The KLPS claims that the presumption in section 14(3)(b) applies to these individuals' personal information. This presumption 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.

[91] The KLPS states that when a death occurs in a correctional facility, a police investigation takes place to rule out foul play which could result in criminal charges. It submits that the section 14(3)(b) presumption applies because the personal information of the correctional staff and other inmates was compiled and is identifiable as part of an investigation by its officers into a possible violation of the law.

[92] The KLPS further states that it considered the limitation in section 14(4)(c), which states:

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

(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.

[93] The KLPS states that while there are compassionate reasons for disclosing information about the incident that led to the inmate's death to his close family, it is necessary to withhold some records to protect the safety of the correctional staff. It submits that the limitation in section 14(4)(c) does not apply because the personal information in the records that it has already disclosed to the appellant should be enough to assist the inmate's close family in understanding the circumstances surrounding his death.

Ministry

[94] The ministry submits that the personal information of correctional staff and other inmates in the records is exempt from disclosure under section 14(1). It submits that the exception in paragraph (f) of section 14(1) does not apply because disclosing the personal information of these individuals to the appellant would constitute an unjustified invasion of their personal privacy.

[95] The ministry claims that all or close to all of the personal information in the records would be subject to the mandatory presumption against disclosure in section 14(3)(b) of the *Act*. It submits that the records were collected by the KLPS as part of their investigation into a possible violation of the law. Even though the KLPS did not criminally charge any correctional staff, the ministry cites previous IPC orders that have found that even if no criminal proceedings were commenced against any individuals,

section 14(3)(b) may still apply. For the presumption to apply, there need only be an investigation into a possible violation of law.²²

Correctional staff

[96] The correctional staff submit that their personal information in the records is exempt from disclosure under section 14(1). They submit that the exception in paragraph (f) of section 14(1) does not apply because disclosing their personal information to the appellant would constitute an unjustified invasion of their personal privacy.

[97] As with the KLPS and the ministry, the correctional staff submit that the presumption in section 14(3)(b) applies to the records containing their personal information. However, they also claim that the presumptions in sections 14(3)(d) and (g) are relevant. These presumptions state:

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

(d) relates to employment or educational history;

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

[98] With regard to the presumption in section 14(3)(d), the correctional staff submit that the records could include references to the experience of the officers involved, including their employment history, how they have handled similar matters in the past, and what training they received relevant to the incident on December 15, 2016.

[99] Finally, with respect to the presumption in section 14(3)(g), the correctional staff submit that the records could include evaluations of their conduct on the day in question.

Appellant

[100] The appellant submits that the personal information of correctional staff and other inmates in the records is not exempt from disclosure under section 14(1). He submits that the exception in paragraph (f) of section 14(1) applies because disclosing the personal information of these other individuals to him would *not* constitute an unjustified invasion of these individuals' personal privacy.

[101] The appellant claims that none of the section 14(3) presumptions raised by the KLPS and other parties apply, including sections 14(3)(b) and (g), because they only apply to personal information. He submits that because the records generally contain

²² Orders MO-2213, PO-1849 and PO-2608.

professional rather than personal information of correctional staff, the section 14(3) presumptions cannot apply to such information. He submits that any personal information of correctional staff such as their home addresses or phone numbers can be severed from the records, which means that the remaining information is their professional information, to which the section 14(3) presumptions do not apply.

[102] The appellant further asserts that the limitation to the section 14(3) presumptions in section 14(4)(c) applies to the personal information of his deceased son in the records. He submits that disclosing this information is desirable for compassionate reasons to allow the family to understand the circumstances of his son's death. He maintains that the information contained in the records will assist the family in the grieving process and will allow them to better understand the events that led to his death.

Analysis and findings

[103] The records remaining at issue include the video witness statements that correctional staff and other inmates provided to the KLPS, the typewritten brief synopses of the correctional staff's witness statements, a typewritten witness statement provided by a correctional staff person and the handwritten notes prepared by KLPS officers. These records contain the personal information of the deceased inmate, correctional staff and other inmates. It must be determined whether this personal information is exempt from disclosure under section 14(1) of the *Act*.

[104] For the reasons that follow, I find that the personal information of the deceased inmate, correctional staff and other inmates in the records is exempt from disclosure under section 14(1).

Section 14(3) presumptions

[105] In deciding whether disclosure would or would not be an unjustified invasion of personal privacy, the section 14(3) presumptions should generally be considered first. These presumptions outline several situations in which disclosing personal information is presumed to be an unjustified invasion of personal privacy. If any of the section 14(3) presumptions are found to apply, they cannot be rebutted by the factors in section 14(2) for the purposes of deciding whether the section 14(1) exemption has been established.²³

[106] In addition, if one of these presumptions applies, the personal information cannot be disclosed unless:

- there is a reason under section 14(4) that disclosure of the information would *not* be an "unjustified invasion of personal privacy," or

²³ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

- there is a “compelling public interest” under section 16 that means the information should nonetheless be disclosed (the “public interest override”).²⁴

Section 14(3)(b)

[107] Under section 14(3)(b), a disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation.

[108] The personal information of the deceased inmate, correctional staff and other inmates in all of the records fits squarely within the section 14(3)(b) presumption because it was compiled and is identifiable as part of a criminal investigation by KLPS officers into possible violations of the *Criminal Code* by correctional staff in relation to the incident that led to the inmate’s death.

[109] The KLPS later announced that there were no grounds for bringing criminal charges against any correctional staff. However, the section 14(3)(b) presumption only requires that there be an investigation into a *possible* violation of law. So, even if criminal proceedings were never started against the individual, section 14(3)(b) may still apply.²⁵

[110] In these circumstances, I find that the personal information of the deceased inmate, correctional staff and other inmates in the records is covered by the section 14(3)(b) presumption and its disclosure to the appellant is presumed to be an unjustified invasion of these individuals’ personal privacy.

Section 14(3)(d)

[111] Under section 14(3)(d), a disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information relates to employment or educational history.

[112] In their video witness statements, some correctional staff describe their previous jobs in the correctional system, which qualifies as their “employment history.” I find that the personal information of these correctional staff in those particular records is covered by the section 14(3)(d) presumption and its disclosure to the appellant is presumed to be an unjustified invasion of these individuals’ personal privacy.

Section 14(3)(g)

[113] Under section 14(3)(g), a disclosure of personal information is presumed to

²⁴ *Ibid.*

²⁵ *Supra* note 22.

constitute an unjustified invasion of personal privacy where the personal information consists of personal recommendations or evaluations, character references or personnel evaluations.

[114] The correctional staff claim that their personal information might also fit within the section 14(3)(g) presumption because the records could include evaluations of their conduct on the day of the incident in question.

[115] "Personal evaluations" or "personnel evaluations" refer to assessments made according to measurable (or objective) standards.²⁶

[116] Based on my review of the records, I find that none of the personal information of correctional staff consists of the types of "personal recommendations or evaluations, character references or personnel evaluations" contemplated by section 14(3)(g). I find, therefore that this presumption does not apply to the personal information of correctional staff in the records.

Summary

[117] I find that the personal information of the deceased inmate, correctional staff and other inmates in the records is covered by the section 14(3)(b) and (d) presumptions and its disclosure to the appellant is presumed to be an unjustified invasion of these individuals' personal privacy.

[118] Because these presumptions apply to this personal information, they cannot be rebutted by the factors in section 14(2) for the purposes of deciding whether the section 14(1) exemption has been established.²⁷ However, they can be rebutted by the provisions in section 14(4) and, in particular, section 14(4)(c).

Section 14(4)(c) limitation

[119] The appellant is the father of the deceased inmate, which triggers the possible application of the compassionate grounds provision in section 14(4)(c) of the *Act*. This provision states:

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

(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.

²⁶ Orders PO-1756 and PO-2176.

²⁷ *Supra* note 23.

[120] If the requirements of section 14(4)(c) are met, the personal information of a deceased individual cannot be exempt from disclosure under section 14(1), because disclosing it does not constitute an unjustified invasion of their personal privacy in accordance with the exception in section 14(1)(f), despite the presumptions in section 14(3).

[121] The revised access decisions that the KLPS issued to the appellant stated that it was disclosing a number of records to him for compassionate reasons under section 14(4)(c) of the *Act*. However, the KLPS submits that section 14(4)(c) does not apply to the deceased inmate's personal information in the remaining records.

[122] Section 14(4)(c) provides for the disclosure of the personal information of a deceased individual, if disclosure to a "close relative" would be desirable for compassionate reasons.

[123] In order for this section to apply, the following conditions must apply:

1. the records must contain the personal information of someone who has died,
2. the requester must be a spouse or "close relative" of the deceased individual, and
3. the disclosure of the personal information of the deceased individual must be desirable for compassionate reasons given the circumstances of the request.²⁸

[124] In my view, the first two conditions for satisfying the requirements of section 14(4)(c) are easily met with respect to the personal information of the deceased inmate in the records at issue.

[125] First, the records clearly contain the personal information of someone who has died. That individual is the appellant's son, who died at Central East Correctional Centre on December 15, 2016 after an altercation with correctional staff.

[126] Second, the appellant is indisputably a "close relative" of the deceased inmate, as required by section 14(4)(c). The term "close relative" is defined in section 2(1) of the *Act* as including a parent. Here, the appellant is the father of the deceased inmate.

[127] For the third requirement, there is no doubt that disclosing as much of the deceased inmate's personal information to his father is generally desirable for compassionate reasons given the circumstances of the access request. Many of the records that contain the deceased inmate's personal information shed light on the incident that led to his death.

[128] However, the numerous records at issue in this appeal contain not simply the

²⁸ Orders MO-2237 and MO-2245.

personal information of the deceased inmate but also that of correctional staff and other inmates. The IPC has found in previous orders that personal information about an individual who has died can include information that also belongs to another individual. In Order MO-2237, then Assistant Commissioner Brian Beamish stated:

The first question to address here is whether the reference to “personal information about a deceased individual” can include information that also qualifies as that of another individual. In my view, this question should be answered in the affirmative. The circumstances of an individual’s death, particularly one that is followed by a police or coroner’s investigation, are likely to involve discussions with other individuals that will entail, to a greater or lesser extent, the collection and recording of those individuals’ personal information. In my view, an interpretation of this section that excludes any information of a deceased individual on the basis that it also qualifies as the personal information of another individual would be inconsistent with the definition of “personal information”, set out above, since the information would clearly qualify as recorded information “about” the deceased individual. It would also frustrate the obvious legislative intent behind section 14(4)(c), of assisting relatives in coming to terms with the death of a loved one.²⁹

[129] He further found that the factors referred to in section 14(2) may provide some help in deciding whether the personal information belonging to the other individual should be disclosed for compassionate reasons. However, the overall circumstances must be considered when deciding whether the disclosure of information under section 14(4)(c) would interfere with that individual’s right to privacy.³⁰

[130] In the circumstances of this appeal, it is difficult to determine, in a precise and coherent manner, what personal information of the deceased inmate in each record also qualifies as the personal information of correctional staff and other inmates for the purposes of section 14(4)(c). This is because of the large number of records at issue and the manner in which the personal information of the deceased inmate, correctional staff and other inmates appears in each record.

[131] In Order MO-2237, six records were at issue that contained the personal information of the deceased individual and one affected party. In those records, the personal information of the deceased individual was found to also qualify as the personal information of the affected party because this information was co-mingled or mixed together. By contrast, there are more than 100 records at issue in this appeal, including numerous witness statements provided by dozens of correctional staff and other inmates about the incident that led to the inmate’s death. The personal information of the deceased inmate, correctional staff and other inmates is intertwined

²⁹ *Ibid.*, p. 11.

³⁰ *Ibid.*, p. 15.

in some parts of these records but not in others.

[132] Under Issue G below, I determine whether, under section 16 of the *Act*, there is a compelling public interest in disclosing the records that clearly outweighs the privacy protection purpose of the section 14(1) exemption with respect to the personal information of the deceased inmate, correctional staff and other inmates in those records.

[133] After applying the public interest override to the information in the records that is exempt from disclosure under section 14(1), I find that much of the deceased inmate's personal information will be disclosed to the appellant. In these circumstances, I am satisfied that no further disclosure – beyond what will occur due to my findings under the public interest override – is desirable for compassionate reasons under section 14(4)(c).

Summary

[134] I find that the personal information of the deceased inmate, correctional staff and other inmates in the records is exempt from disclosure under section 14(1).

E. Do the discretionary exemptions at sections 8(1)(e) and 13 regarding endangering life or physical safety or threatening safety or health apply to the records?

[135] The KLPS claims that disclosing the records at issue could reasonably be expected to lead to the harms set out in the discretionary exemptions at sections 8(1)(e) and 13 of the *Act*.

[136] Section 8(1)(e) states:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,

(e) endanger the life or physical safety of a law enforcement officer or any other person;

[137] Section 13 states:

A head may refuse to disclose a record whose disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

[138] Because these discretionary exemptions are similar, I have decided to consider them together.

[139] For sections 8(1)(e) and 13 to apply, the parties resisting disclosure must show

that the risk of harm is real and not just a possibility.³¹ However, they do not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the information.³²

[140] A person's subjective fear, or their sincere belief that they could be harmed, is important, but is not enough on its own establish these exemptions.³³

Summary of parties' representations

KLPS

[141] The KLPS states that it does not normally sever the names of correctional staff from records when processing access requests under the *Act* because these individuals are identified in a professional, not a personal capacity. However, it submits that the discretionary exemptions in sections 8(1)(e) and 13 apply to all of the records that identify correctional staff and other individuals because of threats made against them on social media.

[142] In particular, it refers to a threat made on Twitter that stated, "To the guards who are responsible for Soli's death. We are coming for you." This threat was followed by the hashtag, "#justiceforsoli". It states that this threat was investigated and it is unknown who made it.

[143] The KLPS further states that after it notified correctional staff about the appellant's access request, some of them responded and expressed concern about their safety if the records are disclosed. In addition, some correctional staff expressed a fear of internal reprisals for breaking the "code of silence" within the correctional facility.

[144] The KLPS submits that it considered the threat on Twitter and the concerns expressed by correctional staff and concluded that disclosing the records at issue could reasonably be expected to both endanger the life or physical safety of correctional staff and other persons under section 8(1)(e) and seriously threaten the safety or health of these same individuals under section 13 of the *Act*.

Ministry

[145] The ministry submits that it is concerned that the records that the KLPS has withheld under section 8(1)(e) might be ordered disclosed to the appellant. It states that it has taken the position that a careful and cautious approach is required when it comes to disclosing correctional records that have been withheld for safety reasons.

³¹ *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

³² *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616.

³³ Order PO-2003.

[146] The ministry adds that it is particularly concerned by the impact that disclosure may have on violence in correctional institutions. It states that violence against correctional officers has been increasing in recent years, and it has always worked collaboratively with police services and other law enforcement partners to prevent it. It submits that disclosing sensitive records could derail the hard work being conducted by itself and its law enforcement partners.

[147] With respect to the approach that should be taken in applying section 8(1)(e), the ministry cites previous jurisprudence that has found that the law enforcement exemption in section 8 must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.³⁴

[148] Finally, the ministry submits that the test for section 8(1)(e) that was set out in the Notice of Inquiry is incorrect, because this test states that the KLPS “must provide detailed and convincing evidence about the potential for harm.” It submits that past IPC orders have consistently stated that this test does not apply to section 8(1)(e). It further submits that the test for section 8(1)(e) is set out in paragraph 129 of Order PO-3338, which states that the institution “must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the institution must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated.”

Correctional staff

[149] The correctional staff submit that those records that reveal their identity are exempt from disclosure under section 8(1)(e), because disclosing them could reasonably be expected to endanger their lives or physical safety. They further submit that the same records are exempt from disclosure under section 13 because disclosing them could reasonably be expected to seriously threaten their safety or health.

[150] They state that correctional officers and nurses keep their identity confidential from inmates and the families of inmates. They point out that correctional officers provide care, custody and control for individuals convicted of and/or charged with serious crimes, while nurses provide medical care to this population. They claim that inmates are often hostile towards them and blame them for various day-to-day issues, particularly given their obligation to enforce rules and control and monitor the activities of inmates.

[151] They further submit that disclosing the records and parts of records withheld by the ministry will provide the public with the full names and identities of the correctional staff involved. This information could then be further disseminated, and their identities could be disclosed on a much broader basis. They submit that by making such information public, the correctional staff involved could be subjected to threats and

³⁴ *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

retaliation from inmates whom they have been responsible for.

[152] They then refer to a number of threats and other statements that were posted on Twitter about the inmate's death, including:

- "To the guards who are responsible for Soli's death. We are coming for you".
- "He was killed by the actions of corrections officers" and "There is no longer any excuse for allowing these guards to get away with murder."

[153] The correctional staff point out that in addition to these tweets, there was a Facebook page which identified the inmate and stated that he was "murdered by the guards."

[154] As supporting evidence, the correctional staff attached copies of these social media posts to their representations. They submit that these posts underscore the serious threat to their health and safety if any identifying information about them is disclosed.

[155] They also cite previous jurisprudence, including *Duncanson v. Fineberg*,³⁵ where the Divisional Court upheld an IPC decision not to disclose the names of all officers of the Metropolitan Toronto Police under section 13 of the *Act* because disclosure could reasonably be expected to make the police officers' work more dangerous and acknowledged that it was possible that "identification could place family members at risk." The correctional staff submit that they should be extended these same protections and considerations.

[156] The two correctional managers and the correctional staff person who submitted their own representations make similar arguments and express particular concern that members of the public may be able to locate and harm them and their families if their identities are disclosed. The correctional staff person further submits that she may face retaliation from other correctional staff if her forthright account of the incident that led to the inmate's death is disclosed. She submits that there is a "code of silence" within the correctional facility and that other staff would deem that she did not follow it when providing her witness statement. She states:

. . . I stand behind my actions on the day in question as well as my statement; however I worry for my safety and believe that the release of this information may cause retaliation from some of my colleagues who are vocal about their belief that 14 correctional officers were wrongly suspended following the death of this particular individual.

³⁵ 1999 CanLII 18726 (ON SCDC).

Appellant

[157] The appellant submits that the discretionary exemptions in sections 8(1)(e) and 13 do not apply to the records at issue. He states that for either of these exemptions to apply, the KLPS must demonstrate a risk of harm that is more than just hypothetical, speculative or gratuitous. He asserts that the KLPS has failed to do so and instead relies on the subjective fears of correctional staff to ground its reliance on these provisions. He further submits that a single, vague Twitter post is not a credible threat nor is it probative evidence of any risk of harm.

[158] The appellant further states that the reality is that identifying information about several correctional staff has been in the public domain since 2018, when his family commenced civil litigation against a number of correctional officers. He submits that the fact that the names of these correctional officers who are alleged to have been involved in his son's death have been in the public record for years without incident undermines the asserted fears of these individuals.

Summary of parties' reply representations

Correctional staff

[159] Only the correctional staff provided reply representations that respond to the appellant's representations on whether the sections 8(1)(e) and 13 exemptions apply to the records.

[160] The correctional staff submit that contrary to the appellant's representations, the risk of harm in this matter is more than "hypothetical, speculative or gratuitous." They assert that correctional officers and nurses working in a correctional facility deal with actual risk of harm in dealing with volatile and dangerous inmates in the course of their employment. They further submit that the possibility of a threat is not merely speculative in this case, because a direct threat was made against staff. As such, the exemptions in sections 8(1)(e) and 13 apply to the records.

[161] The correctional staff person who submitted her own representations disputes the appellant's claim that her name and identity are already in the public domain. She submits that any statements made by witnesses or correctional staff in the media have not mentioned her involvement or presence on the day of the inmate's death.

[162] She also disputes the appellant's claim that any endangerment or threat to her safety that could reasonably be expected to result from disclosing the records is "hypothetical" or "speculative." She submits that following the inmate's death, she experienced numerous instances of bullying, harassment and physical abuse from other correctional staff that made her fear for her safety and provides a list of examples.³⁶

³⁶ I cannot describe these examples in greater detail in this public order because they would have the effect of identifying this particular correctional staff person.

She states that she left her job at the correctional centre and is now employed elsewhere.

Analysis and findings

[163] Section 8(1)(e) gives the KLPS the discretion to refuse to disclose a record if the disclosure could reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person. Similarly, section 13 gives the KLPS the discretion to refuse to disclose a record if the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

[164] For the reasons that follow, I find that sections 8(1)(e) and 13 do not apply to those records that identify correctional staff by name, because disclosure could not reasonably be expected to endanger their lives or physical safety or seriously threaten their safety or health. These records include the video witness statements that correctional staff and other inmates provided to the KLPS, the typewritten brief synopses of the correctional staff's witness statements, a typewritten witness statement provided by a correctional staff person and the handwritten notes prepared by KLPS officers.

[165] For sections 8(1)(e) and 13 to apply, there must be a reasonable basis for concluding that disclosure of the records could be expected to lead to the harms set out in these exemptions. A person's subjective fear, or their sincere belief that they could be harmed, is important, but is not enough on its own establish this exemption.³⁷

[166] In my view, there is no dispute that the persons to whom sections 8(1)(e) ("a law enforcement officer or any other person") and 13 ("an individual") apply include correctional staff.

[167] The death of the inmate after an altercation with correctional staff and the subsequent lack of any criminal charges produced an outpouring of grief from his family but also anger and frustration from some members of the public, who believed that correctional staff were responsible for his death. In their representations, both the KLPS and correctional staff have pointed to several social media posts to support their position that disclosing those records that identify the correctional staff could reasonably be expected to endanger their lives or physical safety or seriously threaten their safety or health.

[168] For example, one individual on Twitter posted a tweet in February, 2017 which stated, "To the guards who are responsible for Soli's death. We are coming for you." Other social media posts suggested that correctional staff "murdered" the inmate and should be held accountable.

[169] In assessing whether this evidence is sufficient to establish that disclosing the

³⁷ *Supra* note 33.

records that identify correctional staff could reasonably be expected to endanger their lives or physical safety or seriously threaten their safety or health, I find that there are two important considerations that should be taken into account.

[170] First, in response to the access request that led to related appeal PA18-267, the ministry disclosed numerous records, some in full and others in part, to the appellant, including employee/other information reports, occurrence reports, inmate incident reports, and some use of force occurrence reports and use of force local investigation reports. The names and other information relating to many of the correctional staff who were on duty on the day the inmate died, including correctional officers, managers and health care staff, appear in these records and were disclosed to the appellant. There is no evidence that this disclosure has in any way endangered the lives or physical safety of these correctional staff or seriously threatened their safety or health.

[171] Similarly, the ministry also disclosed the use of force occurrence report of the correctional staff person who fears that she may face a threat to her safety from the public and retaliation from her colleagues if records that identify her are disclosed. There is no evidence that this disclosure has in any way endangered her life or physical safety or seriously threatened her safety or health.

[172] Second, the KLPS investigated the February, 2017 threat on Twitter that was directed towards correctional staff. One of the records at issue in related appeal PA18-267 states that the KLPS concluded that there was no evidence that any of the correctional staff involved in the incident were in any immediate danger and therefore closed its investigation.³⁸

[173] In my view, both of these considerations weigh against finding that disclosing the records at issue in this particular appeal that identify correctional staff could reasonably be expected to endanger their lives or physical safety under section 8(1)(e) or seriously threaten their safety or health under section 13.

[174] I am also not convinced by the correctional staff's argument that the Divisional Court's findings in *Duncanson* are applicable to the particular correctional staff whose names appear in the records. In that case, the Court upheld an IPC decision that had found that a list of all officers employed by the Metropolitan Toronto Police was exempt from disclosure under section 13. The correctional staff state that they keep their identities confidential from inmates and the families of inmates for safety reasons and that they should be extended the "same protections and considerations" as the police officers in *Duncanson*.

[175] In *Ontario (Ministry of Community and Social Services) v. John Doe*,³⁹ the Court of Appeal discussed *Duncanson* and emphasized the importance of taking a case-by-case approach with respect to whether disclosing the names of police officers and other

³⁸ Page 96 of the records.

³⁹ 2015 ONCA 107 (CanLII),

public servants could reasonably be expected to lead to the harms set out in sections 14(1)(e) and 20 of *FIPPA*, which are the equivalent provisions to sections 8(1)(e) and 13 of the *Act*. It stated:

At para. 55, the Divisional Court noted that *Duncanson* is not authority for the proposition that demonstration of a generalized risk is sufficient in all cases. The Court in *Duncanson* recognized that whether generalized risk is sufficient is dependent on the facts of each case.⁴⁰

[176] In my view, the facts here are distinguishable from those in *Duncanson*, and I do not accept that the correctional staff whose names appear in the records face a generalized risk that would trigger the application of sections 8(1)(e) and 13. In *Duncanson*, the record at issue listed the names of all police officers employed by the Metropolitan Toronto Police, including those who work undercover and in other sensitive positions. Here, the records at issue only contain the names of those staff in the correctional centre who were on duty on the day of the incident that resulted in the inmate's death.

[177] In addition, the correctional staff's claim that they face a generalized risk that triggers the application of the sections 8(1)(e) and 13 exemptions is belied by the fact that in response to the appellant's access request in related appeal PA18-267, the ministry disclosed records and parts of records to the appellant that contain the names of numerous correctional officers, managers and health care staff. As indicated above, there is no evidence that this disclosure has in any way endangered the lives or physical safety of these correctional staff or seriously threatened their safety or health.

[178] I find, therefore, that in the particular circumstances of this appeal, the correctional staff who are identified in the records do not face a generalized risk that would trigger the application of the sections 8(1)(e) and 13 exemptions.

[179] I accept the correctional staff's assertion that for safety reasons, they do not share their full names with inmates or families of inmates. However, their position here is that they should remain anonymous even after being involved in or having witnessed an altercation with an inmate that resulted in his death. This runs contrary to the principles of transparency and accountability that underpin freedom-of-information legislation in Ontario.

[180] In *John Doe*, the Court of Appeal discussed previous Supreme Court of Canada jurisprudence on the meaning of the phrase "could reasonably be expected to" in the context of sections 14(1)(e) and 20 of *FIPPA*. It stated:

The Supreme Court has clarified what is meant by "could reasonably be expected to" where that phrase appears in the *Act* including in ss. 14(1)(e) and 20 . . . The Court held . . . that the "could reasonably be

⁴⁰ *Ibid.*, para. 21.

expected to” standard provides “a middle ground between that which is probable and that which is merely possible.” It went on to write, at para. 54:

An institution must provide evidence “well beyond” or “considerably above” a mere possibility of harm in order to reach that middle ground.⁴¹

[181] I find that neither the KLPS, the ministry nor correctional staff has provided evidence that is “well beyond” or “considerably above” a mere possibility of harm in order to reach the middle ground that would trigger the application of the sections 8(1)(e) and 13 exemptions for those records that identify the correctional staff. These records include the video witness statements that correctional staff and other inmates provided to the KLPS, the typewritten brief synopses of the correctional staff’s witness statements, a typewritten witness statement provided by a correctional staff person, and the handwritten notes prepared by KLPS officers.

[182] In summary, I find that the records that identify correctional staff are not exempt from disclosure under sections 8(1)(e) and 13.

F. Do any of the other discretionary law enforcement exemptions at section 8 raised by the ministry apply to the records?

[183] The KLPS is the institution in this appeal and amongst the section 8 exemptions, it narrowed its claim to section 8(1)(e), which is addressed above under Issue E. In its representations, the ministry, which in an affected party in this appeal, states that it is uncertain as to why the KLPS did not claim additional section 8 exemptions for the records at issue. It submits that the following exemptions might apply to some or all of the records and identified the equivalent exemptions in *FIPPA*:

- Section 8(1)(a) (Section 14(1)(a) of *FIPPA*)
- Section 8(1)(i) (Section 14(1)(i) of *FIPPA*)
- Section 8(1)(j) (Section 14(1)(j) of *FIPPA*)
- Section 8(1)(k) (Section 14(1)(k) of *FIPPA*)
- Section 8(1)(l) (Section 14(1)(l) of *FIPPA*)
- Section 8(2)(a) (Section 14(2)(a) of *FIPPA*)

[184] The ministry then provides a series of brief arguments as to why each of these exemptions might apply to the records.

⁴¹ *Supra* note 39, para. 25, citing *Ontario (Community Safety and Correctional Services)*, *supra* note 32.

[185] For the reasons that follow, I find that the ministry cannot raise most of the discretionary exemptions in section 8 that were not claimed by the KLPS. However, I find that some information which I found exempt from disclosure under section 14(1)(k) of *FIPPA* in Order PO-4428, is also exempt from disclosure in the records at issue in this appeal under section 8(1)(k) of the *Act*, because disclosing it could reasonably be expected to jeopardize the security of a centre for lawful detention. This information includes the hourly schedule of correctional staff and a specific procedure that staff follow when responding to an emergency code.

[186] The wording of the section 8 exemptions gives the discretion to claim them to the "head" of the institution that received the access request. For example, the opening wording of section 8(1) states, in part, "A head may refuse to disclose a record if the disclosure could reasonably be expected to . . ." There is nothing in this wording to suggest that the section 8 exemptions may be claimed by an affected party such as the ministry.

[187] The IPC has found in previous orders that it would only be in the "most unusual of cases" that an affected party could raise the application of an exemption which has not been claimed by the head of an institution.⁴² This is particularly in cases in which the exemption is designed to protect the interests not simply of the institution, but of third parties as well, such as sections 8(1)(d) and (e) and section 13. Consequently, it must be determined whether the ministry's claim that various additional section 8 exemptions apply to the records falls within the "most unusual of cases."

[188] As noted above, the vast majority of the records that the KLPS received from the correctional centre, which falls under the ministry's purview, are no longer at issue in this appeal, including an inmate incident report, occurrence reports, use of force occurrence reports, and surveillance videos. In addition, I have found above that the ICIT records that the KLPS received from the ministry are exempt from disclosure under section 9(1)(b) and not disclosable under the public interest override in section 16.

[189] Given that these records, which are essentially ministry-created records, are either no longer at issue in this appeal or will not be ordered disclosed, I find that the situation here does not fall within the category of the "most unusual of cases" in which an affected party (the ministry, in this case) could raise section 8 exemptions not claimed by the KLPS.

[190] However, I have decided to make one exception to this finding. In Order PO-4428, I found that some information in the records, such as the use of force occurrence reports, was exempt from disclosure under section 14(1)(k) of *FIPPA*, including the hourly schedule of correctional staff and a specific procedure that staff follow when responding to an emergency code. Section 14(1)(k) is the equivalent to section 8(1)(k) of the *Act*, which states:

⁴² Order P-1137. See also Orders P-257, PO-3917 and PO-3979.

A head may refuse to disclose a record if the disclosure could reasonably be expected to,

(k) jeopardize the security of a centre for lawful detention;

[191] The hourly schedule of correctional staff and a specific procedure that staff follow when responding to an emergency code are found in some of the records at issue in this appeal, such as the typewritten brief synopses of the video witness statements provided by correctional staff, a typewritten witness statement provided by a correctional staff person, and the handwritten notes prepared by KLPS officers.⁴³ This information was found exempt from disclosure in other records in Order PO-4428 because disclosing it could reasonably be expected to jeopardize the security of a centre for lawful detention. In particular, I found that this information could be used by individuals with criminal intent to breach the centre's security.

[192] In my view, it would be inconsistent to find that such information is exempt from disclosure under section 14(1)(k) of *FIPPA* in Order PO-4428 but to not make this finding for the same information in different records in this appeal simply because section 8(1)(k) was not claimed by the KLPS.

[193] In these circumstances, I find that my analysis in Order PO-4428 flows through and applies to this information in the records at issue in this appeal. In particular, I find that such information is exempt from disclosure under section 8(1)(k) of the *Act*, because disclosing it could reasonably be expected to jeopardize the security of a centre for lawful detention.

[194] It is important to note that the section 8(1)(k) exemption is discretionary (the institution "may" refuse to disclose), meaning that the KLPS can decide to disclose information even if the information qualifies for exemption. Even though I have found that this exemption applies to the hourly schedule of correctional staff and a specific procedure that staff follow when responding to an emergency code, section 43(2) of the *Act* precludes me from substituting my own discretion for that of the KLPS. Consequently, I am obligated to allow the KLPS to exercise its discretion under section 8(1)(k) and will do so in the order provisions below.

[195] However, given the low likelihood of the KLPS exercising its discretion in favour of disclosing information that could reasonably be expected to jeopardize the security of a centre for lawful detention, I will order it to report its decision on its exercise of discretion to the IPC and other parties only if it decides to disclose such information.

⁴³ In Order PO-4428, I also found that the layout of the correctional centre in the surveillance videos and the work telephone numbers of correctional staff in other records are exempt from disclosure under section 14(1)(k). However, that information does not appear in any of the records in this appeal that were created by the KLPS.

G. Under section 16, is there a compelling public interest in disclosing the records that clearly outweighs the purposes of the sections 9(1)(b) and 14(1) exemptions?

[196] I have found that the following records are exempt from disclosure in their entirety under section 9(1)(b): the ICIT activation reports, a SMEAC briefing note and photographs taken by ICIT. I have also found that the personal information of the deceased inmate, correctional staff and other inmates in the following records is exempt from disclosure under section 14(1): the video witness statements that correctional staff and other inmates provided to the KLPS, the typewritten brief synopses of the correctional staff's witness statements, a typewritten witness statement provided by a correctional staff person, and the handwritten notes prepared by KLPS officers.

[197] The appellant claims that there is a compelling public interest in disclosing these records that clearly outweighs the purposes of the sections 9(1)(b) and 14(1) exemptions.

[198] Section 16 of the *Act* 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.

[199] 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.

[200] The public interest override in section 16 cannot apply to the information in the records that I have found is exempt from disclosure under section 8(1)(k), because that exemption is not one of those listed in section 16 that can be overridden.

Summary of parties' representations

Appellant

[201] The appellant submits that there is a compelling public interest in disclosing the records in this case. He submits that such disclosure is desirable for the purpose of subjecting the activities of both the KLPS and the ministry to public scrutiny, in accordance with the *Act's* "central purpose of shedding light on the operations of

government."⁴⁴

[202] The appellant further submits that where an individual held in state custody has died at the hands of state actors, there is a significant public interest in transparency and information about the circumstances of the death. He points out that in this case, the public interest is evidenced by substantial media coverage, including an investigation into the inmate's death by CBC's *The Fifth Estate*,⁴⁵ and many other articles related to his death and the subsequent police investigations.⁴⁶ He points out that members of the public continue to gather for vigils and rallies in the inmate's honour,⁴⁷ a Google search for his name returns thousands of results, and the case has recently become the subject of a TVO investigative podcast, "Unascertained."⁴⁸

[203] The appellant submits that disclosing the records is critical to allow the public to hold government actors with the authority to use force against citizens to account for how that power is exercised against individuals in state custody. He asserts that the information would serve the purpose of informing the citizenry about the actions of correctional officers in state detention centres.

[204] He further submits that the records disclosed to date are not adequate to address these public interest considerations. He adds that there remain many questions to be answered about the involvement of correctional officers in the inmate's death, and the records released to date have not provided the answers. Finally, he submits that there is no public interest in non-disclosure of the records.

Ministry

[205] The ministry submits that the IPC has found that a compelling public interest in disclosure does not to apply where "another public process or forum has been established to address public interest considerations."⁴⁹ In particular, it claims that the Ontario Chief Pathologist's report⁵⁰ and the Coroner's inquest⁵¹ are both public processes or forums for addressing public interest considerations. The ministry further states that it relies upon Order PO-3484, which determined that a Coroner's inquest met the requirements of being a public process to address public interest considerations, and therefore a determining factor in not relying upon the public

⁴⁴ *Infra* note 53.

⁴⁵ [Deadly restraint | CBC News](#)

⁴⁶ See, for example: www.cbc.ca/news/canada/toronto/soleiman-faqiri-no-charges-organizations-support-1.5687539; www.theglobeandmail.com/canada/article-opp-says-it-wont-lay-charges-in-death-of-soleiman-faqiri-as-police/

⁴⁷ <https://globalnews.ca/news/7346019/soleiman-faqiri-justice-prison-mental-health-reform/>

⁴⁸ [Unascertained | TVO Today](#)

⁴⁹ Orders P-123/124, P-391, M-539 and PO-3484.

⁵⁰ *Supra* note 9.

⁵¹ [Virtual Inquest into the death of Soleiman Faqiri Announced | Ontario Newsroom](#) The inquest commenced on November 20, 2023 and the inquest jury issued its verdict and recommendations on December 12, 2023.

interest override in section 16.

Correctional staff

[206] The correctional staff dispute the appellant's argument that there is a compelling public interest which weighs in favour of disclosing the records by subjecting activities to public scrutiny. They claim that such disclosure is being sought not for public interest, but for purposes relating to civil litigation. They claim that such interests are clearly private in nature and therefore section 16 of the *Act* does not apply.

[207] The correctional staff further submit that in *John Doe v. Hale*,⁵² the Divisional Court held that an individual's interest in gaining access to information for use in prosecuting a civil action or defending against criminal charges constituted a private interest and not a public interest, within the meaning of access-to-information legislative schemes.

[208] Finally, they state that even if there is a public interest in disclosure, it must be compelling and must clearly outweigh the purposes of the exemptions. They submit that the purposes behind the exemptions outweigh any public interest in this case. Furthermore, they assert that there is a competing public interest to protect the health and safety of public servants which is far more compelling than any media or other interests.

KLPS

[209] The KLPS's representations do not address whether there is a compelling public interest in disclosing these records that clearly outweighs the purposes of the sections 9(1)(b) and 14(1) exemptions.

Analysis and findings

[210] For the reasons that follow, I find that the public interest override in section 16 of the *Act* applies to most of the contents of the typewritten brief synopses of the video witness statements that correctional staff provided to the KLPS, a typewritten witness statement provided by a correctional staff person, and the handwritten notes prepared by KLPS officers.

[211] However, I find that there is some personal information of correctional staff and other inmates in these records to which the public interest override in section 16 does not apply, and this information remains exempt from disclosure under the personal privacy exemption in section 14(1). Consequently, I will order the KLPS to disclose these records to the appellant but to sever some of the personal information of correctional staff and other inmates from them.

⁵² 2006 CanLII 24240 (ON SCDC).

[212] I also find that the public interest override in section 16 does not apply to the ICIT records that the KLPS received from the correctional centre, nor to the video witness statements that correctional staff and other inmates provided to the KLPS. As a result, these records remain exempt from disclosure under sections 9(1)(b) and 14(1) of the *Act* respectively and will not be ordered disclosed to the appellant.

[213] As noted above, 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.

[214] In considering whether there is a “public interest” in disclosure of a record, the first question to ask is whether there is a relationship between the record and the *Act*’s central purpose of shedding light on the operations of government.⁵³ 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 to make effective use of the means of expressing public opinion or to make political choices.⁵⁴ The IPC has defined the word “compelling” in section 16 as “rousing strong interest or attention.”⁵⁵

[215] A “public interest” does not exist where the interests being advanced are essentially private in nature.⁵⁶ However, if a private interest raises issues of more general application, the IPC may find that there is a public interest in disclosure.⁵⁷

[216] A compelling public interest has been found not to exist in some circumstances where another public process or forum has been established to address public interest considerations.⁵⁸

[217] The death of an inmate in violent circumstances while in the custody of a correctional institution operated by the state automatically raises public interest considerations with respect to records that document that death. The KLPS’s decision not to lay criminal charges against any correctional staff involved in the incident also resulted in criticism from the inmate’s family and other members of the public.⁵⁹ These particular circumstances accentuate the public interest considerations that are triggered with respect to the KLPS criminal investigation records that relate to the inmate’s death.

⁵³ Orders P-984 and PO-2607.

⁵⁴ Orders P-984 and PO-2556.

⁵⁵ Order P-984.

⁵⁶ Orders P-12, P-347 and P-1439.

⁵⁷ Order MO-1564.

⁵⁸ *Supra* note 49.

⁵⁹ <https://macleans.ca/news/canada/there-will-be-no-justice-in-the-prison-death-of-soleiman-faqiri/>; <https://kawarthanow.com/2019/12/13/justice-for-soli-vigil-in-peterborough-on-december-15-one-of-seven-held-across-canada/>

[218] The death of this specific inmate has been the subject of widespread media coverage in Canada over the past several years, including an investigative report on CBC's *The Fifth Estate*.⁶⁰ In addition, both individual members of the public and advocacy groups have written articles and organized public gatherings and meetings about the inmate's death and questioned the KLPS's decision not to lay any criminal charges.⁶¹ In these circumstances, I find that the inmate's death "roused strong interest and attention," which means that the public interest in disclosing records that shed light on the KLPS criminal investigation is "compelling."

Correctional officer witness statements and other records

[219] With respect to the specific records at issue in this appeal, I find that there is a compelling public interest in disclosing the following records: the typewritten brief synopses of the video witness statements that correctional officers provided to the KLPS, a typewritten witness statement provided by a correctional staff person, and the handwritten notes prepared by KLPS officers.

[220] Even though the appellant has a private interest in accessing the records because he wishes to better understand the circumstances that led to his son's death, there is clearly a broader public interest in disclosure as well. In particular, disclosing these records would serve the purpose of informing or enlightening the public about the KLPS criminal investigation.

[221] As noted above, the ministry cites Order PO-3484 and submits that a compelling public interest in disclosure does not exist with respect to these records because the Ontario Chief Pathologist's report⁶² and the Coroner's inquest⁶³ are both public processes or forums for addressing public interest considerations.

[222] I do not find the ministry's arguments persuasive in the particular circumstances of this appeal. Although the IPC has found in some previous orders, including Order PO-3484, that a compelling public interest has been found not to exist in some circumstances where another public process or forum has been established to address public interest considerations,⁶⁴ each case must be assessed on its own merits.

[223] The institution in this appeal, which received and responded to the appellant's access request under the *Act*, is the KLPS. The records at issue are those that the KLPS created or collected as part of its criminal investigation into the inmate's death.

[224] Both the Ontario Chief Pathologist's review and subsequent report and the Coroner's inquest have shed light on the circumstances that led to the inmate's death.

⁶⁰ *Supra* note 45.

⁶¹ *Supra* note 59.

⁶² *Supra* note 9.

⁶³ *Supra* note 51.

⁶⁴ *Supra* note 49.

However, neither of these processes is designed to inform or enlighten the public about the KLPS criminal investigation, which did not result in charges against any correctional staff involved in the inmate's death. With respect to the Coroner's inquest, section 31(2) of the *Coroner's Act*⁶⁵ makes it clear that an inquest jury shall not make any finding of legal responsibility or express any conclusion of law on any matter referred to in subsection (1),⁶⁶ which requires it to steer away from scrutinizing or evaluating the KLPS criminal investigation into the inmate's death.

[225] In these circumstances, I find that there is a compelling public interest in disclosing the above records that is not addressed by the Ontario Chief Pathologist's review and subsequent report and the Coroner's inquest into the inmate's death.

[226] However, with respect to the video witness statements that correctional staff provided to the KLPS, I find that any compelling public interest in disclosure is satisfied by the fact that I will be ordering below that the typewritten "brief synopses" of these statements be disclosed to the appellant. Although these records are described as "brief synopses," they accurately transcribe the relevant questions posed by KLPS officers and the answers and evidence that correctional staff provided in response. As a result, I find that there is not a compelling public interest in also disclosing the video witness statements of correctional staff, which, unlike the typewritten brief synopses, also reveal their faces and voices.

[227] For section 16 to apply to a record, it is not sufficient to simply establish that there is a compelling public interest in disclosure. It must also be established that this interest clearly outweighs the purpose of the exemption(s) claimed.

[228] I have found that the personal information of the deceased inmate, correctional staff and other inmates in the following records is exempt from disclosure under section 14(1): the typewritten brief synopses of the video witness statements that correctional officers provided to the KLPS, a typewritten witness statement provided by a correctional staff person, and the handwritten notes prepared by KLPS officers. Consequently, it must be established whether the compelling public interest in disclosing these records clearly outweighs the purpose of the section 14(1) exemption. The purpose of this exemption is to protect the privacy of individuals with respect to personal information about themselves held by institutions.⁶⁷

[229] The main contents of the above records shed significant light on the KLPS criminal investigation, particularly with respect to the involvement of correctional staff

⁶⁵ R.S.O. 1990, c. C.37.

⁶⁶ Section 31(1) states: Where an inquest is held, it shall inquire into the circumstances of the death and determine, (a) who the deceased was; how the deceased came to his or her death; (c) when the deceased came to his or her death; (d) where the deceased came to his or her death; and (e) by what means the deceased came to his or her death.

⁶⁷ The purpose of the section 14(1) exemption can be traced to the general purpose section in section 1 of the *Act* and particularly section 1(b).

in the altercation that led to the inmate's death. I find that the compelling public interest in disclosing those parts of the records clearly outweighs the purpose of the section 14(1) exemption, which is to protect the privacy of the deceased inmate and correctional staff with respect to their personal information in these records. As a result, the public interest override in section 16 of the *Act* applies to these parts of the records and they must be disclosed to the appellant.

[230] However, this finding does not apply to all of the personal information in these records. For example, in the typewritten brief synopses of their video witness statements, some correctional staff describe their employment history in the correctional system. Some of the witness statements provided by correctional staff also identify other inmates by name or contain references to the contents of other inmates' witness statements.

[231] I found that all of this personal information is exempt from disclosure under section 14(1). In my view, the compelling public interest in disclosing the main contents of these records does not clearly outweigh the privacy protection purpose of the section 14(1) exemption with respect to the parts of the records containing this personal information. As a result, this personal information remains exempt from disclosure under section 14(1) and I will be ordering the KLPS to sever it before disclosing the records to the appellant.

ICIT records and video witness statements of inmates

[232] I have found that the nine ICIT activation reports, a SMEAC briefing note and photographs taken by ICIT are exempt from disclosure under section 9(1)(b). In addition, I have found that the personal information of the deceased inmate and other inmates in the video witness statements that these other inmates provided to the KLPS is exempt from disclosure under section 14(1) of the *Act*.

ICIT records

[233] An ICIT was activated and placed on stand-by to potentially assist with the inmate on December 15, 2016, but was not involved in the incident that led to his death. As a result, the ICIT records at issue in this appeal are not particularly revealing and largely repeat information that is found in records that have already been disclosed to the appellant by both the KLPS and the ministry.

[234] The purpose of the section 9(1) exemption is to ensure that institutions under the *Act* can continue to receive information that other governments might not be willing to provide without some assurance that it will not be disclosed.⁶⁸ There may be cases in which there is a compelling public interest in disclosing information in ICIT records that clearly outweighs the purpose of the section 9(1) exemption. However, given the nature of the particular ICIT records at issue in this appeal, I find that is not the case here.

⁶⁸ *Supra* note 21.

[235] I find, therefore, that any compelling public interest that exists in disclosing the ICIT records does not clearly outweigh the purpose of the section 9(1)(b) exemption. In these circumstances, I find that the public interest override in section 16 does not apply to these records. As a result, they remain exempt from disclosure in their entirety under section 9(1)(b) of the *Act* and will not be ordered disclosed to the appellant.

Video witness statements of other inmates

[236] Although some of the inmates who provided video witness statements to the KLPS described what they saw or heard with respect to the incident that led to the inmate's death, they can best be described as reluctant witnesses. In my view, inmates who are or were incarcerated in a correctional facility are clearly in a vulnerable position and have a heightened expectation of privacy with respect to both the information in records that reveals that they were witnesses in a criminal investigation and the information they shared with the police about what they witnessed.

[237] There may be situations in which there is a compelling public interest in disclosing the witness statements of inmates that clearly outweighs the privacy protection purpose of the section 14(1) exemption. However, in the particular circumstances of this appeal, I find that any compelling public interest that exists in disclosing the video witness statements that other inmates provided to the KLPS does not clearly outweigh the privacy protection purpose of the section 14(1) exemption with respect to the personal information of these individuals, which is sometimes intertwined with the personal information of the deceased inmate and correctional staff.

[238] I find, therefore, that the public interest override in section 16 does not apply to the video witness statements that other inmates provided to the KLPS. As a result, these records remain exempt from disclosure in their entirety under section 14(1) of the *Act* and will not be ordered disclosed to the appellant.

Summary

[239] I find that the public interest override in section 16 of the *Act* applies to most of the contents of the typewritten brief synopses of the witness statements that correctional staff provided to the KLPS, a typewritten witness statement provided by a correctional staff person, and the handwritten notes prepared by KLPS officers. However, I also find that the public interest override in section 16 does not apply to the ICIT records that the KLPS received from the correctional centre and the video witness statements that correctional staff and other inmates provided to the KLPS.

ORDER:

1. Subject to order provisions 2 and 3, I order the KLPS to disclose the following records to the appellant:

- a. the 41 typewritten brief synopses of the video witness statements that correctional staff provided to the KLPS (records 1 to 41);
 - b. a typewritten witness statement provided by a correctional staff person (record 42); and
 - c. 15 handwritten notes prepared by KLPS officers (records 43- 58).
2. I order the KLPS to sever the following personal information of correctional staff and other inmates from the records ordered disclosed under order provision 1 because it is exempt from disclosure under section 14(1) of the *Act*:
 - a. references to the employment history of correctional staff;
 - b. the names of other inmates in the correctional centre; and
 - c. references to the contents of the witness statements of other inmates.
3. I order the KLPS to exercise its discretion with respect to those parts of the records that reveal the hourly schedule of correctional staff and a specific procedure that staff follow when responding to an emergency code, which I have found is exempt from disclosure under section 8(1)(k) of the *Act*.
 - a. If, after exercising its discretion, the KLPS decides to disclose this information to the appellant, it should issue an access decision to the appellant, the ministry and any affected correctional staff, with a copy to the IPC, that sets out what considerations it took into account in exercising its discretion and the right to appeal that decision to the IPC within 30 days.
 - b. If, after exercising its discretion, the KLPS decides to withhold this information, it is not required to notify any of the parties and I order it to sever this information from the records ordered disclosed under order provision 1.
4. I am providing the KLPS with a PDF copy of the records ordered disclosed under order provision 1 and have highlighted in yellow the information that must be severed under order provision 2 and may be severed under order provision 3. To be clear, the KLPS must only withhold the information highlighted in yellow.
5. I allow the KLPS to sever the exempt information specified in order provisions 2 and 3 if it appears in any other parts of the records and I have inadvertently failed to identify it.
6. I order the KLPS to disclose the severed records to the appellant by **February 1, 2024**, but not before **January 25, 2024**.

7. I reserve the right to require the KLPS to provide me with a copy of the records that it discloses to the appellant.
8. I uphold the KLPS's decision to deny access to the ICIT records, including the SMEAC briefing note (record 129), ICIT activation reports (records 139-147), and photos taken by ICIT (record 148), under section 9(1)(b) of the *Act*.
9. I uphold the KLPS's decision to deny access to the video witness statements of correctional staff (records 59-86) and other inmates (records 189-204) under section 14(1) of the *Act*.

Original signed by: _____

Colin Bhattacharjee
Adjudicator

December 21, 2023 _____

APPENDIX A: RECORDS AT ISSUE

KLPS record numbers	General description of records	KLPS's access decision	Exemption(s) claimed by KLPS	IPC adjudicator's decision
1 to 41	Typewritten brief synopses of video witness statements that correctional staff provided to the KLPS	Withheld in full	Sections 38(a), 38(b), 8(1)(e), 13 and 14(1)	<p>Public interest override in section 16 applies to records, except for some information that is exempt from disclosure under sections 8(1)(k) and 14(1)</p> <p>KLPS ordered to disclose records to appellant, with severances</p>
42	Typewritten witness statement that a correctional staff person provided to the KLPS	Withheld in full	Sections 38(a), 38(b), 8(1)(e), 13 and 14(1)	<p>Public interest override in section 16 applies to record, except for some information that is exempt from disclosure under section 8(1)(k)</p> <p>KLPS ordered to disclose record to appellant, with severances</p>

43-58	Handwritten notes prepared by KLPS officers, including lists of questions for specific witnesses	Withheld in full	Sections 38(a), 38(b), 8(1)(e), 13 and 14(1)	Public interest override in section 16 applies to records, except for some information that is exempt from disclosure under sections 8(1)(k) and 14(1) KLPS ordered to disclose records to appellant, with severances
59-86	Video witness statements that correctional staff provided to KLPS officers investigating the inmate's death	Withheld in full	Sections 38(a), 38(b), 8(1)(e), 13 and 14(1)	Records exempt from disclosure under section 14(1) and public interest override in section 16 does not apply to them No disclosure ordered
129	SMEAC briefing note prepared by ICIT	Withheld in full	Sections 38(a), 38(b), 8(1)(e), 9(1), 13 and 14(1)	Record exempt from disclosure under section 9(1)(b) and public interest override in section 16 does not apply to it No disclosure ordered

139-147	ICIT activation reports	Withheld in full	Sections 38(a), 38(b), 8(1)(e), 9(1), 13 and 14(1)	Records exempt from disclosure under section 9(1)(b) and public interest override in section 16 does not apply to them No disclosure ordered
148	Photos taken by ICIT	Withheld in full	Sections 38(a), 38(b), 8(1)(e), 9(1), 13 and 14(1)	Records exempt from disclosure under section 9(1)(b) and public interest override in section 16 does not apply to them No disclosure ordered
189-204	Video witness statements that other inmates provided to KLPS	Withheld in full	Sections 38(a), 38(b), 8(1)(e), 9(1), 13 and 14(1)	Records exempt from disclosure under section 14(1) and public interest override in section 16 does not apply to them No disclosure ordered