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

ORDER MO-1573

Appeal MA-010193-1

Niagara Regional Police Services Board

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NATURE OF THE APPEAL:

This appeal arises from a request made by an insurer (the appellant) to the Niagara Regional Police Service (the Police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The appellant sought access to "any statements, police officers notes etc. pertaining to [a specified motor vehicle] accident" in which a van struck and killed an individual riding a bicycle.

The Police notified the alleged driver of the van, seeking his views on disclosure of the records. The alleged driver advised the Police that he consented to the disclosure of his personal information in the records.

The Police then issued a decision letter granting partial access to 89 pages of records, consisting of a sudden death report, vehicle reports, arrest report, property reports, general incident report, supplementary reports, police officers' notes, witness statements and will say statements. The Police indicated that access to portions of the records containing personal information of individuals other than the alleged driver was denied on the basis of the personal privacy exemption in section 14 of the *Act*. The severed records were enclosed with this letter. The Police also stated:

> My file contains the statement of [named police officer], the Central Traffic Unit officer that investigated this accident. I have denied access, in full, to this statement as it solely relates to technical data gathered as a result of [the named officer's] investigation. As explained to [you], technical information forms part of the reconstruction file and may be obtained through [the named officer] . . .

The Police also requested, and received from the appellant, a fee of $75.30 for photocopying and preparation and search time under section 45 of the *Act*.

The appellant then wrote to the investigating officer, seeking access to the "reconstruction file", including the statement of the investigating officer referred to in the original Police decision. In response, the investigating officer verbally advised the appellant that, for $2,500, the Police would provide access to a "collision reconstruction report based on the contents of" the reconstruction file, and that the Police would not provide access to the "raw technical data" only. The investigating officer also indicated that his decision was based on a specific municipal by-law. In response to further inquiries from the appellant about the basis for this decision, the Police wrote to the appellant stating:

> By-law 189-2000 provides for the imposition of a user fee and is enacted pursuant to the provisions of Section 220.1 of the *Municipal Act* . . . The By-law was approved by the Regional Municipality of Niagara on October 19, 2000 . . .
>
> Your Freedom of information request for documentation was denied by the Freedom of Information Co-ordinator. The basis for the denial was Section 15(a) of the [*Act*]. The documents requested are available to the public through the [Police] Traffic Unit.

> With respect to the charges imposed by the By-law, I understand that these charges are identical, or at least similar, to those charged by other major Police Services for similar information.

The appellant appealed the decision of the Police to deny access to the records, other than the 89 pages of severed records disclosed to the appellant in the original decision, pursuant to section 15(a) of the *Act*.

This office sent a Notice of Inquiry setting out the issues in the appeal to the Police, initially. The Police provided representations in response. This office then sent a Notice of Inquiry to the appellant, together with a copy of the representations of the Police. The appellant, in turn, provided representations. I then decided to seek additional representations from the Police in reply. The Police provided reply representations to this office, and copied the appellant. The appellant chose not to make additional representations in response.

RECORDS:

The records at issue in this appeal are described as follows:

> Motor Vehicle Accident Report
>
> Field Sketch
>
> Police Officer's Technical Notes
>
> List of Photographs and Corresponding Photographs
>
> Scale Diagram and attached Total Station Data
>
> Vehicle Mechanical Inspection Report and Corresponding Statement
>
> Invoice with technical notations

The Police sometimes refer to these records collectively as a "Traffic Reconstruction Report".

DISCUSSION:

RECORDS CURRENTLY AVAILABLE TO THE PUBLIC

Introduction

Section 15(a) reads:

> A head may refuse to disclose a record if,

> the record or the information contained in the record has been published or is currently available to the public . . .

Representations

The Police submit:

> [T]he Section 15(a) exemption applies to the record in issue, as the record is available in its entirety to the public through a regularized system of access.
>
> **Record in Issue**
>
> The record in issue is a Traffic Reconstruction Report. That report is in printed form and is technical in nature. It is prepared by accident reconstructionists working in the Central Traffic Unit of the Police. The report is prepared from technical information gathered in the course of the Police investigation into a particular accident. Witness statements and/or other records containing personal information which are protected by the [*Act*] are not included in the Reconstruction Report or its enclosures.
>
> The report itself is compiled in response to a request for same from a member of the public, and therefore is compiled solely for the purpose of making a record available to the public.
>
> **Information Available to the Public Through a Regularized System of Access**
>
> . . . The report is available upon request, and upon payment of a prescribed fee . . .
>
> In [our] decision, [we] informed the requester that the reconstruction file was available through [our] Central Traffic Unit. [We] provided the requester with the name of the investigating traffic officer as well as his phone extension . . .
>
> Any member of the public can obtain these records in their entirety by contacting the Central Traffic Unit and paying the prescribed fee.
>
> In order to establish that a regularized system of access exists, the Police must demonstrate that a system of access exists, that the record or information is available to everyone and that there is a pricing structure which is applied to all who wish to obtain the information (orders P-1316 and P-1387).
>
> Each of these three criteria are met in this instance.
>
> In the facts giving rise to Order P-1316, there was no prescribed system of access set out in either a statute or regulation. That fact led the [IPC] to the view that he must examine the system of access more closely. Notwithstanding a $1,700.00

fee, the decision of the Ministry was upheld as the system of access in fact existed.

. . . [T]he system of access is set out implicitly in By-law 189-2000 [of the Regional Municipality of Niagara Police Services Board] as set out below, but even if the system itself is not specified, the fact that it exists meets the test of Order P-1316 and P-1387.

By-law 189-2000

[The] By-law . . . is enacted in accordance with the user fee provisions of Section 220.1 of the *Municipal Act* . . . As required by that statute, the Regional Municipality of Niagara has approved that By-law on October 19, 2000, and accordingly, it is in force from that date forward.

The By-law does not itemize the regularized system of access to these records, but the system of access is in place and was explained to the requester as indicated above.

. . . . .

Inapplicability of Fee Structure of the Act

The user fees charged pursuant to the By-law are authorized under the *Municipal Act*, and while they are substantial, they are no different in theory than user fees charged pursuant to the *Municipal Act* by any municipal institution for its records.

The By-law also provides for decreased fees if specific documents are requested as opposed to a complete report.

. . . [S]ince the Section 15(a) exemption applies, it is outside the jurisdiction of the [IPC] to challenge or comment on the user fees properly chargeable pursuant to another provincial statute. Orders 159, P-1316 and P-1387 stand for the proposition that, once an institution establishes that Section 15(a) applies, the fee structure of the *Act*, including the provisions for fee waiver, is not operative. Once that fee structure is no longer operative, the appropriate fees can be charged pursuant to other authorizing legislation such as, in this case, the *Municipal Act* . .

Balance of convenience

In this case, the balance of convenience favours the Police. The records requested consist of all documents obtainable through the regularized system of access outlined above, as opposed to a few pages of a much larger document.

Further, in this case, [the] By-law . . . allows for production of any of the individual documents which are included in the preparation and production of the full report. In other words, a requester has a choice of receiving all of the

documents itemized in Schedule "A" to the By-law plus the complete Collision Reconstruction Report, or any combination of the individual documents without the report. If the latter document or documents are requested, the fees are significantly reduced. In providing the requester with these various options, the By-law implicitly recognizes the balance of convenience argument and is designed to ensure that a requester receives and pays for only the information which the requester needs.

Therefore, regardless of whether the requester asks for the full report, or any individual document or documents, such request can be fully accommodated through this regularized system of access.

For all of these reasons, and based on the principles set out in Order 170, the balance of convenience clearly favours the [Police].

In their reply, the Police made the following additional representations:

- all of the records at issue fall within the scope of the By-law;

- since the By-law came into force, four complete reconstruction reports and 13 partial reconstruction reports have been requested and compiled; in addition, ten reconstruction officer interviews have been conducted;

- to date, all requesters have been parties involved in the particular accident; however, if any member of the public, including individuals with no direct interest in the matters arising out of the accident, requested the records, they would be provided access subject to the severing of certain personal information which is explained below;

- section 3.3 of the By-law requires that the fee must be paid in advance of the compilation of the complete reconstruction report; this is the case whether the requester is an involved party or an individual with no direct interest in the matter; as explained below, the identity of the requester can make a difference in terms of what personal information is to be severed;

- the identity of the requester has no bearing on the fees charged;

- there is no policy requiring minimum information which must be provided in order to obtain access; as a practical matter, there must be sufficient information to enable [the Police] to identify the accident in question; this could include an approximate date of the accident, its location (nearest intersection), the first officer at the scene or the name of the involved party; this has not been an issue because all requesters have information as to date, location and names of the involved parties which allows [the Police] to identify the accident to which the request relates;

- if criminal charges are contemplated or pending, access is not granted in accordance with the law enforcement exemptions at sections 8(1)(a) and/or (f) of the *Act*, and in accordance with Police General Order 003, section 7.2 which states "In all cases where a criminal charge is pending, disclosure remains the responsibility of the Crown Attorney's office";

- records which contain personal information are severed; with respect to the Motor Vehicle Accident Report, personal information of witnesses is severed in respect of all requests; personal information of parties is not severed if the requester is a party to the accident as this information is provided by the police officer in any event to the party at the time of the accident; personal information of parties is severed if the requester were to be a non-party to the accident; photographs containing personal information do not form part of collision reconstruction reports and in effect are severed;

- the technical supplementary report on occasion will contain personal information; personal information of witnesses is severed for all requesters; personal information of non-parties is severed except for personal information of the requester; if a non-party requested the document, all personal information would be severed;

- requests normally come to the Freedom of Information Co-ordinator's office for all information relating to a motor vehicle accident, and she refers them to the traffic reconstructionists for the technical information; on occasion, the request has gone directly to the traffic reconstructionist office; in either event, the reconstructionist will refer the file back to the Co-ordinator to deal issues under the *Act* relating to records containing personal information prior to release of documents; and

- A complete reconstruction report consists of all items listed in Schedule "A" of the By-law; no additional material exists over and above those items listed; a complete collision reconstruction report has not been prepared in this case, as no request for the report has been made; the seven items listed above are the only records in existence with respect to this request.

The appellant made the following submissions in its letter of appeal and during the mediation stage of the appeal, which are incorporated by reference in its inquiry submissions:

> . . . The Police Service takes the remarkable position that the subject documentation is "available to the public" because it may be obtained directly from one of its Officers or a sub-branch of the Police Service. This is a perverse interpretation of the legislation. Clearly, the "available to the public" exception was enacted to avoid nuisance requests in circumstances where members of the public have reasonable access to the same information and documentation through

other means. This is certainly not the case here, where the [Police have] a monopoly on the sought information. In light of the purpose and spirit of the [*Act*], it is clear that the identified exception was not intended to be used to create or perpetuate such a monopoly.

We are particularly troubled by the amount and the apparent basis for the $2,500.00 fee which is sought by the [Police]. Schedule "A" of [the By-law] sets out various expenses for the "preparation and sale of collision reconstruction reports." To the extent that these fees relate to the *preparation* costs of various technical reports and other documentation, the amounts may be reasonable. However, *we do not seek preparation of such documentation, but merely a photostat of previously-prepared documentation already in the possession of [the Police]*. Accordingly, there is certainly no correlation between the amounts sought and the appropriate administrative costs associated with furnishing a photocopy of the complete file. While the [*Act*] is silent with respect to the administrative charges associated with answering an information request, charging an exorbitant amount constitutes a constructive refusal to provide access and is, therefore, contrary to the positive obligations and the spirit of the *Act*.

. . . . .

In previous decisions, the [IPC] has determined that the exception prescribed by Section 15(a) of the *Act* applies only where the information is currently available through some regularized access system. In the case at hand, there is no such system. [The By-law] does not create any such system, but simply sets out a fee schedule made pursuant to the *Municipal Act*.

In cases where the [IPC] has allowed agencies to rely upon the "regularized system of access" exception, there has been some true system in place for facilitating access by the public to enormous bodies of information. Such systems have included records of all septic systems in a municipality (Order MO-1411) and tax assessment rolls (Order P-1316). In other words, the exception has been applied where some distribution centre has been established for the benefit of members of the public who are entitled to access as a fundamental right of citizenship. The [IPC] has expressly stated that the exception only applies where the distribution mechanism is in the nature of a public library or a government publication centre [Order P-327].

The [IPC] has also made it quite clear that Subsection 15(a) is not to be abused by an agency to avoid its obligations under the *Act*, but should only be given effect where there is a true method of alternative access available to the public which the balance of convenience favours [Order P-327].

Furthermore, . . . the documentation at issue is not "available to the public" through this alternative (i.e. as this [phrase] is used within Section 15(a) of the *Act*), as the cost structure involved prohibits true availability . . . [The $2,500] figure does not relate to the administrative costs associated with making the

> materials available to the public, but relates to the underlying police investigation. This is clearly distinguishable from cases in which alternative sources of information imposed fees related to the administrative costs of answering a request (e.g. charges which approximated the average cost of conducting a search [Order MO-1411] or photocopying, charged at the rate of 3-for-a-penny [Order P-1316]).
>
> It is quite clear that the [Police are] not simply charging an amount to make the materials available to the public, but [are] attempting to capitalize on the intellectual property in the substance of the documentation at issue, the value of which is artificially created by the police monopoly on this information. This is clearly not consistent with, and is indeed offensive to, the spirit of the *Act*. It is our position that it is an attempted gross abuse of Section 15(a), which was intended to free an agency from nuisance requests where the information or documentation is readily available elsewhere, and not to promote the restriction of access to information to drive up its commercial value [appellant's emphasis].

In addition, the appellant submitted the following in its inquiry representations:

> **Record in Issue**
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> . . . [T]he requested information is clearly not "compiled in response to request for same from a member of the public." We have not ever asked that any new document be created, and in particular have not ever asked the [Police] to compile a "Traffic Reconstruction Report" as described by [the Police]. We have simply sought a copy of the existing contents of the "technical reconstruction file" which was patently in existence at the time that we made our initial request.
>
> **By-Law 189-2000**
>
> [The By-law] does not prescribe a system of access to information. This internal by-law simply prescribes a fee schedule. Thus, not only is this by-law patently not for the purpose of facilitating access to information by the public, but was obviously enacted to create intellectual property value in information over which the [Police] holds a monopoly. This artificial creation of wealth in information by a public body is obviously contrary to the spirit of the *Act*.
>
> The [Police] have compared the fee schedule prescribed by [the By-law] to the fee at issue in [Order] P-1316. This comparison is clearly not apt. In [Order] P-1316, the vast majority of the $1,700.00 administration fee was a "three-for-a-penny" processing fee associated with administering the data-distribution system. In the case at hand, there is simply no connection between administrative costs of making information available and the fee structure.
>
> **Balance of Convenience**

> The very consideration "balance of convenience" reveals the untenability of the argument [of the Police]. Despite the fact that the Police may be broken down into distinct departments, this is clearly not a situation in which there are alternative mechanisms for obtaining information where one mechanism might be found to be of greater overall convenience. Here, the Police are not directing information-seekers to an alternative source, but are simply demanding money. As stated in our previous written submissions, this is obviously not the purpose for which paragraph 15(a) of the *Act* was included.

Analysis

General

Most freedom of information statutes in Canada permit the government to refuse to disclose information that is available to the public. As stated by McNairn and Woodbury in *Government Information: Access and Privacy* (DeBoo: Toronto, 1989) at p. 2-28:

> Someone who is seeking information for which there is already a system of public access in place will normally be required to proceed in accordance with the rules of that system. A person who puts in an access request for a deed to property or a list of directors in a company's information return, for example, will likely be instructed to visit the land or companies registry to locate and view the relevant document. A government institution is unlikely to undertake a search for such a document when it has provided the facility for that to be done by members of the public or their representatives. If copies of a deed or a company return, once located, are ordered from the public office, charges will be levied in accordance with the scale of fees under the land registration or companies legislation, rather than that under the access legislation.
>
> The authority for diverting the requester to another access system in these circumstances is fairly clear under the Nova Scotia, Ontario and Saskatchewan Acts. While the other access statutes are silent on this matter, they should not be interpreted as creating a right to use their access processes in preference to resorting to the public record. In other words, the existing systems for access to particular kinds of information will take priority even if not as convenient or cost effective for the requester . . .

In Ontario, this office has stated that in order for the section 15(a) "publicly available" exemption to apply, the institution must establish that the record is available to the public generally, through a regularized system of access, such as a public library or a government publications centre [see Orders P-327, P-1316, P-1387]. In Order P-1316, former Commissioner Tom Wright expanded on the meaning of the phrase "regularized system of access":

> . . . [I]n order to establish that a regularized system of access exists for the computer tape, the Ministry must demonstrate that a system exists, the tape is available to everyone and there is a pricing structure which is applied to all who wish to obtain the information.

The term "regularized system of access" has been found to apply to a variety of records and circumstances, as follows:

- unreported court decisions (Order P-159);
- statutes and regulations, and excerpts therefrom (Orders P-170, P-1387);
- property assessment rolls (P-1316);
- septic records (MO-1411); and
- property sale data (PO-1655).

In many cases, the exemption was found to apply, despite the fact that the alternative source included a fee system that was different from the fees structure under the *Act* (see Orders P-159, P-1316, P-1387; MO-1411; PO-1655). In Order P-1387, former Commissioner Wright considered the appellant's argument that the exemption should not apply due to the higher cost of access to the records. In rejecting this argument, the former Commissioner stated:

> The appellant's representations address the issue of cost as a factor to be considered in examining the application of section 22(a) of the *Act*. He states that the *Act* supports the proposition that any impediments to making law available, such as costs, should be restricted as much as possible. The appellant submits that where a government institution itself has entered into the profit-driven market for the sale of its information resources, then it cannot take shelter in section 22(a). Since I have found that section 22(a) has been properly applied to exempt the information at issue, the fee structure of the *Act*, including the provisions for fee waiver, are no longer operative and I am unable to consider the issue of cost.

Similarly, the Information and Privacy Commissioner of British Columbia applied his equivalent exemption (section 20(1)(a)) to digital map data, which were available at a price of $30,000, despite submissions from the appellant and interveners that the high price constitutes an "effective barrier to access" (Order No. 91-1996). In that decision, former Commissioner David Flaherty held that once the government has established that the requested information is "available for purchase by the public", the only remaining question is whether the public body has exercised its discretion to refuse access in good faith and considering all relevant circumstances. Still, the former Commissioner urged the government to further develop a policy for making the information available to non-profit organizations at a reduced cost.

The current British Columbia Commissioner, David Loukidelis, in his recent Order 01-51, further articulated the approach his office takes in applying this exemption:

> . . . If a record is made available to anyone who is prepared to pay the price charged by the seller – or a price negotiated by seller and purchaser – it is

> available for purchase. (It does not matter whether the price paid includes a profit element or only covers the seller's costs of production and sale.) A record will, for example, be "available for purchase by the public" where it is produced by a privately or publicly owned publisher or entity and can be acquired at a bookstore or similar facility – whether traditional or on-line – or be obtained directly from the publisher or entity or agent. A record will also be available for purchase by the public where a public body has formally decided – in accordance with any applicable law or policy or rules applicable to the public body – that particular records, or kinds of records, are available for purchase by the public and are held out to the public, in some way, as being available for purchase. This may include cases where a public body tells people that records are available for purchase at the time they inquire about obtaining them – it is not necessary to publicly advertise their availability for purchase in advance. These examples of how a record may be available for purchase by the public do not exhaust the meaning of "available for purchase by the public".

I generally agree with the approaches described in these cases, with some exceptions as noted below.

Is there a generalized system of access to the records?

In my view, the Police have established that a regularized system of access exists for the traffic reconstruction records. While the system is not formalized, in the sense that there is a detailed procedure for access spelled out in a law or policy, this is not fatal (see Order P-1316). The pricing structure is clearly set out in detail in the by-law issued under the *Municipal Act*, and the by-law also implicitly states that a requester can seek either the entire report (consisting of a compilation of records) or individual records. In addition, the Police have described the informal system in some detail, which I accept has been applied consistently in a number of cases over the past two years since the by-law came into effect. I am also satisfied that the system would apply to any member of the public who sought access, despite the fact that, as a practical matter, it is unlikely that a non-party would be interested in obtaining these types of records in the usual case. I note also that a number of police services throughout Ontario have similar systems in place for access to traffic reconstruction records, with similar fee scales, and that these systems have been in place for a number of years.

The Police indicate that access to these records is variable, depending on whether there is an on-going law enforcement matter (in which case the section 8 exemption would be claimed) and who the requester is (in which case the section 14 may be claimed). In my view, it is reasonable for the Police, in this manner, to take into account the law enforcement and personal privacy interests under the *Act*, and this practice does not compel a conclusion that the Police do not have a regularized system of public access. By analogy, section 33 of the *Act*'s provincial counterpart requires institutions to make certain documents such as manuals, directives and guidelines available to the public, yet permits institutions to delete portions which otherwise may be exempt under the *Act*. In my view, this supports the notion that records can be considered generally available to the public, even where portions might be withheld in certain circumstances.

The appellant argues that there is no correlation between the pricing structure and the actual costs to the Police of providing access. As indicated above, once it is established that the records are "publicly available", the exemption applies, and this office is not in a position to inquire into whether (as the BC Commissioner put it) the alternative fee structure "includes a profit element or only covers the seller's costs of production and sale."

However, I accept that there may be circumstances where the cost of accessing a record outside the *Act* is so prohibitive that it amounts to an effective denial of access. In a recent case in the United States, *Hartford Courant Co. v. Freedom of Information Commission*, (SC 16568) (July 23, 2002), the Supreme Court of Connecticut was asked to decide whether a request for criminal history records should be considered as falling under a departmental fee for services statute, or the freedom of information statute. The applicable fee under the departmental statute was over $20 million, while the fee under the freedom of information statute was far lower. For various reasons that are not applicable here, having to do with the interpretation of the specific legislation, the court decided that the freedom of information statute applied. The court's final point in support of its decision read as follows:

> Were we to hold otherwise, the fee for the plaintiff's request would be $20,375,000, a result that would have the practical effect of denying the plaintiff access to records that, by statute, must be made available to the public. Such a result would be inconsistent both with the act's broad policy favoring the disclosure of information and with the well established canon of statutory construction "that those who promulgate statutes or rules do not intend to promulgate statutes or rules that lead to absurd consequences or bizarre results." *State v. Siano*, 216 Conn. 273, 278, 579 A.2d 79 (1990).

I agree with this view. Applying the "absurd result" principle here, this office may find in certain circumstances that a record is not in fact "publicly available" under section 15(a), due to the magnitude of the fee. However, the "absurd result" principle is not engaged here, particularly where the evidence indicates that the Police have granted access to similar records based on the by-law fee structure.

The appellant submits that this office has stated the exemption applies only "where the distribution mechanism is in the nature of a public library or a government publications centre." In my view, these are merely examples this office has given of common types of alternative public access vehicles, and are not intended to restrict the types of schemes that may fall within the scope of section 15(a) of the *Act*.

To conclude, I find that the Police have a regularized system of access to the traffic reconstruction records.

Should the Police's exercise of discretion be upheld?

The section 15(a) exemption is discretionary, in that it permits an institution to disclose information, despite the fact that it could be withheld because it is publicly available. On appeal, the Commissioner may review the institution's exercise of discretion, to determine whether or not it has erred in doing so, but this office may not substitute its own discretion for that of the institution (see section 43(2)). An institution will be found to have erred in the exercise of discretion, for example, where it does so in bad faith, for an improper purpose, or takes into account irrelevant considerations, or fails to consider relevant considerations. In that event, this office may send the matter back to the institution for a re-exercise of discretion, based on proper considerations.

Previous decisions of this office under the "publicly available" exemption have examined the "balance of convenience", to determine whether it would be more convenient in the circumstances for access to be granted under the *Act* as opposed to under the alternate access scheme. For example, in Order P-159, former Commissioner Wright noted that, in exercising its discretion, the Ministry of Health took into account that fact that it would be expensive and time-consuming if the request proceeded under the *Act*, as opposed to through the court office (see also Order P-170). However, in later decisions, this office has suggested that the exemption will not apply unless the balance of convenience favours the institution (see, for example, Orders P-327, M-773). On this point, in BC Order No. 01-51, Commissioner Loukidelis stated:

> The applicant argues that, consistent with the Ontario approach, the "balance of convenience" means the Ministry should not be allowed to rely on s. 20(1)(a), since it can readily give the applicant access to the case law. In the British Columbia context, I prefer to approach the issue by asking whether the public body has considered the exercise of discretion to disclose records despite the fact that it is authorized to refuse access under s. 20(1)(a). This is consistent with the approach I have taken to the exercise of discretion in relation to other of the Act's permissive exceptions . . . It is also consistent with Commissioner Flaherty's approach to this issue in Order No. 91-1996.
>
> In Order No. 91-1996, my predecessor considered whether the public body had exercised its discretion under s. 20(1)(a) in good faith and not for an improper purpose or based on irrelevant considerations. In Order No. 325-1999, at p. 5, I set out the following non-exhaustive list of factors to be considered by a public body in exercising its discretion to withhold or disclose records under a permissive exception:
>
> > In exercising its discretion, the head considers all relevant factors affecting the particular case, including:
> >
> > - the general purposes of the legislation: public bodies should make information available to the public; individuals should have access to personal information about themselves;

- the wording of the discretionary exception and the interests which the section attempts to balance;
- whether the individual's request could be satisfied by severing the record and by providing the applicant with as much information as is reasonably practicable;
- the historic practice of the public body with respect to the release of similar types of documents;
- the nature of the record and the extent to which the document is significant and/or sensitive to the public body;
- whether the disclosure of the information will increase public confidence in the operation of the public body;
- the age of the record;
- whether there is a sympathetic or compelling need to release materials;
- whether previous orders of the Commissioner have ruled that similar types of records or information should or should not be subject to disclosure; and
- when the policy advice exception is claimed, whether the decision to which the advice or recommendations relates has already been made.

In light of the first factor, especially, a public body should consider whether the Act's objective of accountability favours giving the applicant access to a requested record under the Act even though it could, technically, rely on s. 20(1)(a). If a record can only be purchased with difficulty – e.g., because it is difficult for a purchaser to locate copies – the public body should give access to it despite s. 20(1)(a). In such a case, the public body may choose to rely on s. 20(1)(a) because it reasonably considers that to give access under the Act would, despite the ability to charge fees, unreasonably burden it. Further, if the public body can easily provide a copy of a requested record under the Act, and doing so will not unreasonably burden the public body even if it charges fees, it should do so.

I agree with Commissioner Loukidelis's approach to this issue. Therefore, the appropriate question to ask under section 15(a) is whether the institution has properly exercised its discretion, which necessarily entails a consideration of the relevant balance of convenience factors. In the circumstances of the section 15(a) exemption, I would add to the list of possible factors for the institution to consider the reasons why the requester seeks the records, whether the requester is an individual or an organization, and whether the records have already been created or whether they are created only after receiving a request. I would also emphasize that, as Commissioner Loukidelis states, the factors are not necessarily exhaustive.

In the circumstances of this case, the Police were asked in the initial Notice of Inquiry to make representations that indicate what factors were considered in deciding to exercise discretion in

favour of applying the exemption. The Police provided representations on the balance of convenience factors, which are set out above. While I see no apparent error on the face of those representations, it is not clear to me whether the Police have taken into account all of the relevant circumstances of this case, including any listed above that may be applicable. Accordingly, I will require the Police to re-exercise its discretion in accordance with the above.

ORDER:

1. I uphold the decision of the Police that section 15(a) of the *Act* applies to the records, subject to the re-exercise of discretion referred to below.

2. I order the Police to re-exercise its discretion under section 15(a) of the *Act*, taking into account all relevant factors and circumstances of this case, using the above principles as a guide.

3. I order the Police to provide me and the appellant with representations on its exercise of discretion no later than **October 16, 2002**.

4. The appellant may submit responding representations on the exercise of discretion issue no later than **October 30, 2002**.

5. I remain seized of this appeal in order to deal with the exercise of discretion issue, and any other issues that may be outstanding.

Original Signed By: September 24, 2002
David Goodis
Senior Adjudicator