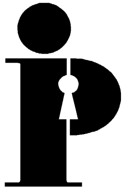

ORDER MO-2092

Appeal MA-050176-1

Toronto Police Services Board

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NATURE OF THE APPEAL:

The Toronto Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) from a former tenant of a residential address for access to all the Police reports relating to specific telephone calls to the Police made by himself, the landlord and another tenant. The requester asked in particular for information relating to the following telephone calls:

- any that he made from March 4, 2005 to April 3, 2005 (detailed in documentation that accompanied the request),

- those that he alleges were made by the landlord and the other tenant on April 2 or 3, 2005.

The requester also seeks information relating to any "interventions" of the Police pertaining to these calls.

The Police initially identified six pages of responsive records. In their first decision letter dated May 3, 2005, the Police took the position that while the records were responsive to the request, some of the information in the records was not. The Police also advised that the responsive portions of the records were subject to the exemption at section 38(a) (refuse to disclose requester's own information), in conjunction with sections 8(1)(a) and (f) (law enforcement), as well as section 38(b) (personal privacy) with particular reference to section 14(3)(b) (information compiled and identifiable as part of investigation). As set out in their decision letter, the Police withheld access to all the responsive records they had identified.

The requester (now the appellant) appealed the decision.

At mediation, the appellant asserted that further responsive records should exist in addition to those identified by the Police. The Police then conducted a further search and located additional responsive records. Accordingly, the Police issued a subsequent decision letter dated August 18, 2005. The letter advised that they were denying access to all the records, including the six pages of responsive records that they had identified earlier. In addition to the reasons initially provided to the appellant, the letter advised that the Police would be relying on the exemption in section 8(1)(l) of the *Act* (facilitate commission of an unlawful act) to deny access to any "ten" codes contained in the responsive records. In turn, the appellant confirmed with the mediator that he was not seeking access to the "ten" codes. As a result, this information and the application of section 8(1)(l) are no longer at issue in this appeal.

Also at mediation, the appellant advised that he does not wish to seek access to information in the officer's notes that is not relevant to the request. Accordingly, this non-responsive information was also removed from the scope of the appeal. The appellant indicated, however, that he wishes to pursue access to a portion of an I/CAD Address History Report that the Police claim is non-responsive to the request. Accordingly, this information remains at issue. No other matters could be resolved at mediation and the appeal moved to the adjudication stage of the process.

A Notice of Inquiry was sent to the Police, initially. The Police provided representations in response. The Police asked that portions of their representations not be shared due to certain confidentiality concerns. A Notice of Inquiry, along with a copy of the non-confidential representations of the Police, was then sent to the appellant. The appellant provided representations in response. In making my determinations in this appeal, I considered both the confidential and non-confidential representations of the parties.

The Police state that the information in all the responsive records was obtained during the course of an investigation which resulted in a proceeding under the *Criminal Code*. Based on my review of the appellant's materials, it appears that those proceedings were initiated by the appellant, not the Police. In response to an inquiry from this office, the Police advised that those proceedings are now at an end.

RECORDS:

There are 58 pages of records at issue in this appeal. They include a Record of Summons Application, Supplementary Records of Summons Applications, Civilian Witness List, I/CAD Address History Report (page 6), I/CAD Event Details Report (pages 57 and 58) and Police officers' handwritten notes (pages 7 to 56).

DISCUSSION:

RESPONSIVENESS OF THE RECORDS IDENTIFIED BY THE POLICE

Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> > (a) make a request in writing to the institution that the person believes has custody or control of the record;
> >
> > (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
>
> . . . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880].

As set out above, at mediation, the appellant advised that he does not wish to seek access to information in the officer's notes that is not responsive to the request, because it is not relevant, or because it is a "ten" code. This information appears at pages 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 36, 39, 41, 42, 46, 47, 48, 49, 51, 52, 53, 54, and 56 of the records. Accordingly, the non-responsive information is removed from the scope of the appeal.

The appellant indicated, however, that he wishes to pursue access to that portion of an I/CAD Address History Report (page 6 of the records) which the Police claim is non-responsive to the request. In their representations, the Police clarified that the only information claimed to be non-responsive in that record are the printing instructions which appear in the top right and left hand portions on the page. In support of their position they rely on my reasoning in Order PO-2409, where I wrote:

> In Orders PO-2315 and PO-2316 Adjudicator DeVries addressed the Ministry's submission that administrative information relating to the date, time and by whom the report was printed in that appeal (information that post-dated that request) was not reasonably responsive to that request. He wrote:
>
> > Previous orders have identified that, to be considered responsive to a request, the records must "reasonably relate" to the request [See Order P-880]. I adopt the approach taken in Order P-880 and find that the portions of the records severed by the Ministry as "non-responsive" do not reasonably relate to the request, and are therefore not responsive to the appellant's request.
>
> Although I have the benefit of submissions on this issue from the appellant (the appellant in Orders PO-2315 and PO-2316 made none), I see no reason to depart from the ruling of Adjudicator DeVries. The information that the appellant sought in his request does not include the time and badge number of the individual printing a copy of the record that contains the information that the appellant seeks. I find therefore that the information in the portions of the records severed by the Ministry as non-responsive does not reasonably relate to the request, and is therefore not responsive to it.

In the circumstances of this appeal, I have not been provided with any basis upon which to depart from my reasoning set out above. I find, therefore, that the information relating to the printing instructions in the top right and left hand portions of the I/CAD Address History Report (page 6) do not reasonably relate to the request, and is, therefore, also not responsive to it.

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply to the information in the records, it is necessary to decide whether the record contains "personal information", and if so, to whom it relates.

Section 2(1) of the *Act* defines "personal information", in part, as follows:

> (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,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> …
>
> (g) the views or opinions of another individual about the individual, and
>
> (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.

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11]. To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

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], but 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].

In my view, all of the records contain information about the appellant that meets the definition of "personal information" in paragraphs (a) (age and sex), (b) (medical, criminal and employment history), (c) (address and telephone number), (g) (views of other individuals about the appellant) and (h) (the appellant's name along with other personal information relating to him). The officer's notes also describe the appellant and the views of other individuals about him (paragraphs (g) and (h)).

In addition, many of the records also contain the personal information of other identifiable individuals. This information qualifies as the personal information of these individuals because it includes information about their age, sex and marital or family status (paragraph (a)), medical, criminal and employment history (paragraph (b)), their addresses and telephone numbers (paragraph (c)) or their names along with other personal information about them (paragraph (h)).

In particular, my findings on this issue are as follows:

1. Pages numbered 1 to 6, 7 to 8, 9 to 10, 11, 12, 13, 14, 15 to 17, 18 to 21, 22 to 23, 24, 25 to 26, 27 to 28, 29 to 30, 31 to 32, 33 to 39, 40 to 41, 42 to 46, 47 to 48, 49 to 51, 52 to 53 and 54 to 56 contain the personal information of the appellant, along with other identifiable individuals.

2. Pages 57 to 58 contain the personal information of the appellant only, and not of other identifiable individuals.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

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

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if section 6, 7, **8**, 8.1, 8.2, 9, 10, 11, 12, 13, or 15 would apply to the disclosure of that personal information. [emphasis added]

LAW ENFORCEMENT

The Police take the position that the information in the records is exempt from disclosure under section 38(a) because the information fits within sections 8(1)(a) and 8(1)(f) of the *Act*.

Section 8(1)(a) and (f) provide:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > (a) interfere with a law enforcement matter;
> >
> > (f) deprive a person of the right to a fair trial or impartial adjudication.

General principles

Law Enforcement

The term "law enforcement" is used in several parts of section 8, and is defined in section 2(1) of the *Act* 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)

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)].

Under section 8(1)(a) the law enforcement matter in question must be a specific, ongoing matter. The exemption does not apply where the matter is completed, or where the alleged interference is with "potential" law enforcement matters [Orders PO-2085, MO-1578].

To obtain the protection of the section 8(1)(f) exemption, the Police must show that there is a "real and substantial risk" of interference with the right to a fair trial or impartial adjudication in the event of disclosure. The exemption is not available as a protection against remote and speculative dangers. [Order P-948; *Dagenais v. Canadian Broadcasting Corp.* (1994), 120 D.L.R. (4th) (S.C.C.); Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.)].

For the purpose of both sections 8(1)(a) and (f), the Police 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.)].

It is not sufficient for an institution to take the position that the harms under section 8 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfillment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

Section 8(1)(a)

As discussed above, the proceedings under the *Criminal Code* are at an end. As a result, I am not satisfied that releasing any of the information in the records will interfere with an ongoing law enforcement matter. I find, therefore, that the information does not fit within the ambit of the exemption in section 8(1)(a).

Section 8(1)(f)

The Police submitted that the information sought by the appellant "comprises the basis" of the proceedings under the *Criminal Code*. They submit that:

> What is being sought, in essence, is complete access to the case against the accused person, before the individual has a chance to defend herself in a court of law.
>
> It is obvious that dissemination of the requested information prior to the pending trial could jeopardize both the Crown's mandate, and the rights of the individual who has been charged in this matter. Section 8(1)(f) would, therefore, apply to the records at issue.

As stated above, those proceedings are at an end.

In my view the limited submissions made by the Police in this matter do not support the application of the section 8(1)(f) exemption. While the Police submit that disclosure *could* jeopardize an ongoing proceeding, they do not identify any proceedings other than those relating to the peace bond, which are now complete. If other proceedings exist, the Police have failed to establish that there is a "real and substantial risk" of interference with the right to any fair trial or impartial adjudication in the event of disclosure. I find therefore, that the information does not fit within the ambit of section 8(1)(a) either.

In all the circumstances, the Police have failed to provide me with sufficient evidence to substantiate a finding that the information fits within sections 8(1)(a) and/or (f). As a result, I find that the exemption in section 38(a) of the *Act* does not apply.

PERSONAL PRIVACY

Section 38(b) of the *Act* reads as follows:

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

In order for disclosure to "constitute an unjustified invasion of another individual's personal privacy" under section 38(b), the information in question must be the personal information of an individual or individuals other than the person requesting it. If the information falls within the scope of section 38(b), that does not end the matter. Despite this finding, the Police may exercise their discretion to disclose the information to the appellant. This involves a weighing of the appellant's right of access to his own personal information against the other individual's right to protection of their privacy.

Under section 38(b), the factors and presumptions in sections 14(2) to (4) provide guidance in determining whether the "unjustified invasion of personal privacy" threshold is met. Section 14(2) provides some criteria for the institution 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. In this case the Police rely on section 14(3)(b).

The Divisional Court has stated that once a presumption against disclosure has been established under section 14(3), it cannot be rebutted by either one or a combination of the factors set out in 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767 (*John Doe*)] though it can be overcome if the personal information at issue falls under section 14(4) of the *Act*, or if a finding is made under section 16 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the exemption. [See Order PO-1764]

As I have found that pages 57 and 58 of the records contain the personal information of the appellant only, and not of other individuals, their disclosure would not result in an unjustified invasion of another individual's personal privacy under section 38(b). As I have found that sections 8(1)(a) and (f) in conjunction with the section 38(a) exemption does not apply to these records, no other discretionary exemptions were claimed and no mandatory exemptions apply, I will order that these pages be released to the appellant.

Section 14(3)(b)

Section 14(3)(b) reads as follows:

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

Analysis and Findings

I find that section 14(3)(b) applies in the circumstances of this appeal. I have reviewed the records remaining at issue and in my opinion, with some limited exceptions discussed below, the information in the records were compiled and are identifiable as part of an investigation into a possible violation of law, namely the *Criminal Code*. The presumed unjustified invasion of personal privacy at section 14(3)(b) therefore applies to this information. Sections 14(4) and 16 do not apply to this information. Accordingly, I conclude that the disclosure of this information would constitute an unjustified invasion of personal privacy.

I do not reach the same conclusion with some of the information found at pages 1 and 4 of the records. In my view this information, which is found in the Record of Summons Application and Supplementary Record of Summons Applications, was collected and compiled after the completion of the investigation and is not, therefore, subject to the section 14(3)(b) presumption. I will therefore consider the factors and circumstances under section 14(2) in relation to this information.

In conclusion, subject to my discussion on the absurd result principle and the exercise of discretion by the Police, I find that, except as indicated above, the undisclosed personal information in Record of Summons Application, the Supplementary Record of Summons Applications, the Civilian Witness List, the responsive portions of the I/CAD Address History Report (page 6) and the responsive portions of the Police officers' handwritten notes (pages 7 to 56) is subject to the section 14(3)(b) presumption and is, therefore, exempt under section 38(b).

I now turn to the balance of the records under consideration.

Section 14(2)

The appellant's representations include a chronology of events describing the interactions between the appellant, the landlord and other individuals, including police officers, in relation to his tenancy. The appellant alleges that the Police are withholding information in order to frustrate his ability to pursue a complaint against two police officers who were drawn into his dispute with the landlord.

I found above that the bulk of the personal information in the records remaining at issue is subject to the section 14(3)(b) presumption. I found, however, that this presumption did not apply to some of the personal information on pages 1 and 4 of the records. In my view, this information consists of information about processing matters, detention and release particulars, and procedural steps in the *Criminal Code* proceedings, which include the date of a court appearance.

The Police have referred to 14(2)(e), (h) and (i) as factors favouring non-disclosure which they considered in denying access to the information on pages 1 and 4 of the records. In my view, in the circumstances of this appeal, notwithstanding the position of the Police, the factor favouring non-disclosure in section 14(2)(f) is also relevant. I will include it in my analysis.

The appellant refers to the factor at section 14(2)(d) as a relevant consideration favouring the disclosure of personal information.

These sections state:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
>
> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
>
> (f) the personal information is highly sensitive;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence;
>
> (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

Analysis and Findings

In support of his position that the factor in 14(2)(d) is a relevant consideration, the appellant refers to his need to access the records in order to pursue a complaint against two Police officers.

For section 14(2)(d) to apply, the appellant must establish that:

> (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and
>
> (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
>
> (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
>
> (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing

[Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.)].

The appellant asserts that that he needs access to the records in order to pursue a complaint against two Police officers. However he has failed to establish how the personal information of the other individual in pages 1 and 4 of the records, that does not fall within the section 14(3)(b) presumption, "has some bearing on or is significant to the determination of the right in question" or is "required in order to prepare for the proceeding or to ensure an impartial hearing". Hence section 14(2)(d) is not a relevant consideration.

Section 14(2)(e) pertains to the unfair exposure to pecuniary harm. Even if it could be established that release of the remaining withheld information would expose an individual to pecuniary or other harm, I am not satisfied that releasing the information would result in such exposure being *unfair*. Therefore section 14(2)(e) does not apply.

While section 14(2)(h) has been found to apply to information or statements provided in certain circumstances (such as those discussed in Order MO-1224), those are not the circumstances of this appeal. The information on pages 1 and 4 was not supplied in confidence by the individual to whom the information relates. Hence, I am not satisfied that the Police have established the application of this factor.

With respect to section 14(2)(i), even if it could be established that release of the information would cause damage to a person's reputation, I am not satisfied, in the circumstances of this appeal, that this harm would be *unfair*, as is required. Hence this factor also does not apply.

I come to a different conclusion with respect to the factor at section 14(2)(f). In my view this factor is an extremely relevant consideration that favours the non-disclosure of the personal information of another identifiable individual at pages 1 and 4 of the records. Based upon the circumstances of this appeal and the nature and type of information, some of which particularizes certain proceedings, I find that the information is highly sensitive for the purpose of section 14(2)(f), because its disclosure could reasonably be expected to cause excessive personal distress to the identifiable individual (See Orders M-1053 and PO-2339).

In the result, subject to my discussion on the absurd result principle and the exercise of discretion by the Police, in light of my finding that the factor favouring privacy protection at section 14(2)(f) applies and there being no factor of circumstance favouring disclosure, the disclosure of this information constitutes an unjustified invasion of this other individual's personal privacy. The information is therefore exempt under section 38(b).

ABSURD RESULT

Whether or not the factors or circumstances in section 14(2) or the presumptions in section 14(3) apply, where the requester originally supplied the information, 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 [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]

- 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]

My review of the following pages of the records indicates that the information was supplied by the appellant or is clearly within his knowledge: a portion of pages 1 to 5, a portion of pages 7 to 8, a portion of pages 9 to 10, a portion of page 11, a portion of page 12, a portion of page 13, the entire responsive portion of page 14, a portion of pages 15 to 17, a portion of pages 18 to 21, the entire responsive portion of pages 22 to 23, the entire responsive portion of page 24, a portion of pages 25 to 26, a portion of pages 27 to 28, the entire responsive portion of pages 29 to 32, a portion of pages 33 to 39, a portion of pages 40 to 41, a portion of pages 42 to 46 and a portion of pages 47 to 48.

I cannot agree that in the circumstances of this appeal, the disclosure of the above-referenced information to the appellant would result in an unjustified invasion of another individual's personal privacy under section 38(b), whether or not any of the presumptions in section 14(3) apply. Rather, to decline to grant access to this information, under the circumstances, would lead to an absurd result [Orders MO-1196, PO-1679, MO-1755]. As a result, I will order that this information be disclosed.

I am not satisfied that the balance of the withheld information was supplied by the appellant or that he is otherwise aware of it, so as to lead to an absurd result if it was withheld.

EXERCISE OF DISCRETION

Where appropriate, institutions have the discretion under the *Act* to disclose information even if it qualifies for exemption under the *Act*. Because section 38(b) is a discretionary exemption, I must also review the Police's exercise of discretion in deciding to deny access to the withheld information. On appeal, this office may review the institution's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so.

I may find that the Police erred in exercising their discretion where, for example:

- it does so in bad faith or for an improper purpose

- it takes into account irrelevant considerations

- it fails to take into account relevant considerations

In these cases, I may send the matter back to the Police for an exercise of discretion based on proper considerations [Order MO-1573].

The Police list the factors relating to their exercise of discretion not to release the information to the appellant. The appellant asserts that the Police did not properly exercise their discretion.

I have reviewed the representations of the Police and the appellant. In the circumstances of this appeal, I conclude that the exercise of discretion by the Police to withhold the information that I have not ordered to be disclosed was appropriate, given the circumstances and nature of the information.

ORDER:

1. I uphold the decision of the Police to deny access to all of page 6 and to portions of pages 1 to 5 and 7 to 56 of the records. For greater certainty, I have highlighted the exempt or non-responsive information on the copy of the records provided to the Police with this Order. The highlighted information is **not** to be disclosed.

2. I order the Police to disclose to the appellant the remainder of the records, including pages 57 and 58 in their entirety, by providing it to the appellant, **by November 6, 2006** but not before **October 30, 2006**.

3. 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 as disclosed to the appellant, upon request.

Original signed by: September 29, 2006
Steven Faughnan
Adjudicator