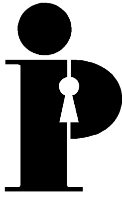

ORDER MO-1383

Appeal MA-990148-2

Chatham-Kent Police Services Board

NATURE OF THE APPEAL:

This is an appeal under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) from a decision of the Chatham-Kent Police Services Board (the Police). As background to this appeal, the requester (now the appellant) made a complaint to the Ontario Civilian Commission on Police Services (OCCOPS) about the conduct of three members of the Amherstburg Police Service (the Amherstburg Police), including its Chief. The complaint stemmed from the appellant's concern about an "investigation" conducted by the Amherstburg Police into disparaging comments which the appellant allegedly made about the Police to a group of Girl Guides. The OCCOPS assigned the matter to the Police for investigation. In her request, the appellant sought access to records concerning her complaint against the members of the Amherstburg Police and the ensuing investigation into the complaint conducted by the Chatham-Kent Police.

In its first decision on the request, the Police informed the appellant that the requested records were excluded from the scope of the *Act*, pursuant to section 52. In Order MO-1280, Adjudicator Donald Hale concluded that the records were subject to the *Act* and, among other things, ordered the Police to provide the appellant with a decision letter with respect to those records which it has identified as responsive to her request and ordered it to conduct a further search for records responsive to the request. Subsequently, the Police conducted a further search, located additional information, and issued a new access decision with respect to all records located. The Police granted partial access to the information in the records and relied on the following sections of the *Act* to deny access to the remainder:

Section 6(1)(b)	substance of in-camera deliberations
Section 7(1)	advice or recommendations of an officer, employee or consultant
Section 8(1)(d)	confidential source of information
Section 8(2)(a)	report prepared in the course of law enforcement
Section 9(1)(b)	information received in confidence from a government
Section 10(1)(d)	third party information
Section 11(c)	prejudice to economic interests
Section 11(d)	injurious to financial interests
Section 12	solicitor-client privilege
Section 14(2)(h)	information supplied in confidence
Section 14(2)(i)	damage to reputation
Section 14(3)(a)	medical or other history, diagnosis, condition, treatment or evaluation
Section 14(3)(b)	investigation into a possible violation of law
Section 14(3)(d)	relates to employment or educational history
Section 14(3)(g)	personal recommendations or evaluations
Section 14(3)(h)	racial or ethnic origin, sexual orientation or religious or political beliefs
Section 38(b)	discretion to deny personal information

I sent a Notice of Inquiry to the Police, initially, inviting their representations on the issues raised by the appeal. No representations were received. The appellant was then invited to submit representations, and has.

RECORDS:

The Police identified 76 pages of records as responsive to the appellant's request. Access was granted to pages
1-6, 10, 11, 22 to 29, 43 to 45, 54, 56 to 60, 69, 70 and 74 in their entirety. These pages are accordingly not at issue.

Access was granted to parts of pages 7 to 9 and 30.

Access was denied to the entirety of pages 12 to 21, 31 to 42, 46 to 53, 55, 61 to 68 and 71 to 73 (except for some incidental information such as standard-form headings).

Of the pages from which portions have been withheld, pages 7 to 9 consist of memos to the Police from a named inspector, on Chatham-Kent Police Service letterhead, about the appellant's complaint. Page 30 is a letter from the OCCOPS, from which the name of the addressee and the telephone number of the writer have been severed.

Of the pages which have been withheld in their entirety, pages 12 to 17 consist of typed statements given by the officers who were the subjects of the complaint and investigation, bearing their signatures. Pages 18 to 21 consist of a handwritten report of an interview with a witness, including such information as the individual's address, employer, date of birth and telephone number, and the name of the interviewee. Pages 36 to 37 are a typewritten version of pages 18 to 21, and are identical to pages 51 and 52, and pages 66 and 67. The handwritten version at pages 18 to 21 contains almost, although not completely, identical information to the typewritten versions.

Page 31 is a letter to the OCCOPS from one of the subject officers. Page 32 is a memo to the Amherstburg Police Services Board (the Amherstburg Board) from one of the subject officers, attaching a report which is found at pages 33 and 34. Page 35 is a printout of an electronic message. Page 38 is a memo from one of the subject officers to the Board. Pages 39 to 40 are a letter from one of the subject officers to a named individual. The same letter, with the addition of letterhead and a date, is found at pages 49 to 50 and again, at pages 64 and 65. Page 41 is a memo from one of the subject officers to the Board. Page 42 is a letter from a named individual to one of the subject officers, and is duplicated at page 53 and again at page 68. Pages 46 to 48 consist of a report from an individual of undisclosed identity, and is found duplicated at pages 61 to 63.

Of the remaining records, page 55 is a memo from one of the subjects to the Amherstburg Board. Page 71 is a letter from a law firm to the Amherstburg Board, as are pages 72 and 73. Page 75 is a letter from the Amherstburg Board to a law firm. Finally, page 76 is a duplicate of page 73.

As I have indicated, there are several documents which appear in duplicate and even triplicate in the records. It appears that this is so because some documents appear on their own, and again as attachments

to other documents. It also appears that some of the documents which have been withheld in their entirety by the Police may have been attached to correspondence sent by the **appellant** to others. For instance, pages 46 to 53 and 61 to 68 appear to have been sent by the appellant as part of a fax transmission to the OCCOPS dated November 13, 1997.

CONCLUSION:

I allow the application of sections 14, 38(b) and 12 of the *Act* to some of the records, order disclosure of other records, and reject the application of all other exemptions relied on by the Police.

DISCUSSION:

IN CAMERA DELIBERATIONS

Section 6(1)(b) permits an institution to refuse access to a record that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public. In order to rely on section 6(1)(b), it must be established that:

1. a meeting of a council, board, commission or other body or a committee of one of them took place; and
2. that a statute authorizes the holding of this meeting in the absence of the public; and
3. that disclosure of the record at issue would reveal the actual substance of the deliberations of this meeting.
[see Orders M-64, M-98, M-102, M-219 and MO-1248]

The Police have relied on section 6(1)(b) of the *Act* in withholding access to the following parts of the records:

Pages 17 to 21, 36 to 37, 42, 46 to 48, 51 to 53, 61 to 63, 66 to 68, 71 to 73, 75 to 76

It should be noted that, as described above, a number of the above pages are duplicates of each other.

As I have indicated, the Police have not submitted representations in this matter. On my review of the records, there is nothing based on which I can conclude that the three requirements outlined above have been met with respect to any of the pages of the records for which this exemption is claimed. With respect to most of these pages, there is no reference to any specific meeting of a council, board, commission or other body or a committee of one of them. An exception is page 75 of the records, which refers to a meeting of the Amherstburg Board and sets out the text of a motion considered at that meeting; however, there is no indication that this meeting was held *in camera*, and no statutory basis for an *in camera* meeting has been provided.

In summary, I find that the elements necessary to support the exemption under section 6(1)(b) have not been established.

ADVICE OR RECOMMENDATIONS

Section 7(1) of the *Act* provides that an institution may refuse to disclose a record if the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution. In Order 94, former Commissioner Sidney B. Linden commented on the purpose and scope of this exemption. He stated that it "... purports to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making". Put another way, the purpose of the exemption is to ensure that:

> . . . persons employed in the public service are able to advise and make recommendations freely and frankly, and to preserve the head's ability to take actions and make decisions without unfair pressure. [Orders 24, P-1363 and P-1690]

A number of previous orders have established that advice or recommendations for the purpose of section 7(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process [Orders 118, P-348, P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order P-883, upheld on judicial review in *Ontario (Minister of Consumer and Commercial Relations) v. Ontario (Information and Privacy Commissioner)* (December 21, 1995), Toronto Doc. 220/95 (Ont. Div. Ct.), leave to appeal refused [1996] O.J. No. 1838 (C.A.)].

The Police have relied on section 7(1) of the *Act* in withholding access to the following parts of the records:

> Portions of page 7, the entirety of pages 12 to 16, 33 to 35, 38 to 39, 41 to 42, 47 to 49, 53, 55, 62 to 64, 68, 71 to 73, 75, 76

Again, it should be noted that a number of the above pages are duplicates of each other.

Pages 71 to 73, 75 and 76 will be discussed in the section entitled "Solicitor-Client Privilege", below. Since I have determined that these parts of the records are exempt under other sections of the *Act*, it is unnecessary for me to decide whether section 7(1) may also apply to them.

On my review of the remaining portions of the records for which this exemption has been claimed, I am satisfied that none qualifies for exemption under section 7(1). The two portions which have been withheld from page 7 of the records do not set out or reveal advice or recommendations, but merely state factual information about the investigation.

Pages 12 to 16 are witness statements of the subject officers, and do not contain advice or recommendations about a suggested course of action. Pages 33, 34 and 55 are memos written by the Chief of Police of Amherstburg Police Services to the Board of that police service, containing information about

the complaint filed by the appellant. They are factual accounts and do not contain advice or recommendations as to a suggested course of action. Pages 38 and 41, which precede pages 33, 34 and 55 in time, are memos from the same Chief of Police to the same board, updating it as to actions taken to investigate the appellant; again, they contain factual information but no advice or recommendations.

The rest of the records for which section 7(1) is claimed consists of either correspondence about the matter relating to the appellant, from the Amherstburg Police to a member of the community or from the same member of the community to the Amherstburg Police, or a statement by another member of the community giving her assessment of the matter. None of these records contain advice or recommendations to an institution as to a suggested course of action.

In summary, I find that none of the records for which the application of section 7(1) is claimed meet the terms of that exemption.

LAW ENFORCEMENT

Section 8(1)(d): Confidential source of information

Section 8(1)(d) permits an institution to deny access to a record or a part of a record where disclosure could reasonably be expected to disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source. In order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide detailed and convincing evidence to establish a reasonable expectation of probable harm (PO-1747). Further, the institution must provide evidence of the circumstances in which the information was provided to the institution by the informant in order to establish confidentiality (Order 139).

In this case, the Police have relied on section 8(1)(d) to withhold the following parts of the records, a number of which are duplicates of each other:

Pages 17 to 21, 33, 35 to 38, 48, 51 to 52, 63, 66, 67, 72

As I have indicated, the Police have not submitted representations in this matter. In the absence of any representations, and on my review of the records, I find that there is no basis for me to conclude that any of the information provided in the above portions of the records was given under circumstances of confidentiality. Further, I am also satisfied that much of the information (in particular, that contained inpages 18 to 21, 35 to 38, 48, 51 to 52, 63, and 66 to 67) is not in relation to a "law enforcement matter" at all, but was gathered as part of an investigation by the Amherstburg Police into comments allegedly made bythe appellant to a group of Girl Guides. It has been found in a prior matter between the appellant and the Amherstburg Police (in Investigation MC-980044-1, enclosed with the appellant's representations) thatthe

collection of information by the Amherstburg Police about those comments was not in relation to a "law enforcement matter". I adopt that finding here.

In summary, I find that the application of the section 8(1)(d) exemption has not been established for any of the parts of the records for which it has been claimed, because there is no evidence supporting an assertion of confidentiality and because, in relation to some of the information, it did not involve a law enforcement matter.

Section 8(2)(a): Report prepared in course of law enforcement

Section 8(2)(a) of the *Act* permits an institution to deny access to a record or a part of a record that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law. In order for a record to qualify for exemption under section 8(2)(a), the institution must satisfy each part of the following three parts test:

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

[See Order 200 and Order P-324]

In this case, the institution has relied on the section 8(2)(a) exemption to withhold the following portions of the records, many of which are duplicates of each other:

Pages 12 to 13, 17 to 21, 33 to 34, 36 to 37, 39, 49, 51 to 52, 64, 66, 67

I have already found in the previous section that the information on pages 18 to 21, 36 to 37, 51 to 52 and 66 to 67 was not gathered in the course of a law enforcement matter. On my review, pages 39, 49 and 64 were created in the same context, and also do not meet the requirement that they be prepared in the course of law enforcement. These parts of the records accordingly do not meet the second requirement of the three-part test set out above, and the exemption under section 8(2)(a) does not apply to them. I therefore turn to a consideration of whether pages 12 to 13, 17, and 33 meet the requirements of this exemption.

Report

The word "report" is not defined in the *Act*. However, previous orders have found that in order to qualify as a report, a record must consist of a formal statement or account of the results of the collation and

consideration of information. Generally speaking, results would not include mere observations or recordings of fact (Order 200).

Of the remaining parts of the records for which the section 8(2)(a) exemption has been claimed, I am satisfied that pages 12 to 13 and 17 do not meet the definition of a "report", in that they consist of statements made by two of the subject officers in relation to the complaint made by the appellant, and do not reflect the collation and consideration of information.

Pages 33 to 34 may meet the definition of a report, in that they constitute a formal account by the Chief of Police of the Amherstburg Police, to the Board of that police service, of the background to the appellant's complaint against the three officers, including himself. It is unnecessary to determine this conclusively, however, as I have decided that even if this record is a report within the meaning of section 8(2)(a), it was not "prepared in the course of law enforcement, inspections or investigations".

Prepared in the course of law enforcement

In prior decisions, it has been found that, broadly speaking, the provisions of the provincial equivalent to section 8(2)(a) deal with the confidentiality that necessarily surrounds law enforcement investigations in order that institutions charged with external, regulatory activities can carry out their duties. They were not, however, intended to apply to internal investigations into complaints about the conduct of an institution's staff which do not relate to the institution's law enforcement responsibilities (Order P-399).

On my review of the records and the representations of the appellant, I have determined that the most reasonable characterization of pages 33 to 34 of the records is that it is an internal report in which the Chief of Police informs the Board to whom he reports of his understanding of the background events which led to the appellant's complaint against him and the other subject officers. It was not, accordingly, "prepared in the course of law enforcement".

RELATIONS WITH GOVERNMENTS

Section 9(1)(b) of the *Act* permits an institution to deny access to records or parts of records if the disclosure could reasonably be expected to reveal information the institution has received in confidence from specified governments, agencies or organizations. In order to deny access to a record under section 9(1), the institution must demonstrate that the disclosure of the record could reasonably be expected to reveal information which the institution received from one of the governments, agencies or organizations listed in the section *and* that this information was received by the institution in confidence (Order M-128). Further, as with several other exemptions which are similarly worded in the *Act*, in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide detailed and convincing evidence to establish a reasonable expectation of probable harm (see Order P-373, two court decisions on judicial review of that order in *Ontario*

(Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour)* v. *Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)).
In this case, the Police have claimed the application of section 9(1)(b) to the following parts of the records, many of which are duplicates of each other:

Pages 7, 9, 12 to 20, 31, 32 to 42, 46 to 53, 55, 61 to 68, 71 to 73 and 75 to 76

Based on my review of the records and the representations, I can find no basis for concluding that any of the information in these pages was received "in confidence". Further, for many of these pages, it is not possible to identify a government or agency or organization of a government from which the information might have been received. Accordingly, I find that the required elements for the application of section 9(1)(b) have not been established.

In summary, I reject the application of the section 9(1)(b) exemption to any parts of the records for which it has been claimed.

LABOUR RELATIONS INFORMATION SUPPLIED IN CONFIDENCE

Section 10(1)(d) of the *Act*, which is a mandatory exemption, requires an institution to deny access to a record or a part of a record if disclosure could reasonably be expected to reveal information supplied in confidence to, or the report of a person appointed to resolve a labour relations dispute. For a record to qualify for exemption under section 10(1)(d), the institution and/or the affected party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; **and**
3. the prospect of disclosure of the record must give rise to a reasonable expectation that the harm specified in section 10(1)(d) will occur.

[Orders 36, P-373, M-29 and M-37]

In this case, the Police have claimed the application of section 10(1)(d) for pages 7 and 9 of the record only. On my review of these records, and in the absence of any representations on this from the Police, I find no basis for the application of section 10(1)(d). "Labour relations" under the *Act* has been defined in previous orders to pertain to the collective bargaining relationship between an employer and its employees.

There is nothing in this case to suggest that the information in these records was collected or arises out of a labour relations dispute.

In summary, I reject the application of the section 10(1)(d) exemption to pages 7 and 9 of the records.

ECONOMIC AND OTHER INTERESTS OF AN INSTITUTION

Sections 11(c) and (d) of the *Act* permit an institution to deny access to a record or a part of a record that contains information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or competitive position of an institution [section 11(c)], or information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution [section 11(d)]. Broadly speaking, section 11 is designed to protect certain economic interests of institutions covered by the *Act*. Sections 11(c) and (d) take into consideration the **consequences** which would result to an institution if a record was released (see Order MO-1199-F).

In this case, the Police have relied on sections 11(c) and (d) with respect to pages 48 and 63 of the records, which are identical to each other. On my review of the record, and in the absence of any representations from the Police, I can find no basis for the application of sections 11(c) or (d). There is simply no evidence to suggest that disclosure of the information could reasonably be expected to result in the harms protected by those exemptions.

In summary, I reject the application of the section 11(c) or (d) exemptions to pages 48 and 63 of the records.

PERSONAL INFORMATION/INVASION OF PRIVACY

Personal Information

The Police have relied on exemptions under section 14 of the *Act* to deny access to portions of pages 7 to 9 and 30, and the entirety of pages 12 to 21, 31 to 42, 46 to 53, 55, 61 to 68, 71 to 73 and 75 to 76, as well as the provisions of section 38(b) in relation to some of these pages. As indicated earlier, many of these pages are duplicates of each other.

It is unnecessary for me to consider pages 71 to 73 and 75 to 76 in this section, since I have determined that they are exempt from disclosure under other sections of the *Act* (see section entitled "Solicitor-Client Privilege" below).

In order to determine whether the exemptions found in sections 14 and/or 38(b) apply to these records, it is necessary, firstly, to determine whether they contain "personal information" within the meaning of the *Act*. In relying on sections 14 and/or 38(b) to deny access to the records or parts of records, the Police have

apparently made a determination that the records contain personal information. In her submissions, the appellant states generally that she believes the records contain information related to the professional views and activities of both the Amherstburg Police and the Chatham-Kent Police.

Under section 2(1) of the *Act*, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual and the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.
For the purposes of this decision, each separate letter, memorandum and witness statement constitutes a record. On my review, I am satisfied that the records at pages 7 to 8, 12 to 13, 14 to 16, 18 to 21, 30, 31, 32 to 34, 35, 36 to 37, 38, 39 to 40, 41, 42, 46 to 48, 49 to 50, 51 to 52, 53, 55, 61 to 63, 64 to 65, 66 to 67, 68, 71, 72 to 73 and 75 to 76 contain the personal information of the appellant.

The records at pages 7 to 9 contain information about the officers who are the subject of the appellant's complaint to the OCCOPS. In a prior order, Adjudicator Holly Big Canoe found that information about constables qualifies as their personal information when it appears in the context of a complaint about the professional conduct of these individuals, even though some of this information would normally be considered professional and not personal information (see Order MO-1288). I adopt that approach and apply it here. Since pages 7 to 9 were created in the context of an investigation of the subject officers, referred to the Police by the OCCOPS, the information about the subject officers in these records qualifies as their personal information. The same applies to the records at pages 12 to 17, 31 to 34 and 55. Pages 18 to 21 consist of a statement provided by a member of the community, and contains the personal information of this individual as well as of others.

On pages 30 and 35, there are references to individuals other than the appellant; however, I find that the information is in relation to these individuals in their employment capacities, and does not qualify as their "personal information" (see Reconsideration Order R-980015). Since these pages contain the personal information of the appellant and of no other individuals, she is entitled to have access to these records because of section 37(1) of the *Act*.

The records at pages 36 to 42, 46 to 53 and 61 to 68 contain some personal information of individuals other than the appellant, and some information in relation to individuals in their employment capacities.

As I indicated in my Notice of Inquiry, it appears that pages 46 to 53 and 61 to 68 of the records (which are two sets of identical documents) are either in the possession of the appellant or known to her, since they were part of a lengthy set of materials which the appellant faxed to the OCCOPS. A number of previous orders have found that non-disclosure of personal information which was originally provided to the institution by an appellant, or personal information of other individuals which would clearly have beenknown to a requester, would contradict one of the primary purposes of the *Act*, which is to allow individuals to have access to records containing their own personal information unless there is a compelling reason for

non-disclosure. They determined that applying the presumption to deny access to the information which the appellant provided to the institution would, according to the rules of statutory interpretation, lead to an "absurd" result. I agree with these orders, and in applying this principle here, I am satisfied that the exemptions under section 14 and 38 of the *Act* cannot apply so as to deny the appellant access to these pages of the records. Pages 36 and 37 are identical to pages 51 and 52, pages 39 to 40 are identical to pages 49 to 50 (with the exception of letterhead), and page 42 is identical to page 53. The appellant is also entitled to these additional records by application of the "absurd result" principle.
The statement in typewritten form on pages 36 to 37 and 51 to 52, which I have ordered disclosed to the appellant, is also found in handwritten form at pages 18 to 21. On my review of these records, I am satisfied that the typewritten version is identical in content to the handwritten version, with the exception of the name of the employer of the person interviewed, the time the interview commenced, the place of the interview and the condition of the person interviewed, which appear in the handwritten version, on page 18. I also order disclosure to the appellant of pages 18 to 21 under the application of the "absurd result" principle, with the exception of the name of the employer and the condition of the person interviewed, discussed further below.

I also find that the "absurd result" principle applies to page 38 of the records. The personal information of an individual other than the appellant on page 38 is also found in records which the appellant has in her possession or knowledge. Since the only other personal information on this page is that of the appellant, she is accordingly entitled to this record, by application of the "absurd result" principle.

In light of my findings above, it remains to consider the application of the exemptions under sections 14 and 38(b) of the *Act* to pages 7 to 9, 12 to 17, 31 to 34, 41 and 55, and the two portions of page 18 referred to above.

Section 37(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exceptions to this general right of access. Section 38(b) of the *Act* provides:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if the disclosure would constitute an unjustified invasion of another individual's personal privacy;

Under section 38(b), where a record contains the personal information of both the appellant and other individuals and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information. The institution may also decide to grant access despite this invasion of privacy.

Section 38(b) introduces a balancing principle. The institution must look at the information and weigh the requester's right of access to his or her own personal information against other individuals' rights to the protection of their personal privacy. If the institution determines that release of the information would constitute an unjustified invasion of another individual's personal privacy, then section 38(b) gives the institution the discretion to deny access to the personal information of the requester.

In considering the application of section 38(b), sections 14(2) and (3) of the *Act* provide guidance in determining whether disclosure would result in an unjustified invasion of personal privacy. Section 14(2) provides some criteria for the head to consider in making this determination. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy.

With respect to section 14(3), the Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. In other words, once section 14(3) is found to apply, the factors in section 14(2) cannot be resorted to in favour of disclosure.

In applying sections 14 and 38(b) to the facts of this case, I am also guided by section 4(2) of the *Act* which requires the disclosure of "as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions".

In this case, the Police have relied on the factors in sections 14(2)(h) and (i), and the presumptions in sections 14(3)(b), (g) and (h) in claiming that the disclosure of the above-noted records and parts of records would constitute an unjustified invasion of the personal privacy of individuals other than the appellant. These sections provide:

> 14. (2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> > (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
> >
> > (i) the disclosure may unfairly damage the reputation of any person referred to in the record.
>
> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

> (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;
>
> (g) consists of personal recommendations or evaluations, character references or personnel evaluations; or
>
> (h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

Although the Police have also referred to section 14(3)(d) in their decision, it is unnecessary to consider it here, since I have found above that page 35 of the records, for which this exemption was claimed, does not contain the personal information of any individuals apart from the appellant.

It is also unnecessary to consider the application of sections 14(3)(a) or (g) to the records, since the information in the records for which this exemption has been claimed (on pages 38, 39, 47, 49, 62, or 64) is subject to the "absurd result" principle under my findings above.

Section 14(3)(b): Information compiled and identifiable as part of an investigation into a possible violation of law

The Police have relied on the presumption in section 14(3)(b) in relation to the information on pages 7, 9, 12 to 17, 31, 33 to 34, 41 and 55 of the records. I find that, with the exception of page 41, the information on these pages arises out of the complaint by the appellant to the OCCOPS, and includes memos from the inspector authorized to conduct the investigation into the complaint, memos from the Chief of Police of the Amherstburg Police Service informing the Board of that police service of the background of the complaint, and statements given by the subject officers. Previous orders have found that a public complaint investigation under the *Police Services Act* is a law enforcement investigation, since such an investigation can lead to charges against the subject officer (Order PO-1708, P-1250, P-932). I agree with those orders and accordingly, find that the information on these pages is covered by the presumption in section 14(3)(b). On the same basis, I find that the section 14(3)(b) presumption also applies to the information on pages 8 and 32, although the presumption was not specifically claimed for those pages.

In summary, the information on pages 7 to 9, 12 to 17, 31 to 34 and 55 is covered by the presumption in section 14(3)(b) of the *Act*, and qualifies for exemption under section 38(b). Further, nothing before me establishes that the Police have improperly exercised their discretion under section 38(b), in denying access to these records.

I find that the section 14(3)(b) presumption does not apply to the information on page 41. This page consists of a memo from the Chief of Police of the Amherstburg Police Service to the Board of that police service, providing an update as to his investigation of the comments allegedly made by the appellant to a

group of Girl Guides. This memo pre-dates the appellant's complaint to the OCCOPS, and thus was not compiled in the context of that law enforcement process. Further, as I have referred to above, the investigation of the appellant by the Amherstburg Police Service has been found not to be a law enforcement matter. I find therefore that the presumption in section 14(3)(b) has no application to the personal information in this memo.

Section 14(3)(h): Racial or ethnic origin, sexual orientation or religious or political beliefs or associations

The Police have also claimed the application of the presumption in section 14(3)(h) to the information on page 41. On my review of this record, I am satisfied that it does not contain information about the racial or ethnic origin, sexual orientation or religious or political beliefs or associations of any individual, and this presumption accordingly does not apply.

Section 14(2): Criteria for determining whether unjustified invasion of personal privacy

Although I have found that the presumptions in section 14(3) claimed by the Police have no application to page 41, I must still assess whether the disclosure of this information may constitute an unjustified invasionof the personal privacy of an individual other than the appellant. The personal information on page 41, apart from that of the appellant, consists of a reference to a letter sent to a named individual on a specific date from the Amherstburg Police. The Police have referred to the factor in section 14(2)(h) (information supplied in confidence) in support of its position that disclosure would constitute such an unjustified invasion of personal privacy. In the absence of any representations from the Police on this issue, however, I have no basis on which I may conclude that the information was supplied in confidence.

The appellant has not addressed in her submissions the specific issue of whether it might be an unjustified invasion of the personal privacy of individuals whose information is found in the records, to provide her with access to that information.

On balance, I find that, with respect to page 41, it has not been established that it would *not* constitute an unjustified invasion of the personal privacy of individuals whose personal information is contained in the record, to disclose that information to the appellant. Accordingly, I find that the portion of page 41 which contains the personal information of an individual other than the appellant qualifies for exemption under section 38(b). Since this record also contains information which is not covered by an exemption, and the personal information can be readily severed from the rest of the record, I will order that page 41 be disclosed, with the personal information of an identifiable individual withheld.

Finally, I also find that the information about the name of an individual's employer and the condition of the person interviewed found on page 18 of the records is personal information whose disclosure ought to be

denied in accordance with the analysis above, although the rest of that page is subject to the "absurd result" principle. This information can also be readily severed from the rest of the records.

In summary, I find that pages 30 and 35 of the records contain the personal information of the appellant but not of any other individuals and thus ought to be disclosed to her because of section 37(1) of the *Act*. I find that the presumption in section 14(3)(b) applies to pages 7 to 9, 12 to 17, 31 to 34 and 55 of the records. Although I find that no presumptions under section 14(3) apply to pages 18 and 41 of the records, disclosure of the personal information of individuals other than the appellant found in those records would constitute an unjustified invasion of the personal privacy of those individuals. In the case of page 18, it is the disclosure of the personal information of individuals which is not already known to the appellant, and which is thus not subject to the "absurd result" principle, which would constitute an unjustified invasion of personal privacy. Pages 18 and 41 also contain information which is not covered by an exemption, or which is subject to the "absurd result" principle, and which can be disclosed.

SOLICITOR-CLIENT PRIVILEGE

Section 12 of the *Act* provides that an institution may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

This section consists of two branches, which provide an institution with discretion to refuse to disclose:

1. a record that is subject to common law solicitor-client privilege (Branch 1); and

2. a record which was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

Although the wording of the two branches is different, the Commissioner's orders have held that their scope is essentially the same:

> In essence, then, the second branch of section 19 [the provincial equivalent to section 12] was intended to avoid any problems that might otherwise arise in determining, for purposes of solicitor-client privilege, who the "client" is . . . In my view, Branch 2 of section 19 is not intended to enable government lawyers to assert a privilege which is more expansive or durable than that which is available at common law to other solicitor-client relationships [Order P-1342; upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.)].

Thus, section 12 encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In this case, on my review, it is only necessary to consider the application of the first head of privilege.

Solicitor-client communication privilege

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation (Order P-1551).

This privilege has been described by the Supreme Court of Canada as follows:

> ... all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship ... [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 at 618, cited in Order P-1409]

The privilege has been found to apply to "a continuum of communications" between a solicitor and client:

> . . . the test is whether the communication or document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the solicitor and client ... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), cited in Order P-1409].

The Police have claimed the application of section 12 to pages 71 to 73 and 75 to 76 of the records. The appellant has not made representations on this particular issue. On my review, I am satisfied that these

communications were made confidentially within the framework of a solicitor-client relationship between the Amherstburg Police Services Board and its solicitors, for the purposes of obtaining legal advice. Accordingly, they are exempt from disclosure.

ORDER:

1. I order disclosure of pages 30, 35, 36 to 37, 38, 39 to 40, 42, 46 to 53, and 61 to 68.

2. I order disclosure of pages 18 to 21 and 41, with the exception of portions which I have found exempt from disclosure. For greater certainty, I have provided a copy of those unsevered records for the Police highlighting those portions which shall be **withheld.**

3. I uphold the decision of the Police to deny access to the other records or parts of records at issue.

4. In order to verify compliance with Provisions 1 and 2 of this order, I reserve the right to require the Police to provide me with a copy of the records which they provided to the appellant.

5. I order disclosure to be made by sending the appellant a copy of the records, excluding the exempted portions, by **February 1, 2001**, but not before **January 29, 2001.**

______________________________ December 22, 2000

Sherry Liang
Adjudicator