Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

INTERIM ORDER MO-1577-I

Appeal MA-020019-1

Ottawa Police Services Board

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NATURE OF THE APPEAL:

This is an appeal from a decision of the Ottawa Police Services Board (the Police), made under the provisions of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) had sought access to records relating to the collection and subsequent disclosure of Canadian Police Information Centre (CPIC) information about him to his employer. Specifically, he requested copies of

> all documents leading to the disclosure of my criminal record, the disclosure itself, and all subsequent related documents including but not excluding the following:
>
> - any document that has my name on it,
> - has a case number associated with my name,
> - all communication around this incident with my employer both sent and received,
> - memos, internal or external communications,
> - memorandum of agreement pertaining to the release of such records,
> - any related correspondence with [a named non-profit agency], Ottawa Police, OCDC or the RCMP.

As background, the appellant was employed by a non-profit agency as a community support worker. In July of 2000, his employer wrote to the Ottawa–Carleton Detention Centre (OCDC) and asked it to proceed with a CPIC inquiry for three named employees, including the appellant. The OCDC in turn asked the Police for that information. The OCDC was subsequently provided with a copy of the appellant's criminal convictions report, and in turn, provided the agency with a copy of the report. As a result, the appellant was dismissed from his position with the agency.

Following these events, the appellant made a complaint to this office regarding the disclosure of his information to his employer, resulting in a Privacy Complaint Report. Further, the Professional Standards Section of the Police instituted an investigation into the release of the appellant's information by the Police to the OCDC. At the time of the request, this investigation had not been completed.

From the information before me, it appears that the appellant may have instituted, or be in the process of instituting litigation against the Police based on these events.

In its decision, the Police released certain records to the appellant but withheld access to a number of others, relying on the discretionary exemptions under sections 8(1)(a) (interference with law enforcement), 8(1)(b) (interference with investigation), 8(1)(c) (reveal investigative techniques), 8(1)(g) (law enforcement intelligence information), 8(2)(a) (law enforcement report), the discretionary exemption under section 12 (solicitor-client privilege), the mandatory exemption under section 14(1)(f) (unjustified invasion of personal privacy), and section 38 (discretion to refuse access to requester's own information).

During mediation through this office, certain issues were resolved. The number of records in dispute was narrowed, and the institution withdrew its reliance on section 14 of the *Act*.

I sent a Notice of Inquiry to the Police, initially, inviting it to make representations on the issues and facts raised by this appeal. The Police sent representations which were subsequently shared with the appellant (with the exception of certain portions withheld for confidentiality reasons), and the appellant was also invited to make representations, which he did.

Following this, I decided to send a Supplementary Notice of Inquiry to the Police, and to an affected party. In this Supplementary NOI, I invited the Police to make submissions in particular on the application of sections 8(1)(a) and (b) and 8(2)(a) to Group 3 of the records. I invited the Police and the affected party to make submissions on the application of section 14(1) and/or 38(b) to the records in Group 3. Neither has responded.

RECORDS:

The records consist of approximately 130 pages of documents, which I have grouped as follows:

- **Group 1:** Pages 6 to 21 are printouts of Police computer records bearing information about the appellant. The Police have relied on sections 8(1)(a), (c) and (g) with respect to this group, as well as on the discretion in section 38(a).

- **Group 2:** Pages 22 to 23, 30, 34 to 35, 38 to 42 and 44 to 45 consist of printouts of email messages (many of which form part of a string and therefore overlap with each other), while pages 39 to 41 are a memo from counsel for the Police to their Freedom of Information Officer. The Police have relied on section 12 with respect to this group, as well as the discretion in section 38(a).

- **Group 3:** Pages 112 to 113 and 167 to 191 are also printouts of email messages (some of which also form part of overlapping strings of messages). Pages 46 to 49, 90 to 111 and 114 to 166 consist of various letters, memoranda, handwritten notes, printouts of computer records, fax cover pages, registered mail receipts, statutory material and other material. The Police have relied on sections 8(1)(a) and (b) and 8(2)(a) with respect to this group, as well as on the discretion in section 38(a). This group of records appear to have been gathered or produced as part of the investigation of the disclosure by the Professional Standards Section of the Police.

DISCUSSION:

PERSONAL INFORMATION

As I have indicated, the Police have relied on section 38(a) of the *Act*, in conjunction with sections 8(1) and (2) and 12. After receiving the representations of the parties and on my further review of the matter, I have decided that sections 14(1)/38(b) may also be relevant to the appeal, with respect to a limited number of pages in the records.

In order to assess the application of any of these provisions, it is necessary to determine whether the records contain personal information, and to whom that personal information relates.

Under section 2(1) of the *Act*, "personal information" is defined as 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.

On my review of the other records at issue, I find that the records in Group 1 contain the personal information of the appellant as well as, in some cases, of other individuals.

I find that the records in Group 2 contain the personal information of the appellant only.

With respect to Group 3, many of the records contain the personal information of the appellant, but not of any other individual, since this group consists of information obtained during the investigation of the release of the appellant's CPIC information to his employer. The records at pages 97 and 128 to 131 (which together constitute one record) contain the personal information of the appellant as well as of other individuals. Page 97, which contains the request of the appellant's employer to the OCDC to provide CPIC information on three employees (including the appellant), reveals the names and date of birth of the appellant and of the two other employees. Pages 128 to 131, which are part of the notes of the investigator from the Professional Standards Section, contain information that qualifies as "employment history" of an individual other than the appellant, within the meaning of section 2 of the *Act*.

Page 136 of Group 3 contains information of a similar nature to that in pages 128 to 131, but does not contain any personal information of the appellant.

In arriving at my findings on the personal information in the records, I have considered to what extent the information of named employees of the Police is the personal information of those individuals. Generally, information about persons in their professional or employment capacity is not considered personal information under the *Act*. The information of named employees in Groups 1, 2 and much of Group 3 falls into that category. Prior orders have found, however, that information about persons in their professional or employment capacity may qualify as personal information where that person's conduct has been called into question, such as through a formal complaint: see Orders P-939, P-1318, PO-1772 and PO-1912.

The representations of the Police, particularly in connection with sections 8(1) and (2), have alleged that there was a public complaint by the appellant about the actions of a police officer. If this is so, and the information about this officer was collected as part of an investigation into allegations of misconduct, it may well qualify as that individual's personal information. On my review of the file, however, it does not appear that the appellant filed any formal complaint under the *Police Services Act* about the conduct of a specific officer. Rather, his interest was more of a general one, to determine the circumstances around the release of his information, and to receive some assurance that this would never happen again. The investigation by the Professional Standards Section of the Police appears to have been more of a policy-oriented investigation,

directed to reviewing any defects in the policies and procedures of the Police on the release of CPIC information, rather than an investigation into an allegation of misconduct by an employee.

I am satisfied, therefore, that the information in the records about named employees of the Police is not their personal information. The only exceptions are the portions of the records that set out details of the employment history of a specific individual, in pages 128 to 131 and 136.

The records at pages 157 and 158 contain the personal information of individuals other than the appellant, but not of the appellant. They list the Board of Directors of the appellant's employer, and contain the names of those individuals and their home addresses, telephone numbers and fax numbers.

As at least some of the records contain the personal information of the appellant, section 36(1) of the *Act* is applicable to this appeal. Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38, however, provides a number of exceptions to this general right of access. Under section 38(a) of the *Act*, the institution has the discretion to deny an individual access to their own personal information in instances where the exemptions in, among others, sections 8 and 12 would apply to the disclosure of that information. In this case, the Police have relied on sections 8 and 12, in conjunction with section 38(a), to deny access to the records.

Section 38(b) provides another exception to the general right to have access to one's own personal information. Under section 38(b) of the *Act*, where a record contains the personal information of both the requester and other individuals and an 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.

I shall begin with a discussion of the application of sections 8 and 38(a) to the records, then sections 12 and 38(a). After that, I will consider to what extent sections 38(b) and 14(1) are applicable to the records.

LAW ENFORCEMENT

Section 8(1)

The portions of section 8(1) which are at issue in this appeal are:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;

> (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
>
> (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
>
> (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;

In order for a record to qualify for exemption under these sections, the matter to which the record relates must first satisfy the definition of the term "law enforcement" found in section 2(1) of the *Act*. This definition states:

> "law enforcement" means,
>
> (a) policing,
>
> (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
>
> (c) the conduct of proceedings referred to in clause (b);

Further, an institution relying on the section 8 exemption must establish that it is reasonable to expect that the harms set out in these sections will ensue if the information in the records is disclosed. In Order PO-1747, Senior Adjudicator David Goodis stated the following with respect to the words "could reasonably be expected to" in the provincial equivalent to section 8(1):

> The words "could reasonably be expected to" appear in the preamble of section 14(1), as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, 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.)].

With respect to section 8(1)(a) and (b), an institution must also establish that the investigation which it alleges will be harmed by disclosure is still *ongoing*: see Orders P-324, P-403 and M-

1067. Sections 8(1)(c) and (g) are slightly different. The section 8(1)(c) exemption relates to law enforcement "techniques and procedures." With respect to section 8(1)(g), its purpose has been described as providing an institution with the discretion to preclude access to records in circumstances where disclosure would interfere with the gathering of or reveal law enforcement intelligence information, defined in previous orders as:

> information gathered by a law enforcement agency in a covert manner with respect to ongoing efforts devoted to the detection and prosecution of crime or the prevention of possible violation of law, and is distinct from information which is compiled and identifiable as part of the investigation of a specific occurrence. [Order MO-1261]

Group 1

As described above, the records in Group 1 consist of printouts of Police computer records bearing information about the appellant. The Police have relied on sections 8(1)(a), (c) and (g) with respect to these records. Many of the representations of the Police with respect to the application of these sections to the records have been withheld from the appellant for confidentiality reasons. After reviewing these representations, and the records before me, I am satisfied that sections 8(1)(a), (c) and (g) apply to exempt these records from disclosure. Unfortunately, I am unable to provide more detailed reasons for my finding in that to do so would reveal the nature of the information in the records.

I am also satisfied, on my review of the records, that the same reasoning applies to the information at pages 121 to 123 of Group 3 of the records, to which the Police also sought to apply section 8(1)(a) of the *Act*.

To the extent that these records contain the personal information of the appellant, I am satisfied, on the material before me, that the Police have exercised their discretion appropriately under section 38(a) in refusing access to them.

Group 3

The following discussion relates to the records in Group 3 to which the Police have applied sections 8(1)(a) and (b) of the *Act*, with the exception of pages 121 to 123 which I have dealt with above. It is also not necessary to consider pages 137 to 142 of this group in this part, as I find them exempt under the solicitor-client privilege exemption below.

In addition, it should be noted that some of the records in Group 3 consist of email messages. The Police have already released a number of these messages to the appellant, through their access decision of December 20, 2001. I found it convenient to continue to treat them as records at issue in this appeal, rather than to separate them out, as some messages were printed several times by a different individual each time, or are part of a longer string of messages, some of which have not been released.

In the representations of the Police, they assert that the records in Group 3 were not released because of an ongoing investigation. The Police state:

> A violation under the Police Services Act for Breach of Confidentiality were [sic] being investigated because of the formal Public Complaint that had been filed by the appellant. At the time the Access to Information Request was made, the investigation had not been completed….The information could not be released to the appellant during the investigation because the Investigator had to collect the information to determine whether or not wrong doing was by an employee of our Service or an employee from another agency. The release of the information could have predicted or suggested that the fault was that of one specific individual before all the facts were known.

I have reviewed the records and the representations of the Police carefully in order to determine whether the investigation by the Professional Standards Section is a "law enforcement" matter within the meaning of section 2(1) of the *Act*. I have also reviewed the provisions of the *Police Services Act*, which were substantially amended in 1997. I find that there is considerable doubt as to whether the investigation at issue here qualifies as a "law enforcement" matter.

Prior orders in this area have found investigations by a police service to be "investigations into a possible violation of law" for the purposes of section 14(3)(b) of the *Act*, where formal complaints against specified police officers were filed with the Ontario Civilian Commission on Police Services (OCCOPS), or its predecessor, the Office of the Police Complaints Commissioner. Such investigations can lead to charges against the subject officers, which in turn can result in a hearing. However, in one prior decision (Order M-98), it was found that an investigation by a Professional Standards Branch did not qualify as a "law enforcement" matter for the purposes of sections 8(1) and (2) of the *Act* because it was conducted by the Police in their role as an employer, not as a regulatory or law enforcement agency, and was not conducted "with a view to proceedings in a court or tribunal in which a penalty or sanction could be imposed."

Under the *Police Services Act* (*PSA*) as amended, there is a distinction between complaints of a policy or service nature (see sections 60 and 61 of the *PSA*), and complaints about the conduct of specific police officers (see sections 64 to 70 of the *PSA*). The former do not appear to lead to proceedings before a court or tribunal, whereas the latter may.

As I have indicated above, the appellant made no formal complaint about the conduct of a specific officer to the Police, but was more interested in the general facts and issues raised by the release of his information. From the information in the records, it also appears that the investigator did not treat the investigation as arising out of an allegation of misconduct against a police officer, but as a more general investigation into a possible lapse in policies or procedures. It appears, therefore, that as contrasted with an investigation under sections 64 to 70 of the *PSA* (which may lead to proceedings before a court or tribunal), this investigation was conducted as one under section 60 and 61 of that *Act* (which does not lead to proceedings before a court or tribunal).

On the material before me, therefore, I find that it has not been established that the investigation in question is the type which "lead[s] or could lead to proceedings in a court or tribunal" where a sanction may be imposed, within the meaning of "law enforcement" under the *Act*, or otherwise meets the criteria of that definition. I am therefore not convinced that the Police have established the applicability of the exemptions under sections 8(1)(a) and (b) of the *Act* to the records in Group 3.

In the Supplementary Notice of Inquiry, I made reference to the above issues, quoting portions of the *PSA* and requesting more detail from the Police on the nature of the investigation and, in general, further representations in support of its position that the investigation is a "law enforcement" matter. As I have indicated, I did not receive further representations.

As I have found that sections 8(1)(a) and (b) do not apply to the records in Group 3 (with the exception of pages 121 to 123, referred to above), I now turn to consider whether they may be exempt under section 8(2)(a).

Section 8(2)(a)

Introduction

In order for a record to qualify for exemption under section 8(2)(a) of the *Act*, the Police must satisfy each part of the following three part test:

1. the record must be a report; and

2. the report must have been prepared in the course of law enforcement, inspections or investigations; and

3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

[See Order 200 and Order P-324]

In relation to the provincial equivalent to section 8(2)(a), it has been said that "the agency in question must have had the function of enforcing and regulating compliance with the provisions of the particular law which were the focus of the law enforcement activity, inspection or investigation dealt with in the report" (see Order PO-1833).

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).

I agree with this approach, and will apply it to the records at issue before me.

The Police submit that the "investigation done by the Professional Standards Section was a report which compiled information pertaining to the Public complaint laid by the appellant." I take the submission of the Police to be that Group 3 of the records should be considered, as a whole, part of that investigator's "report" for the purposes of section 8(2)(a).

In Order PO-1959, I considered a similar argument in connection with an investigative file from the Special Investigations Unit (the SIU). I concluded that each record in that file should be analyzed to determine whether it met the requirements of a "report" for the purposes of section 14(2)(a) of the provincial *Act* (the equivalent to section 8(2)(a)), and rejected the contention that the file had to be considered as a whole. In Order PO-1959, I found that the Report of the Director met the requirements of section 14(2)(a), as well as certain other records in the file. However, most of the file, consisting of information obtained during the course of the SIU's investigation, steps taken by SIU staff in the discharge of that investigative jurisdiction, and documentary materials obtained or generated by the SIU, did not.

In the appeal before me, I find that only the records at pages 48, 110 to 111, the bottom of 113 to the top of 114, 143 to 144 and 163 to 165 qualify as "reports", in that they constitute more than mere observations or recordings of fact and set out, with some measure of formality, the results of the collation and consideration of information.

Prepared in the course of law enforcement, inspections and investigations

I am not convinced, however, that any of the records which qualify as reports were "prepared in the course of law enforcement, inspections and investigations".

Even if the investigation by the Professional Standards Section could be considered a law enforcement matter (and I have found otherwise above), the only records in Group 3 which qualify as "reports" do not appear to have been prepared during the course of that investigation, but in relation to other investigations.

Page 48, which predates the Professional Standards Section investigation, appears to have been prepared during the course of an internal investigation by another institution, and I have been given no guidance on what "law enforcement" matter it relates to. Pages 110-111 also predate the investigation and relate to an unconnected issue of parole board hearings and, again, it is not clear what "law enforcement" activity is at issue here. The reports on pages 113-114 and 143 to 144 were also not prepared during the course of the Professional Standards Section investigation, but were part of prior internal reviews of the breach of confidentiality, unrelated to a "law enforcement" function. None of these records accordingly qualify for exemption under section 8(2)(a).

Pages 163 to 165 consist of the report of a mediator from this office in relation to a privacy complaint filed by the appellant. Whether it may meet the second and third parts of the test

under section 8(2)(a), I find that it ought to be released to the appellant under the application of the "absurd result" principle: see P-1457 and MO-1340, for instance. The appellant already has a copy of this report, through this office, as he was sent one at the conclusion of the investigation into his privacy complaint.

In sum, the section 8(2)(a) exemption does not apply to the records in Group 3, because they are not "reports" within the meaning of that section, they were not prepared in the course of law enforcement, inspections and investigations, or because it would be an absurd result to withhold them.

As I have indicated, I invited further representations from the Police on the application of section 8(2)(a) to the records in Group 3, but did not receive any.

I now turn to consider the application of sections 12 and 38(a) to the records.

SOLICITOR-CLIENT PRIVILEGE

As with the records in Group 3, a number of the email messages in Group 2 of the records, to which the Police applied the section 12 exemption, have already been disclosed to the appellant with their access decision. These messages are found on pages 23, 30, 34 and 35 of this group. I find therefore that these email messages are not at issue here. I will only consider the information in this group which has not already been disclosed, which consists of page 22, the first two messages on page 23, the first message on page 30, the first message on page 34, pages 38 to 42 and 44 to 45.

Section 12 of the *Act* states:

> A head 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.

Section 12 encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for section 12 to apply, it must be established that one *or* the other, or both, of these heads of privilege apply to the records at issue. I am satisfied that only solicitor-client communication privilege is relevant on the facts of this case.

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].

The Supreme Court of Canada has described this privilege 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 records to which the Police have applied section 12 consist of email messages and a memo from counsel to the Police to their Freedom of Information Officer. Some of the email messages are either to legal counsel for the Police or from legal counsel for the Police. Many of them are to and from other employees of the Police. Although the Police applied section 12 only to the records in Group 2, pages 137 to 144 and page 171 in Group 3 contain the same information as some in Group 2 and I have therefore incorporated them into this part of my analysis

I find that the first two messages on page 23, the first message on page 34 and three of the email messages on pages 44 to 45 are not communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. They are messages between employees of the Police and are not either to or from legal counsel. Neither do they refer to the advice of legal counsel. They are accordingly not exempt under section 12.

All of page 22, the first email message on page 30, the information on pages 38 to 42 and one email message on page 44 qualify for solicitor-client privilege. To the extent that these records contain the personal information of the appellant, I am also satisfied that the Police have exercised their discretion appropriately under section 38(a) in denying access to this information; however, I find that the email messages which qualify for exemption under section 12 can be readily severed from others on the same page which do not.

Pages 137 to 142 of Group 3 are the same as pages 39 to 41 of Group 2, and my findings above on pages 39 to 41 are applicable to them. The email message on page 171 of Group 3 is the same as one on page 38 of Group 2 and again, my finding on page 38 applies to page 171.

I now turn to the application of sections 14(1) and 38(b) of the *Act* to the portions of Group 3 of the records which I have found to contain the personal information of individuals other than the appellant.

INVASION OF PRIVACY

As indicated above, I have found that the records at pages 97 and 128 to 131 (which together constitute one record) of Group 3 contain the personal information of the appellant as well as of other individuals. The records at pages 136, 157 and 158 contain the personal information of individuals other than the appellant, but not of the appellant.

In relation to pages 97 and 128 to 131 of the records, section 38(b) provides an exception to the general right of the appellant to have access to his own personal information. As stated above, under section 38(b) of the *Act*, where a record contains the personal information of both the requester and other individuals and an 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.

Section 38(b) of the *Act* 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 another individual's right to the protection of their privacy. If the institution determines that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 38(b) gives the institution the discretion to deny access to the personal information of the requester.

In relation to pages 136 and 157 to 158, however, which contain the personal information of individuals other than the appellant only, section 38(b) does not apply. If the release of this information would constitute an unjustified invasion of the personal privacy of these individuals, section 14(1) of the *Act* prohibits the Police from releasing this information.

In both these situations (where section 38(b) applies, and where it does not) sections 14(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. 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. Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

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].

I invited the Police and an affected party to provide representations on the application of sections 14(1) and/or 38(b) to the records in Group 3, but did not receive any.

Despite this, I find the presumption in section 14(3)(d) relevant to this appeal:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information, relates to employment or educational history;

I find that the above presumption applies to information of a named police officer in the record at pages 128 – 131 and 136 of Group 3, to the extent that it reveals certain details of that individual's employment history.

With respect to pages 97, 157 and 158, although none of the presumptions in section 14(3) apply, I am satisfied that the disclosure of the names and dates of birth of two persons about whom CPIC inquiries were made, and the home addresses, telephone numbers and fax numbers of certain individuals, would constitute an unjustified invasion of their personal privacy.

Because the records at pages 136 and 157 to 158 do not contain the appellant's personal information, the personal information of the other individuals is exempt from access under section 14(1) of the *Act*. I find, however, that this information can be reasonably severed from the non-exempt portions of these pages.

Since the appellant's personal information is found in pages 97 and 128 to 131, section 38(b) applies. As section 38(b) is a discretionary provision, the Police are required to weigh the appellant's right of access to his own personal information against the other individual's right to the protection of privacy. The Police may choose to exercise their discretion in favour of providing access, or against providing access.

In their decision letter, the Police relied on the discretion in section 38(b) of the *Act*. However, they did not provide any basis for their decision to exercise their discretion against providing access. Further, since by the time the matter came before me, the Police had withdrawn reliance on the provisions of sections 14(1) and 38(b), their representations did not address the exercise of discretion under section 38(b).

As the Police have therefore not properly exercised their discretion under section 38(b), I will return the matter to them in order for them to make a decision about whether to provide the appellant with access to pages 97 and 128 to 131 of the records, or part of them.

***

In conclusion, I find the records in Group 1 exempt under sections 8(1)(a), (c) and (g) of the *Act*.

I find that sections 8(1)(a), (b) and 8(2)(a) do not apply to exempt the records in Group 3, with the exception of pages 121 to 123, which are exempt under section 8(1)(a).

Section 12 of the *Act* applies to exempt the information on page 22, part of page 30, pages 38 to 42 and part of page 44 of Group 2, as well as pages 137 to 142 and 171 of Group 3.

Some of the information on pages 136 and 157 to 158 of Group 3 falls within the scope of the section 14(1), but can reasonably be severed from the rest of these records.

Some of the information on pages 97 and 128 to 131 of Group 3 falls within the scope of the section 14(1)/38(b) exemption, but as the Police have not properly exercised their discretion under section 38(b) of the *Act*, I will remit the matter back to them.

ORDER:

1. I uphold the decision of the Police to withhold access to the records in Group 1.

2. I order the Police to disclose the records in Group 2 to the appellant, with the exception of page 22, part of page 30, pages 38 to 41 and part of page 44.

3. I order the Police to disclose the records in Group 3 to the appellant, with the exception of pages 97, 121 to 123, 128 to 131, 137 to 142 and 171, and the exempt portions of pages 136 and 157 to 158.

4. With respect to pages 97 and 128 to 131, which I have found to contain the personal information of individuals other than the appellant as well as of the appellant, I order the Police to consider the exercise of their discretion under section 38(b) of the *Act*, and provide the appellant with their decision on whether to provide access to the information in these pages, including an explanation of the factors they considered in the exercise of this discretion. This decision is to be made having regard to and within the time lines specified in section 19, 21 and 22 of the *Act*, treating the date of my decision as the date of the request for the purposes of those provisions. A copy of this decision is also to be sent to me at the same time. If the appellant wishes to appeal the decision under section 38(b), he may do so in writing to me by no later than thirty days after his receipt of the decision.

5. For greater certainty, I have sent the Police a copy of pages 30 and 44 of Group 2 and pages 136 and 157 to 158 of Group 3 with the portions to be withheld from the appellant highlighted.

6. Disclosure of the records in Provisions 2 and 3 of this order is to be made by sending a copy to the appellant by **November 8, 2002**. In order to verify compliance with the provisions of this order, I reserve the right to require the Police to provide me with a copy of the records disclosed to the appellant pursuant to Provisions 2 and 3.

Original Signed By: October 10, 2002
Sherry Liang
Adjudicator