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

ORDER MO-1703

Appeal MA-020128-1

Hamilton Police Services Board

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NATURE OF THE APPEAL:

The Hamilton Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to a fatal motor vehicle accident. The requester, who is represented by counsel, is both the widow of the victim of the accident as well as the executrix of his estate.

The Police granted partial access to certain responsive records, and denied access to the remainder, based on a number of exemptions in the *Act*. The Police denied access to two types of records (30 responsive photographs and the Fatal Collision Reconstruction Report (the reconstruction report)) on the basis of the exemption found in section 15(a) (information published or available). The Police indicated that the photographs could be purchased from the Identification Branch of the Police for $11.00 each. With respect to the reconstruction report, the Police referred the requester to the Motor Vehicle Collision Reconstruction Team of the Police, and attached a fee schedule to the decision letter. The fee schedule listed the different fees payable for the various parts of the reconstruction report, and identified that the full reconstruction report was available for a fee of $2,500.

The requester's counsel (now the appellant) appealed the decision, and subsequently confirmed that he was appealing the decision that section 15(a) applied to the photographs and to the reconstruction report.

During the mediation stage of this appeal, Senior Adjudicator David Goodis of this office issued Order MO-1573, which dealt with issues similar to the ones raised in this appeal. In that appeal, access to an accident reconstruction report was denied on the basis of section 15(a), and the institution in that appeal (the Niagara Regional Police Services Board) also identified that the reconstruction report could be obtained for a charge of $2,500. After extensively reviewing the issues in that appeal, Senior Adjudicator Goodis upheld the Police's position that section 15(a) applied to the reconstruction report. The parties in this appeal were referred to that Order during the processing of this appeal.

Mediation did not resolve the issues, and a Notice of Inquiry, summarizing the facts and issues in this appeal, was sent to the Police. The Police provided representations on the issues, and the Notice of Inquiry, along with the non-confidential portions of the Police's representations, was sent to the appellant. The appellant provided representations in response, which were in turn shared with the Police. The Police then provided reply representations.

The issues I must decide in this appeal are whether the discretionary exemption found in section 15(a) applies to the records and, if so, whether the Police properly exercised their discretion in applying that exemption in the circumstances of this appeal.

The records at issue are 30 photographs and the 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;

As identified above, Senior Adjudicator Goodis recently had to decide whether section 15(a) applied to records similar to the ones at issue in this appeal (a reconstruction report) when a police service was charging $2,500 for access to the report (Order MO-1573). Senior Adjudicator Goodis reviewed the history and application of section 15(a) in considerable detail. Concerning the section itself, he stated:

> 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".

Senior Adjudicator Goodis generally agreed with the approaches taken in the cases he referred to, and I agree with his approach and adopt it for the purpose of this appeal.

The Police's Representations

Reconstruction Report

The Police take the position that the reconstruction report is currently available to the public. They state:

> Any member of the public can obtain these records by contacting the Traffic Branch of the [Police] and paying the required fees.

The Police summarize the process through which a request is made. They state:

> When the Traffic Branch receives a request for a Collision Reconstruction Report with a fee, the accident reconstruction officer assembles and severs the report. This report is technical in nature and … therefore can be purchased by any member of the public regardless of whether they were involved as long as applicable fees are paid…. The Freedom of Information Coordinator checks the report to ensure that only technical and no personal information is included.

The Police then identify that the actual reconstruction reports may vary. For example, if a driver of one of the vehicles is requesting the report, his or her personal information could be included in that copy, whereas it would be excluded from copies provided to others.

The Police also identify the fee structure that is in place for providing copies of the reconstruction report. They refer to the Police By-law enacted in accordance with the user fee provisions in the relevant section of the *Municipal Act*.

Photographs

The Police take the position that the photographs are currently available to the public, and that they can be obtained by contacting the Identification Branch of the Police.

The photographs are stored in case envelopes, which hold the negatives and contact prints of all of the photographs from the negatives. When photographs are requested, the requester can order all photos, or view the contact prints and order only the photographs that they require. These photographs are then developed and printed by the Identification Branch and sold for $11.00 each. The Police identify that, if the photographs contain other individuals' personal information, or if the case to which the photographs relate is before the courts, the Police may deny access to them.

The Police also identify the specific by-law which sets out the fees for services charged by the Police, and confirms that Schedule 9 to that by-law sets the fees for photographs at $11.00 per photograph (including GST).

The Appellant's Position

The appellant takes the position that section 15(a) does not apply to the records. He identifies a number of previous orders which determined that section 15(a) applied to a variety of types of records, and then refers to the recent order of Senior Adjudicator Goodis (MO-1573), which he believes was wrongly decided. The appellant states:

> It is submitted that it is incorrect to characterize an internal unit of the very institution to which the request is made as an "alternative source".

After referring to an order where the provincial equivalent of section 15(a) was applied in circumstances where the requester was referred to another institution to obtain access to the records (Order P-1316), the appellant states:

> In this case, there is no alternative source available to obtain the requested information.
>
> Further, the "system of access" is an internal one. It is submitted that an "alternative source" to obtain the information must be a different entity, separate and apart from the one that is denying access.
>
> The mere fact that the institution that creates and holds the only copy of a requested record and subsequently will provide that record for a fee which price is set by the institution can hardly be called a "regularized system of access".
>
> With the exception of MO-1573, "regularized" refers to a source outside of the institution to which the request has been made.

The appellant then submits that, because the traffic unit of the police force is not separate, different and distinct from the Police, section 15(a) cannot apply.

Findings

As identified above, Order MO-1573 dealt with issues very similar to the ones in this appeal. In that order the Senior Adjudicator confirmed that the section 15(a) exemption was available to the Police where a request was made for an accident reconstruction report, and where the Police referred the requester to the system of access which had been established by the Police under the relevant by-law. Furthermore, the amount charged by the Police Force in MO-1573 was similar to the amount charged by the Police in this appeal.

The appellant's position reflects one of the arguments made by the requester in MO-1573. In that order, adjudicator Goodis quotes from the requester's representations:

> … 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.

Senior Adjudicator Goodis did not accept this position, and addressed this issue as follows:

> 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*.

The appellant acknowledges that MO-1573 is an "exception" to his position that alternative sources of access cannot include internal access.

I agree with the approach taken by the Senior Adjudicator in Order MO-1573, and I do not accept the appellant's position that the "alternative source" to obtain the information must be a different entity, separate and apart from the one that is denying access. Order MO-1573 addressed this issue directly, and the adjudicator determined that this was not a relevant factor. Furthermore, many previous orders have applied section 15(a) and its provincial equivalent, and in a number of these orders the "alternative source" of access is an "internal" source. Although in some of these orders section 15(a) did not apply for other reasons, the issue of whether or not the "alternative source" could be the same institution that denied access was not raised as an issue (See orders P-1114, P-1281, MO-1366, MO-1693). In other circumstances where section 15(a) was upheld, the source was the very institution which denied access (See Order MO-1411). This is in addition to Order MO-1573, which clearly addresses this issue.

Accordingly, I do not accept the appellant's position that the information is not publicly available because it is available through an internal source.

I find that section 15(a) applies to the records.

EXERCISE OF DISCRETION

Introduction

Having found that the discretionary exemption in section 15(a) applies to the records, I must now consider whether the Police properly exercised their discretion in deciding to apply that section to the records.

In Order MO-1573, referred to above, Senior Adjudicator Goodis also had to determine whether the Police properly exercised their discretion in deciding to apply section 15(a) to the records. He found that they had not done so, and ordered the Police to re-exercise their discretion under section 15(a) of the *Act*, taking into account all relevant factors and circumstances and using the principles set out in Order MO-1573 as a guide. Those principles were set out as follows:

> 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 [Tom] 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 [David] 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 [former] Commissioner [David] 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.

Following the Police's further exercise of discretion in accordance with Order MO-1573, adjudicator Goodis re-examined the Police's exercise of discretion in Order MO-1585-I. He re-iterated the factors from Order MO-1573, as set out above, and then applied them to the circumstances in his appeal.

I agree with the approach taken by Senior Adjudicator Goodis, and will apply the same factors to determine whether the Police properly exercised their discretion in the circumstances of this appeal.

Representations

Both the Police and the appellant have provided extensive representations on whether or not the Police properly exercised their discretion in applying section 15(a) to the records. In their initial representations the Police submit:

> In exercising discretion, the [Police] took into account all relevant circumstances. The [Police were] careful not to take into account extraneous, irrelevant or unreasonable considerations, and based its decision on realistic concerns.

The Police then summarize the factors they considered, review the factors cited by the Senior Adjudicator in MO-1585-I (set out above), and state that they tried to consider all relevant facts relating to this appeal while exercising their discretion. They also state that, although the list of

factors set out above is not exhaustive, these factors were all considered by them. The Police then state:

> [The Police take] note of the fact that privacy legislation provides for a balancing. We consider each situation on a case-by-case basis. In our view, there is no basis to determine that the records at issue should be dealt with under the *Act* and not properly through the public channels available within this Police Service.

The appellant was provided with a copy of the non-confidential portions of the Police's representations. In his representations the appellant takes the position that the Police erred in exercising their discretion in that the Police did so for an improper purpose, took into account irrelevant considerations, and failed to consider relevant considerations.

The appellant then sets out each of the listed factors identified in Order MO-1585, and identifies the concerns and issues raised in this appeal under each of those factors. These are summarized as follows:

- in this case a widow is seeking information about the death of her spouse from the institution which is itself obliged to investigate this fatal incident
- disclosing this information to a deceased family member meets one of the objectives of the *Act* – accountability
- civil litigation is pending before the courts, and providing this information may assist the court or may resolve the matter
- there is no evidence that the Police would be unduly burdened by providing the record
- the requester is an individual directly involved with the information at issue, and is not a "corporate entity"
- the request is for a distinct item or items which have already been created
- there is no sensitivity to the public or the Police in disclosing the Report
- the Police are accountable to the family and to the public in the work they do, and a decrease in public confidence will result if information regarding investigations is not provided to the family of the victim
- the record is still relevant and civil proceedings are underway
- there are sympathetic and compelling reasons to release these materials
- the very institution investigating the incident is making it difficult to access the information through "cost measures that are onerous"
- the issue is not access to the records, but the price of the records.

The appellant also submits that the Police have acted for an improper purpose. The appellant states that the reconstruction report was created as part of an investigation into the accident, and

that the failure to provide information from the results of those investigations to the families of the victims is an improper purpose in light of the obligations, duties and responsibilities of the Police in these circumstances.

The appellant then lists factors which he believes are relevant but were not taken into consideration:

1) The institution is the Police, and obtaining information from the Police is of greater significance because of the nature of the work the Police do.
2) The role, obligation and relationship of the Police to the particular individual, and the unique and special obligation on the Police to provide to a family member any and all information that is not of a sensitive nature.
3) The economic burden placed on an individual to access information. In this case specific information, not withheld due to sensitivity concerns, is being constructively withheld because of the financially onerous price tag. Therefore, section 15(a) should not be relied on because it makes the fee waiver section of the *Act* inoperative, and amounts to the constructive denial of the requested information to the widow of the deceased.

The appellant also submits that the Police took irrelevant considerations taken into account, and refers to the fact that in Order MO-1573 the adjudicator took into consideration that "others" had paid for the reconstruction report. In the present case the appellant submits that a widow, who is a litigant and related to the victim of a fatal incident, is requesting the report. This, in his view, distinguishes this request from other requests.

The appellant's representations were shared with the Police, and the Police responded by providing further representations, which address a number of the issues raised by the appellant. The Police review each of the listed factors and identify how these factors were considered at the time of determining whether access would be granted.

Findings

Introduction

I have carefully reviewed the representations provided by both the Police and appellant, to decide whether the Police properly exercised their discretion in the circumstances of this appeal.

The Police provide a lengthy review of the various factors they considered in deciding to exercise their discretion not to disclose the records. The appellant takes the position that the Police erred in exercising their discretion in that they did so for an improper purpose, took into account irrelevant considerations, and failed to consider relevant considerations.

If the Police are found to have erred in the exercise of discretion based on any of the three reasons identified by the appellant, I may send the matter back to the Police for a re-exercise of discretion.

Did the Police exercise their discretion for an improper purpose?

I find that the Police did not exercise their discretion for an improper purpose. I do not agree with the appellant that the Police's reliance on section 15(a), and their failure to provide the information to the families of the victims, is an "improper purpose" in light of the obligations, duties and responsibilities of the Police in these circumstances.

Did the Police fail to take into account relevant considerations?

The appellant suggests that the Police failed to take into account a number of relevant considerations, including numerous listed ones, and three specifically identified ones. I am not persuaded that this is the case.

The first factor referred to by the appellant is that, because of the nature of the work done by the Police, obtaining information from them is of greater significance than obtaining information from other institutions. I do not agree. In my view all of the considerations set out above, including the nature of the record as well as whether there is a sympathetic or compelling need to release materials, must be taken into account. In that regard the nature of the institution, and whether the institution is the Police or any other institution, is not a relevant factor.

In my view the second factor referred to by the appellant (the "special obligation" of the Police) simply reflects the obligation on any institution to consider whether requested information relates to a deceased family member, and whether there are sympathetic reasons to release it. The Police specifically identified this as a factor they considered in exercising their discretion, and in my view they have no "unique" or "special" obligation to disclose information to the appellant in this case.

The third factor identified by the appellant, which in his view the Police failed to consider, is the economic burden placed on an individual to access the information. The appellant states that in this case the reconstruction report is already compiled, and it should not be withheld because, as a result, sensitive information is now constructively withheld from the appellant due to the financially onerous price tag. The appellant states that applying section 15(a) makes the fee waiver section of the *Act* inoperative, and therefore section 15(a) should not to be applied. He states that the use of section 15(a) amounts to the constructive denial of the requested information.

The fact that applying section 15(a) may affect fees was specifically examined in Order MO-1573, and the ability of the Police to rely on section 15(a), notwithstanding its possible affect on fees, is not in doubt. The Police must consider all factors in exercising their discretion to apply or not apply section 15(a).

However, the appellant's reference to the reconstruction report being "already compiled" raised a factual consideration, particularly in light of adjudicator Goodis's finding in MO-1585-I that a relevant factor to consider is whether the request included both records that exist and records that the Police would have to create.

In their initial representations the Police specifically state "In this appeal there has been no other request for the [Reconstruction Report]". However, later in those representations the Police state "The fact that there was [an]other request for the [Reconstruction Record] was also considered….". The appellant seems to focus on the latter quote from the Police's representations, and argues that a factor in favour of disclosure is that the requested record has already been created. In reply, the Police clarify that no other request had been made for this record, and that the record had not been created.

In light of the appellant's concern that the Police did not consider relevant factors, I must decide whether the possible ambiguity in the Police's initial representations constitutes a failure by the Police to consider a relevant factor. I find that it does not, and that the Police did consider whether or not a report had been created in deciding to exercise discretion in this appeal.

Based on all of the Police's representations, I interpret the Police's earlier representations where they state "the fact that there was [an]other request for the [Reconstruction Record] was also considered" to mean that the Police specifically considered whether or not the report had already been created. Although the wording of their representations seems to have led to some confusion as to whether the reconstruction report had been requested by others, I am satisfied, based on the Police's representations, that the Police considered this factor in deciding to exercise their discretion to apply the section 15(a) exemption.

To conclude, I find that there are no relevant factors that the Police failed to take into account.

Did the Police take into account irrelevant considerations?

I find that the Police did not take into account irrelevant factors in exercising their discretion. In their representations the Police identify the factors they considered, and I am satisfied that they only considered relevant factors in making their decision.

I would like to address one issue in particular. The Police refer to their attempt to exercise their discretion in a "consistent manner" and at one point state that "consistency requires that [the Police] continue to exercise … discretion in this manner." Furthermore, in dealing with the "public confidence in the operations of the Police", the Police identify that exercising their discretion in favour of disclosure in some circumstances might "create the impression of partiality or favouritism". Comments such as these may suggest that the Police would always exercise their discretion under section 15(a) to deny access in responding to requests for records such as the reconstruction report. If this were the case, the Police would appear to be fettering their discretion under section 15(a) in a given instance.

Elsewhere, however, the Police also refer to their consideration of the specific circumstances of this appeal in deciding to apply section 15(a). The Police state:

> "… in this case [the Police] did consider that it was the widow of the deceased requiring the information. [The Police] felt that after considering the circumstances of the civil litigation that it is not a sympathetic or compelling reason in this case. The exercise of discretion is determined on a case by case basis and there may be a time when this Police service would opt to release for reasons of civil litigation.
>
> The [Police have] considered the sympathetic and compelling circumstances but feel they do not outweigh other factors in favour of relying on the exemption.

The Police also state:

> … the privacy legislation provides for a balancing. We consider each situation on a case-by-case basis. In our view, there is no justification to determine that the records at issue should be dealt with under the *Act* and not properly through the public channels available within this Police Service.
>
> … Exercises of discretion were engaged in after full review of relevant factors ….

Based on my review of the Police's representations as a whole, I am satisfied that their reference to "consistency" relates to the Police's concern that they not be regarded as arbitrarily deciding whether or not to respond to requests under the *Act* or outside of the *Act*. The Police specifically refer to their concern that their discretionary decisions may create the impression of partiality or favouritism. They explain that the manner in which they ordinarily deal with requests for these kinds of records is to proceed through the alternative access scheme developed by the Police. Subject to any factors which may change their decision to exercise discretion in favour of applying an exemption, they will otherwise apply the section 15(a) exemption. In my view, this factor is connected to one of the specific factors listed by Senior Adjudicator Goodis in Order MO-1585, namely "the historic practice of the public body with respect to the release of similar types of documents". Although I might not consider this factor a particularly weighty one, my review of the Police's exercise of discretion is done to determine whether or not the Police have erred in exercising their discretion, not to substitute my own discretion for that of the Police (see section 43(2)). If I were to find that the Police's exercise of discretion took into account an irrelevant consideration, I could send the matter back to the institution for a re-exercise of discretion. However, I am satisfied that the Police did not take into account irrelevant factors in exercising their discretion in this appeal.

Accordingly, I find that the Police properly exercised their discretion in applying section 15(a) in the circumstances of this appeal.

Conclusion

The Police did not err in exercising discretion under section 15(a). Therefore, I uphold the Police's decision to apply section 15(a) to the records.

ORDER:

I uphold the decision of the Police that section 15(a) of the *Act* applies to the records.

Original signed by: October 30, 2003
Frank DeVries
Adjudicator