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

ORDER MO-1927

Appeal MA-040181-1

Toronto Police Services Board

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NATURE OF THE APPEAL:

The appellant submitted a request to the Toronto Police Services Board under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of the "police report" relating to three separate incidents involving his three sons. The appellant also requested a copy of photographs in the police file relating to one of those incidents.

The Toronto Police Services Board (the Police) issued a decision providing partial access to the records, severing information pursuant to the following exemptions in the *Act*:

- section 38(a) (discretion to refuse a requester's own information) in conjunction with sections 8(1)(l) (facilitate the commission of an unlawful act) and 8(2)(a) (law enforcement report);

- section 38(b) (personal privacy) in conjunction with section 14(3)(b) (personal information compiled and identifiable as part of an investigation into a possible violation of law);

- section 14(1) (personal privacy) in conjunction with section 14(2)(f) (highly sensitive) and 14(3)(b).

The Police also cited section 54(c) of the *Act* in their decision. This section provides that a parent having lawful custody of a child under sixteen may exercise any right of the child's under the *Act*, including that child's right of access to his/her personal information. In this appeal, however, it is not disputed that the appellant does not have lawful custody of his three sons and, accordingly, he cannot rely on section 54(c) in a request for their personal information.

The appellant filed an appeal of the Police's decision to deny access to the withheld information.

The appeal was not resolved in mediation, and moved on to the inquiry stage of the appeal process. I began my inquiry by sending a Notice of Inquiry to the Police initially, and received representations in return. I then sent a Notice of Inquiry, along with a copy of the non-confidential representations submitted by the Police, to the appellant who provided representations in return.

The appellant's representations raised issues for reply by the Police. In support of his position that he is entitled to receive the withheld portions of the records, the appellant provided a copy of Minutes of Settlement between himself and his ex-wife. The Minutes of Settlement grant custody of the appellant's three sons to his ex-wife, "subject to all the rights of the Father as a parent". The Minutes of Settlement go on to refer to the appellant's right to receive information about the health, education and welfare of the children, as well as the children's access rights in relation to the appellant.

I sent a copy of the appellant's representations in their entirety, including a copy of the Minutes of Settlement, to the Police, who provided reply representations. I then returned to the appellant for sur-reply, providing him with the Police's reply representations and requesting that he comment on whether the provisions of the Minutes of Settlement entitle him to have access to the severed portions of the records. The appellant responded with further representations,

including a copy of the Divorce Judgment regarding himself and his ex-wife, which confirms the provisions of the Minutes of Settlement.

RECORDS:

The Police have identified a total of 4 records, comprising 16 pages in total, as responsive to the appellant's request.

Record 1 (consisting of pages 1 to 6) is the general occurrence report including an occurrence information sheet for the incident that occurred on September 10, 2002. Record 2 (consisting of pages 7 to 11) is the general occurrence report including an occurrence information sheet for the incident that occurred on August 26, 2002. Record 3 (consisting of pages 12 to 15) is a general occurrence report including an occurrence information sheet for the incident that occurred on September 3, 2003. The Police deny access to Record 1 in its entirety, and parts of Records 2 and 3, under section 38(a) in conjunction with section 8(2)(a), and under section 38(b) in conjunction with section 14(3)(b). The Police also rely on section 38(a) in conjunction with section 8(1)(l) for part of Record 3.

Record 4 (consisting of page 16) is a one-page photo sheet which the Police refer to as a "contact sheet". The Police have denied access to this page in its entirety under sections 14(1) and 38(b), in conjunction with sections 14(2)(f) and 14(3)(b).

DISCUSSION:

PERSONAL INFORMATION

In order to determine whether the exemptions at sections 14(1), 38(a) and 38(b) of the *Act* may apply, it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates. The term "personal information" is defined in section 2(1). The definition states, in part:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> ….

> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> …
>
> (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

The Police submit that the records at issue contain the personal information of the appellant, his sons, his ex-wife and other individuals who were associated with the incidents. The appellant makes no specific representations about whether the information at issue contains personal information as contemplated by the *Act*.

Records 1, 2 and 3 contain the names, dates of birth, ages and other personal information of the appellant's sons. Based on the nature of the investigations summarized in the three occurrence reports, I find that Records 1 and 3 are, in a general sense, the personal information of all of the appellant's sons, and record 2 is the personal information of one son. As well, these records contain the name, address, telephone number, birth date, race, and marital or family status of the appellant's ex-wife, as well as the name, address, date of birth, race, nationality, family status, and other information about another individual, and similar data about other identifiable individuals involved in the incidents. I find that all of this is the personal information of these individuals. In addition, I find that Records 1, 2 and 3 contain the appellant's name, marital or family status and other information about him, and I find that this qualifies as his personal information.

Record 4, the contact sheet, consists of photographs of one of the appellant's sons. Unlike Records 1, 2 and 3, this record does not contain any of the appellant's personal information but I find that it is the personal information of the son depicted in the photographs.

REQUESTER'S OWN INFORMATION/LAW ENFORCEMENT

General principles

Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution and section 38 provides a number of exemptions from this right. Section 38(a) reads:

> 38. A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > (a) if sections 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information;

I have found that Records 1, 2 and 3 contain the appellant's personal information (as well as that of other individuals). Given the exemption claims advanced by the Police and my findings about personal information, I must consider whether Records 1, 2 and 3 are exempt under section 38(a), in conjunction with section 8(2)(a). I must also decide whether page 15 (part of Record 3) is exempt under section 38(a) in conjunction with section 8(1)(l).

Because section 38(a) is a discretionary exemption, even if the information falls within the scope of one of the listed exemptions, the institution must nevertheless consider whether to disclose the information to the requester.

Section 8(2)(a)

This section states:

> A head may refuse to disclose a record,
>
> > that is a report prepared in the course of law enforcement inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

The term "law enforcement" is used in several parts of section 8, and is defined in section 2(1) as follows:

> "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).

The word "report" means "a formal statement or account of the results of the collation and consideration of information". Generally, results would not include mere observations or recordings of fact [Orders P-200, MO-1238, MO-1337-I].

The title of a document is not determinative of whether it is a report, although it may be relevant to the issue [Order MO-1337-I].

The Police submit that each of the three occurrence reports comprising Records 1, 2 and 3 reflected a determination of whether a criminal act had occurred, thus qualifying the investigations as "law enforcement" matters. These investigations were clearly "policing" matters, and I therefore agree with this submission.

The Police further submit:

> Each of the occurrence reports contains factual information provided by individuals involved as well as observations by police officers. In addition, each report contains a conclusion by the officers, as indicated in Paragraph 11, which resulted from considering the information contained within the occurrence reports. Therefore, each occurrence report qualifies as a report.

In Order M-1109, former Assistant Commissioner Tom Mitchinson did not uphold the application of section 8(2)(a) to a police occurrence report. He stated:

> As far as section 8(2)(a) is concerned, only a report is eligible for exemption under this section. The word "report" is not defined in the Act. Based on previous orders, however, for a record to be a report, it 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 M-1048). Having reviewed the record, I find that it does not qualify as a "report". An occurrence report is a form document routinely completed by police officers as part of the criminal investigation process. This particular Occurrence Report consists primarily of descriptive information provided by the appellant to a police officer about the alleged assault, and does not constitute a "report". Therefore, I find that section 8(2)(a) does not apply, regardless of the fact that the record was prepared during the course of a criminal law enforcement investigation by an agency which has the function of enforcing and regulating compliance with the law.

Adjudicator Laurel Cropley reached a different conclusion in Order M-1192:

> In the circumstances of the current appeal, I have reviewed the Occurrence Report and find that it contains factual information provided by the individuals involved as well as observations by the police officer. It also contains conclusions drawn by the police officer as a result of the consideration of the investigation which is reflected in the information contained in the record. In my view, the Occurrence Report in this case does contain a formal account of the results of the collation and consideration of information and thus qualifies as a report.

It is apparent from these two orders that, in many instances, police occurrence reports will not qualify as "reports" under section 8(2)(a), but an occurrence report may qualify if it contains analysis and conclusions which transform it into "a formal account of the collation and consideration of information". I have considered whether this threshold is crossed by Records 1, 2 and 3. Like most occurrence reports, each of these records contains a basic disposition of the information in the case, but contains no underlying analysis. The occurrence reports simply list the personal details of those involved in the incidents, information about the officers who became involved, and the accounts of events given by various participants. In my view, this is mere reporting or observation of fact, and the brief disposition noted in each of the three records is not sufficient to qualify them as "reports". I find that they do not qualify for exemption under section 8(2)(a), and are therefore not exempt under section 38(a).

Section 8(1)(l)

This section states:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > facilitate the commission of an unlawful act or hamper the control of crime.

The Police submit that disclosure of one piece of information severed from page 15 of the records raises safety concerns that could reasonably be expected to lead the commission of a criminal offence. I am unable to elaborate on the submissions of the Police in this regard without revealing the withheld information.

The appellant does not make any specific representations with respect to the application of section 8(1)(l).

Where section 8(1)(l) uses the words "could reasonably be expected to", an institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm." Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General)* v. *Ontario (Information and Privacy*

Commissioner), [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board)* v. *Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

Having reviewed the information in the record to which the Police are referring in their representations, I accept that given the nature of the information, disclosure could reasonably be expected to facilitate the commission of an unlawful act, and I find that this passage qualifies for exemption under section 8(1)(l). I therefore find it exempt under section 38(a).

PERSONAL PRIVACY

As mentioned above, section 36(1) gives individuals a general right of access to their own personal information held by an institution. Under the discretionary exemption at section 38(b) of the *Act*, where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the Police may refuse to disclose that information. I have found that Records 1, 2 and 3 contain both the appellant's personal information and that of other individuals. I will therefore consider whether the undisclosed parts of those records are exempt under section 38(b).

Record 4 contains only the personal information of an individual other than the appellant. In that situation, the mandatory exemption at section 14(1) requires that the institution refuse to disclose the information unless disclosure would not constitute an "unjustified invasion of privacy". I will therefore consider whether Record 4 is exempt under section 14(1).

Section 38(b) of the *Act* states:

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

Section 14(1) states, in part:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > (a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;
> >
> > …
> >
> > (d) under an Act of Ontario or Canada that expressly authorizes the disclosure;

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

In the context of both sections 38(b) and 14(1), sections 14(1) to (4) provide guidance in determining whether the information is exempt.

In this appeal, if any of sections 14(1)(a), (d) or (f) applies, the information is not exempt under section 38(b) or 14(1). I will begin my analysis with sections 14(1)(d) and 14(1)(a).

Section 14(1)(d)

Paragraph 4 of the Minutes of Settlement (repeated in paragraph 4 of the Divorce Judgment) provides that "[t]he children shall have access to the [appellant], subject to the wishes of the children…" This gives rise to the possible application of section 14(1)(d), which provides that personal information can be disclosed "under an Act of Ontario or Canada that expressly authorizes the disclosure." Section 16(5) of the *Divorce Act* entitles spouses who have a right of access to children of the marriage to have information about the children. Section 16(5) of the *Divorce Act* reads:

> Unless the court orders otherwise, *a spouse who is granted access to a child* of the marriage has the right to make inquiries, and to be given information, as to the health, education and welfare of the child [emphasis added].

In his representations, the appellant also refers to the *Children's Law Reform Act*. Section 20(5) of that statute provides that "[t]he entitlement to access to a child includes … the same right as a parent to make inquiries and to be given information about the health, education and welfare of the child".

In Order M-787, Adjudicator Holly Big Canoe dealt with a request for information about the requester's five-year old daughter. The requester was in the midst of a divorce action with the child's mother, in which custody of the child was an issue. In that case, the mother had custody of the child and the father had access to the child pursuant to an interim order of the court. Adjudicator Big Canoe examined whether section 16(5) of the *Divorce Act* was sufficient to invoke the application of section 14(1)(d) of the *Act* and allow the appellant to obtain access to the information about his daughter. She found that where *a spouse is granted access to a child*, section 16(5) of the *Divorce Act* would qualify as an "Act of … Canada that expressly authorizes the disclosure" of information as to the health and welfare of the child within the meaning of section 14(1)(d) of the *Act*. As section 14(1)(d) applied, Adjudicator Big Canoe ordered the institution to disclose the personal information of the appellant's daughter to the appellant.

The appellant submits:

> Paragraph 4 of the Minutes of Settlement was intended to be used for issues of increased access and not the restriction of same. This therefore, permits the application of section 16(5) of the *Divorce Act*.

In my view, sections 16(5) of the *Divorce Act* and 20(5) of the *Children's Law Reform Act* do not apply in the circumstances outlined in the Minutes of Settlement and Divorce Judgment. Paragraph 4 of the Minutes and the Divorce Judgment cannot be construed as the *appellant* being *granted access to his children*, but rather, the opposite: his *children* are granted access to him.

In the circumstances of this appeal, I therefore find that section 14(1)(d) does not apply.

Section 14(1)(a)

Paragraph 3 of the Minutes of Settlement (repeated in the Divorce Judgment) reads:

> The Father shall have full access right as a parent to make inquiries and be given information about the health, education and welfare of the children, including the right to request and receive information from third parties such as the children's school or doctor.

This gives rise to the possible application of section 14(1)(a) of the *Act*, which states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > (a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access.

As noted previously, section 54(c) of the *Act* permits a custodial parent to exercise the rights of a child under the age of sixteen under the *Act*. I must consider whether the wording of paragraph 3 of the Minutes of Settlement, as confirmed in the Divorce Judgment, can be construed as consent of the children given on their behalf by their custodial parent, their mother, under section 54(c) of the *Act*, to allow the appellant to have access to the undisclosed parts of the records.

The appellant submits:

> With respect, paragraph 3 of the [Minutes of Settlement] … allows for Full Rights as a parent to make inquiries and uses examples of third parties such as the children's doctors and educators, however, this does not place a limit nor does it restrict, the types of information which can be requested or supplied.

Although I agree with the appellant that the scope of paragraph 3 is potentially broad, I am not satisfied that it constitutes the "prior written request or consent of the individual" within the meaning of section 14(1)(a) of the *Act*. The preamble to the Minutes of Settlement indicates that their terms are subject to the Court's approval. As noted, the terms of the Minutes of Settlement were incorporated in the Divorce Judgment issued by the Superior Court of Justice. This provision is therefore, in effect, an order of the Court. In my view, this cannot be construed as the mother's consent.

I have also found that the records contain the personal information of a number of individuals other than the appellant's sons, including the appellant's ex-wife, and even if the Minutes and the Divorce Judgment could be construed as consent on behalf of the appellant's sons, it would not extend to that information.

I find that section 14(1)(a) does not apply to permit the appellant to have access to the undisclosed parts of the records.

Nevertheless, it is significant, in my view, that the Divorce Judgment issued by the Superior Court of Justice contains an express provision granting the appellant "full rights as a parent to make inquiries and to be given information about the health, education and welfare of the children, including the right to request and receive information from third parties such as the children's school or doctor." There is no provision in the *Act* expressly authorizing the disclosure of personal information pursuant to a court order, which would be subject to the Court's own enforcement procedures. The appellant has apparently not followed that route to obtain access to the information he seeks. Nevertheless, in their reply representations, the Police indicate that they were unaware of this provision when they initially responded to the appellant's request, and take the position that it is "relevant". I will return to this subject in my discussion of the exercise of discretion, below.

Unjustified Invasion of Personal Privacy

Sections 14 (2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy within the meaning of sections 38(b) and 14(1)(f). Section 14(2) provides criteria 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 and 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 in section 14(3) has been established, it cannot be rebutted by either one or a combination of the factors set out in section 14(2). A section 14(3) presumption can be overcome however, if the personal information at issue is caught by section 14(4) or if the "compelling public interest" override at section 16 applies (*John Doe* v. *Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767).

The Police take the position that disclosure of the information in the records is presumed to constitute an unjustified invasion of privacy under the presumption in section 14(3) (b) of the *Act* which states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> > is compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation.

The Police state:

> [T]he three occurrence reports and the contact sheet, relate to law enforcement investigations. As a result, the application of subsection 14(3)(b) brings the personal information of affected parties in the records within the mandatory presumption of an unjustified invasion of personal privacy.

The appellant does not respond directly to the Police's representations on this issue. He expresses frustration at his inability to obtain information about his sons. He explains that the series of events leading up to this inquiry have threatened his belief that "we live in a fair and democratic society". He also expresses concern that, based on the portions of the record that have been disclosed to him, he has reason to believe that some of the information contained in the records is inaccurate because individuals have been supplying false information to the Police.

With respect to the contact sheet, the appellant states that the pictures he requested are public in nature because a number of people appeared to be aware of the information they contain. He does not see anything in the Police's representations that gives them authority to withhold this type of information.

I am sympathetic to the appellant's circumstances and understand how, as a father, he is frustrated that he has been denied access to his sons' personal information. However, disclosure of personal information is governed by the *Act* and I am bound by its provisions.

In determining whether sections 14(1) and 38(b) apply in the circumstances of this appeal, I have carefully reviewed the records at issue and find that they were compiled by the Police in the course of investigating the circumstances surrounding the three incidents to which the Occurrence Reports relate. I find that the personal information contained in all of the records at issue in this appeal, including the photographs on the contact sheet, was compiled and is identifiable as part of the Police investigation into a possible violation of law, thereby triggering the presumption of an unjustified invasion of privacy at section 14(3)(b). In the circumstances of this appeal, I find that the section 14(3)(b) presumption is not rebutted by section 14(4) or the "public interest override" at section 16, which was not raised. The disclosure of the personal

information of individuals other than the appellant in the records is therefore presumed to constitute an unjustified invasion of personal privacy under section 14(3)(b).

Turning to factors and circumstances under section 14(2), it is my view that the existence of the Divorce Judgment issued by the Superior Court of Justice, which allows the appellant access to information about his children, is a circumstance strongly favouring disclosure. As well, some of the issues raised by the appellant, as summarized in this order, might arguably be considered as circumstances favouring disclosure under section 14(2). However, as set out above, 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 factors set out in section 14(2) (*John Doe v. Ontario*). Because section 14(3)(b) applies, disclosure of the personal information of other individuals in the records constitutes an unjustified invasion of their personal privacy.

The undisclosed information in Records 1, 2 and 3 is the personal information of other individuals, and since I have found that its disclosure would be an unjustified invasion of personal privacy, subject to my findings under "Absurd Result", below, I find that it is exempt under section 38(b) of the *Act*.

Record 4 does not contain any of the appellant's personal information. Like the other records, I have found that disclosure of the personal information it contains would be an unjustified invasion of personal privacy. Record 4, in its entirety, is the personal information of another individual. I therefore find it exempt under section 14(1) of the *Act*.

Absurd Result

Where a requester originally supplied the information contained in a record, or the requester is otherwise aware of it, the information may be found not exempt under section 38(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption. In Order M-444 I stated:

> Turning to the presumption in section 14(3)(b), the evidence shows that the undisclosed information was compiled and is identifiable as part of an investigation into a possible violation of law (namely, a murder investigation) and for that reason, it might be expected that the presumption in section 14(3)(b) would apply.
>
> However, it is an established principle of statutory interpretation that an absurd result, or one which contradicts the purposes of the statute in which it is found, is not a proper implementation of the legislature's intention. In this case, applying the presumption to deny access to information which the appellant provided to the Police in the first place is, in my view, a manifestly absurd result. Moreover, one of the primary purposes of the *Act* is to allow individuals to have access to records containing their own personal information, unless there is a compelling reason for non-disclosure. In my view, in the circumstances of this appeal, non-disclosure of this information would contradict this primary purpose.

> It is possible that, in some cases, the circumstances would dictate that this presumption should apply to information which was supplied by the requester to a government organization. However, in my view, this is not such a case. Accordingly, for the reasons enumerated above, I find that the presumption in section 14(3)(b) does not apply. In the absence of any factors favouring non-disclosure, I find that the exemption in section 38(b) does not apply to the information at issue in the records.

In the context of a request for records containing one's own personal information, the absurd result principle has been held to mandate disclosure where the requester originally supplied the information, or is otherwise aware of it. In those situations, the information may be found not exempt under section 38(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Orders M-444, MO-1323].

The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement [Orders M-444, M-451, M-613]

- the requester was present when the information was provided to the institution [Order P-1414]

- the information is clearly within the requester's knowledge [Orders MO-1196, PO-1679, MO-1755]

Nevertheless, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is in the requester's knowledge [Orders M-757, MO-1323, MO-1378].

Having reviewed the information at issue, I find that certain information on pages 1 and 2 (Record 1), page 8 (Record 2), and page 12 (Record 3) was either provided by the appellant to the Police, or would clearly be within the appellant's knowledge given his involvement with his ex-wife and sons. Disclosing some of this information would not be inconsistent with the purpose of the exemption, namely, protecting the privacy of other individuals. In the circumstances of this appeal, I therefore find that withholding this information would be an "absurd" result.

Accordingly, I find that those passages are not exempt under section 38(b) and should be disclosed.

EXERCISE OF DISCRETION

The section 38 (a) and (b) exemptions are discretionary and permit the Police to disclose information, despite the fact that it could be withheld. The Police must exercise their discretion. On appeal, this office may review the Police's decision in order to determine whether they exercised their discretion and, if so, to determine whether they erred in doing so (Orders PO-2129-F and MO-1629).

The limited information withheld under section 38(a) in conjunction with section 8(1)(l) relates to an individual other than the appellant. I am satisfied, given the nature of the information and the reasons given by the Police for withholding it, that the Police appropriately exercised their discretion to deny access.

Under section 38(b), the exercise of discretion involves a balancing principle. The Police must weigh the appellant's right of access to records containing his own personal information against the other individuals' right to the protection of their privacy.

In their initial submissions, the Police submitted that in balancing the appellant's right of access against the privacy rights of individuals whose personal information is found in the records, the Police considered the following factors, among others:

- the requester is the non-custodial parent of the minor children and therefore the Police cannot apply section 54(c);
- the reports relate to sensitive matters of a domestic nature including allegations of violence;
- the negative stigma that might be attached to an individual whose name is associated with a criminal investigation without full disclosure of how that individual was connected to the particular investigation;
- the trust by members of the public that the Police will protect their personal information, and that release of their personal information would jeopardize that public trust; and
- the right to have closure of events which are no longer under investigation, and/or if charges were laid as a result of that investigation, the right to closure if the matter is concluded in court.

After they received the reply Notice of Inquiry, which enclosed the Minutes of Settlement, the Police stated as follows:

> The Minutes of Settlement which contain a clause entitling the appellant "*to be given information about the health, education and welfare of the children, including the right to request and receive [information] from third parties such as*

> *the children's school or doctor*" is before the [Police] for the first time. This information was not provided in the original request for information. The [Police]'s decision, which is the subject of this appeal, was solely based on the information contained in the original request….
>
> It is submitted that the new evidence provided by the [appellant] at the appeal stage is relevant. …
>
> The Minutes of Settlement provided by the appellant do not have the endorsement of the Court. Should the adjudicator determine that these Minutes provide sufficient confirmation of the appellant's right of access to the third party information of the children, then a new determination by the [Police] is appropriate. [Emphasis added by the Police.]

As noted earlier in this decision, the Minutes of Settlement have now been adopted by the Superior Court of Justice and form part of the Divorce Judgment, giving them the weight of a court order. Although I have decided that the Minutes and the Divorce Judgment do not negate the availability of the discretionary exemption at section 38(b) in this appeal, I am nevertheless of the view that the provision in both of those documents relating to access to information by the appellant is a very significant factor for the Police to weigh in exercising their discretion under section 38(b). In that context, the Police must decide whether to withhold information from Records 1, 2 and 3, and if so, how much to withhold. As the Police note, they were not aware of this factor when they made their initial decision. I will therefore order the Police to re-exercise their discretion, taking this significant factor into account.

OTHER ISSUES

In his representations, the appellant alleges that the withholding of information from him violates provisions of the *Criminal Code* and his rights under the *Canadian Charter of Rights and Freedoms*. The appellant is not specific about how this would support his right of access to the withheld information in the context of the *Act*, but in any event, these arguments are not supported by the evidence and I reject them.

ORDER:

1. I uphold the Police's decision to deny access to Record 4.

2. I order the Police to disclose the information I have found not to be exempt in Records 1, 2 and 3, which appears on pages **1 and 2 (Record 1), page 8 (Record 2), and page 12 (Record 3),** by **June 30, 2005**. For greater certainty, I have provided copies of these pages to the Police with this order, highlighted to show the exempt information, which is not to be disclosed.

3. I order the Police to re-exercise their discretion regarding the application of section 38(b) to the remainder of Records 1, 2 and 3, and in particular, to consider the Divorce Judgment in the re-exercise. I order the Police to communicate the results of their re-exercise of discretion to the appellant, and to me, not later than **June 30, 2005.**

4. I remain seized of this matter to provide any necessary directions to the parties in connection with order provision 3, and for the purpose of deciding whether the Police have re-exercised discretion appropriately.

5. In order to verify compliance with the terms 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 Provision 1.

Original signed by: May 30, 2005
John Higgins
Senior Adjudicator