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

ORDER MO-2229

Appeal MA06-313

Guelph Police Services Board

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NATURE OF THE APPEAL:

The requester submitted a request to the Guelph Police Services Board (the Police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records related to a provincial court criminal matter in which he was involved, and a concurrent child protection matter. The request stated:

> I am requesting the names of the individuals from the [Children's Aid] Society [Family & Child Services, or "FC&S"] who have stated one thing to the [Police] and another in the Ontario Family Court. I have verbal confirmation from [a named police officer that] the names are contained in his notes which he turned over at the completion of his "investigation".

The Police identified 18 pages of notes created by the named police officer as responsive to the request, and initially denied access to them on the basis that the records were in the custody and control of the F&CS, rather than the Police.

The requester (now the appellant) appealed the decision of the Police to this office.

During the mediation stage of this appeal, a mediator from this office contacted the Police regarding the issue of custody or control of the record. Following discussion, the Police conceded that the record is under its custody or control and issued a revised decision letter to the appellant. In the revised November 27, 2006 decision letter, the Police denied access to the record in full, pursuant to section 13 (danger to safety or health) and 14(1) (invasion of privacy), relying specifically on the factor at section 14(2)(e) (unfair exposure to harm) of the *Act*.

In explaining the basis of the decision, the Police referred to "aggressive" behaviour exhibited by the appellant toward the investigating officer at the close of the criminal proceedings. The Police also referred to a voice mail message left with staff from the Police Freedom of Information [FOI] Unit, which was interpreted as "offensive, hostile and aggressive". The revised decision letter stated:

> You now want the names of the females who were involved in the [F&CS] investigation. I have concerns about the safety of these persons. For these reasons the [Police FOI] Unit is applying sections 13 and 14(2)(e) [to deny access to the records].

The Police also severed information from the records, claiming that it is not responsive to the appellant's request.

Shortly after the revised decision letter was issued, the appellant informed the mediator that he wished to pursue access to the information the F&CS employees provided to the Police regarding the child protection matter, as well as their names. It was accepted by the parties to the appeal at that time that the appellant was seeking access to the named officer's notes in their entirety, as well as the names of the F&CS workers. The Police also acknowledged that this clarification falls within the scope of the appellant's original request. The responsiveness of the information severed by the Police was, therefore, added as an issue in this appeal.

The appellant also conveyed his belief that the information he seeks was provided by the same police officer to the Professional Standards Bureau. However, the Police declined the mediator's suggestion of further searches to identify additional responsive records because they viewed this clarification as falling outside the scope of the original request. When advised of this position, the appellant indicated that he would submit a new request for the information to the Professional Standards Bureau of the Police.

No further mediation was possible and the appeal proceeded to the adjudication stage where it was assigned to me to conduct an inquiry. Since the records appear to contain the personal information of the appellant, I decided to seek representations from the parties on the possible application of the discretionary exemptions in sections 38(a), with reference to section 13, and 38(b), taken with section 14(1).

I sent a Notice of Inquiry to the Police, initially, to seek representations. After I received representations from the Police, I sent a modified Notice of Inquiry to the appellant, along with a copy of the non-confidential representations of the Police in order to invite submissions from him, which I received.

After my inquiry into this appeal was completed, the Police contacted this office regarding the incident in which the appellant was alleged to have behaved aggressively towards the investigating officer. The Police informed me that an internal investigation carried out by the Police established that the alleged incident had not occurred. The Police subsequently provided written confirmation of their findings, but declined to reconsider the access decision.

RECORD:

The record at issue consists of 18 pages of the investigating officer's notes.

DISCUSSION:

PRELIMINARY ISSUE: JURISDICTION

It is evident from reading the submissions of the parties, particularly those of the appellant, that the circumstances surrounding this appeal are highly emotionally charged for all those involved. For this reason, it is important to emphasize the limits of my inquiry under the *Act*. I am charged simply with reviewing the decision made by the Police as regards access under the *Act* to certain information requested by the appellant. It is not my function, nor do I have the jurisdiction, to review any other decision made, or action taken by, the Police in relation to the appellant. To be clear, I will not be reviewing, or commenting upon, any aspect of the investigation into the criminal or child protection matters giving rise to the access request, as I have absolutely no authority to do so.

SCOPE OF THE REQUEST/RESPONSIVENESS OF RECORDS

In view of the fact that certain severances to the investigating officer's notes were made by the Police, the responsiveness of the severed information is at issue. 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).

It is a well-settled principle that institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880]. Furthermore, previous orders of this office have established that to be considered responsive to the request, records must "reasonably relate" to the request [Order P-880].

Representations

The Police submit that the portions of the record severed as "non-responsive" pertain to other investigations in which the named police officer was engaged concurrently with the one involving the appellant.

The appellant does not specifically address the issue of the responsiveness of the severed information in his representations. However, he does provide submissions on what information he is not interested in obtaining access to, which will be addressed later in this order.

Analysis and Findings

By way of prefacing my findings as to the responsiveness of information severed by the Police from the record, I think it is important to confirm the scope of the appellant's request.

In my view, the appellant indicated a clear interest through the wording of his request to *confirm* the names of specific F&CS employees. Later in mediation, the appellant clarified that his interest in confirming their names included learning more about their involvement in the criminal and child protection matters, and particularly, what "false information" they may have provided to the named police officer about the latter. The Police have accepted this clarification as falling within the scope of the request. The Police also accepted that the records, which contain information about the criminal and child protection matters, and references to the F&CS employees, fall within the scope of the appellant's request. I agree. The conclusion that the records, as a whole, are reasonably related to the request is supported by the *Act* and past orders of this office which promote a generous approach in favour of requesters to the interpretation of the scope of a request.

Turning to a consideration of the actual severances, I note that portions of 13 of the 18 pages of records are marked as non-responsive to the request. From the parties, I have only the brief statement by the Police that the severed information was recorded in relation to other investigations. The best evidence of the responsiveness of the severed information is provided by review of the records themselves.

I have carefully reviewed all of the records and, specifically, the severances made to pages 4, 5, 6, 7, 8, 10, 11, 12, 13, 15, 16, 17 and 18. Having done so, I am satisfied that all of these severances contain information related to other investigations in which the named officer was engaged, all of which are unrelated to the one involving the appellant. Accordingly, I find that the severed information is non-responsive to the appellant's request and I will uphold this part of the Police's decision.

As an aside, I note that police, or "ten", codes appear in several places in the record. However, while such "ten" codes have been severed by the Police as non-responsive to the request in some places, the codes appearing on pages 6, 8 and 18 have not been severed. I did not seek the representations of the parties on this point. Notwithstanding this, however, I would have found the "ten" codes to be non-responsive to the appellant's request. In the alternative, I would have followed previous orders of this office that have found police codes to be exempt under section 38(a), taken with the law enforcement exemption in section 8(1)(l) of the *Act* (see Orders PO-2571 and MO-2101).

PERSONAL INFORMATION

For the purpose of deciding whether or not the disclosure of the record would constitute an unjustified invasion of personal privacy under section 38(a) or 38(b) of the *Act*, it is necessary to determine whether the record contains personal information and, if so, to whom it belongs. That term is defined in section 2(1) as follows:

> "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,
>
> (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 where they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (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. Information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

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]. However, 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].

Representations

The Police submit that:

> The personal information contained in the record pertains to [the appellant's] ex-wife, both daughters, their grandmother, a Child & Youth Worker, three [F&CS] workers and four other involved parties. The record consists of their names, dates of birth, home addresses, telephone numbers and statements.
>
> The statements and information pertaining directly to [the appellant] have been left intact in this copy of the record [disclosed to him].
>
> …
>
> The personal information of the Child & Youth worker and three [F&CS] workers can be found in a professional capacity. However, the record contains the date of birth of the Child & Youth worker as well as one of the involved [F&CS] workers. We believe this information is outside the scope of their professional capacity.

When provided with the opportunity to respond to the representations of the Police, the appellant offered no submissions specific to the qualification of information as personal information for the purposes of the definition contained in section 2(1) of the *Act*.

However, in providing representations on the issue of the Police's exercise of discretion in this matter, the appellant states that he is not interested in the birthdates of any of the individuals referred to in the record. Accordingly, this information is removed from the scope of the appeal, and it need not be considered in the context of the exemption claims.

Analysis and Findings

I have reviewed the records to determine whether they contain personal information and, if so, to whom it relates. Having done so, I find that the records contain information pertaining to the appellant that qualifies as his personal information, within the meaning of paragraphs (a), (b), (d), (e), and (h) of the definition in section 2(1) of the *Act*.

The records also contain information relating to 13 other individuals, and I find that in the case of nine of these individuals, the information relating to them satisfies the definition of personal information under, variously, paragraphs (a), (b), (d), (e), (g) & (h) of section 2(1).

As acknowledged by the Police, certain portions of the records relate to four of the 13 individuals in a professional capacity relating to their employment. As previously indicated, the appellant has indicated that he does not seek access to the birth date of any individual, and the

removal of this information from the scope of this appeal would include removal of the birth date associated with the two individuals mentioned by the Police in their representations.

In the result, I have concluded that disclosure of the names of these four particular individuals, and certain small portions of text proximate to references to them, would not reveal anything of a personal nature about them and I find that these specific portions do not constitute personal information for the purposes of the definition in section 2(1) of the *Act*. Accordingly, this information about the four individuals does not qualify for exemption under section 38(b). Since the personal privacy exemption at section 38(b) cannot apply, it will only be necessary for me to consider whether the exemption in section 38(a), along with section 13, applies to this information.

It is also unnecessary for me to consider whether the appellant's own personal information qualifies for exemption under section 38(b) since its disclosure to him cannot be an unjustified invasion of another individual's personal privacy, as required under that section. Accordingly, I need only review the disclosure of the appellant's own personal information to him under section 38(a), together with section 13, of the *Act*.

As regards the information in the records, which I have found to be the personal information of the other nine individuals, I will consider whether it qualifies for exemption under the discretionary exemption at section 38(b) of Part II of the *Act*.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/PERSONAL PRIVACY OF ANOTHER INDIVIDUAL OR THREAT TO SAFETY OR HEALTH

Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right. In circumstances where a record contains both the personal information of the appellant and other individuals, the request falls under Part II of the *Act* and the relevant personal privacy exemption is the exemption at section 38(b). Similarly, where the record contains mixed personal information, the relevant exemption for section 13, as claimed in this appeal, is 38(a). These exemptions are mandatory under Part I of the *Act* but discretionary under Part II and thus, in the latter case, an institution may exercise its discretion to disclose information that it could not disclose if Part I were applied [Order MO-1757-I].

SECTION 38(b) - PERSONAL PRIVACY OF ANOTHER INDIVIDUAL

Under this section, an institution may refuse to disclose information to a requester where it appears in a record containing 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. However, as previously stated, the institution may choose to disclose this information upon weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

Sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold under section 38(b) is met. In determining whether the exemption in section 38(b) applies, 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 the personal privacy of the individual to whom the information relates.

Section 14(3) lists the types of information whose disclosure is *presumed* to constitute an unjustified invasion of the personal privacy of another individual. Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767], 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 section 14(1) exemption (See Order PO-1764).

If none of the presumptions in section 14(3) applies, the institution must consider the application of the factors listed in section 14(2), as well as all other considerations that are relevant in the circumstances of the case. In addition, if any of the exceptions to the section 14(1) exemption at paragraphs (a) through (e) applies, disclosure would not be an unjustified invasion of privacy under section 38(b).

Although the decision letter sent to the appellant claimed only the application of sections 13 and the factor in section 14(2)(e), the Police refer to the presumption at section 14(3)(b) of the *Act* in their representations.

Section 14(3)(b) states:

> 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.

Although not originally cited by the Police in the decision issued to the appellant, reference to the presumption at section 14(3)(b) was included in the representations and the appellant was provided an opportunity to respond to those representations, which he did.

Representations

The submissions of the Police on the presumption are brief and largely mirror the wording of the section. The Police state as follows:

> The personal information in this matter was compiled and is identifiable as part of an investigation into a possible violation of law. The complaint against the appellant and the specific law the violation of which was being investigated was [specifically named *Criminal Code* offences].

There is some uncertainty around whether or not the Police actually sought the written consent of any of the individuals referred to in the record, which might have served to bring the information under the exception in paragraph (a) of section 14(1). However, the Police state in their representations that "[c]onsent was not provided by any of the involved parties in the matter".

The Police argue that the factor at section 14(2)(e) of the *Act* applies in this appeal because if the record is released, the "[F&CS] workers involved in the matter will be exposed to other harm or harassment by [the appellant]". The arguments put forward by the Police as to harm contemplated by section 14(2)(e) is based on the incident alleged to have taken place between the appellant and the investigating officer.

In view of my findings on section 14(3)(b) below, it is not necessary to canvas these submissions further under the personal privacy exemption, although they are relevant and will be addressed in my consideration of the exemption in section 38(a), taken with section 13.

In his representations, the appellant expresses the view that section 14(3)(b) should not apply because the criminal matter for which the information was collected has been concluded.

Analysis and Findings

In order for section 14(3)(b) of the *Act* to apply as claimed by the Police in this appeal, the personal information must have been compiled and must be identifiable as part of an investigation into a possible violation of law.

I have reviewed the records and, in my view, the personal information of individuals other than the appellant that they contain was compiled and is identifiable as part of an investigation by the Police with the view to determining whether or not a violation of the *Criminal Code* had taken place. As such, I find that the presumption in section 14(3)(b) applies to the personal information of the other identifiable individuals contained in the records at issue and that its disclosure is presumed to constitute an unjustified invasion of their personal privacy.

I acknowledge the appellant's view that section 14(3)(b) should not apply because the criminal matter has been concluded. However, once established, a presumption under section 14(3) does not cease to apply even though the matter at hand is concluded. As long as the personal

information was compiled during the course of the investigation itself, the presumption continues to apply regardless of the conclusion of the investigation (see Orders MO-1256, PO-2165).

In view of my finding that the presumption in section 14(3)(b) applies to the personal information of the nine other individuals, it is therefore not necessary for me to consider the criteria listed in section 14(2).

Furthermore, as established by *John Doe*, cited above, the section 14(3) presumption can only be overcome if the personal information at issue is caught by section 14(4) or if a "compelling public interest", as contemplated by section 16, is established. The application of sections 14(4) or 16 has not been raised and, in my view, neither are available in the circumstances of this appeal.

Accordingly, the personal information in the record that is *not* the appellant's own personal information, but is that of the nine individuals, is exempt from disclosure under section 38(b) of the *Act*, subject to my review of the Police's exercise of discretion, below.

SECTION 38(a) - THREAT TO SAFETY OR HEALTH

There is only a small amount of information remaining at issue in view of my findings under section 38(b) with section 14(3)(b). This information consists of the names of the F&CS workers, and another worker involved with the children, as well as small portions of text proximate to those names. There is also information I have found to be the appellant's own personal information, but which was not disclosed to him by the Police.

The Police are relying on section 38(a), in conjunction with section 13, which states:

> A head may refuse to disclose a record whose disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

For this exemption to apply, the Police must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the Police must satisfy me that a reasonable basis exists for believing that endangerment will result from disclosure. In other words, the Police must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated (*Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.)).

An individual's subjective fear, while relevant, may not be sufficient to establish the application of the exemption (Order PO-2003). The term "individual" is not necessarily confined to a particular identified individual, and may include any member of an identifiable group or organization (Order PO-1817-R).

Representations

As with their representations on the application of the personal privacy exemption, the Police submit that their claim of the exemption under section 38(a) in conjunction with section 13, is related to behaviour said to have been exhibited by the appellant during the proceedings related to the criminal and child protection matters, including a specific incident. The Police state:

> As demonstrated in the history of this case, the appellant is aggressive and hostile to involved members. [The appellant] has threatened an officer with regards to the investigation. Should the appellant choose to follow the same actions and threaten the [F&CS] workers involved, their safety would be in jeopardy as we do not believe they have the same ability to defend themselves as a trained officer.

The Police submit that the investigating officer advised staff from the FOI Unit that he had serious concerns for the safety of the [F&CS] workers because of an incident in which "he was approached and threatened with physical harm by the appellant in the parking lot of the Court House". The investigating officer is said to have found the appellant's behaviour to be "aggressive, hostile and volatile".

The Police add the following statement to their representations under section 14(2)(e) which is, in my view, related to the section 38(a) claim:

> The [Police] take the position that [the investigating officer] had the means and training to defend himself against the appellant should it have been required at that time. However, we believe that in the same situation, the [F&CS] workers would not be able to defend themselves against [the appellant]. Thus, releasing their particulars to him would unfairly place these individuals in harms way.

The appellant provided lengthy representations on the subject of the section 38(a) exemption aimed more incidentally at countering the submissions of the Police on the access decision. More generally, the appellant's submissions focus on issues related to the criminal and child protection matters, which formed the basis of his access request in the first place. For example, the appellant submits:

> All three [F&CS workers] have requested meetings or have been involved in closed door meetings with me. In papers filed by the [F&CS], not a single concern about their personal safety has been raised. …
>
> None of the people involved can in any way state that I have so much as raised my voice in their direction. I have engaged in dialogue with said individuals and have conducted myself in a manner that can only be described as professional and civilized.

The appellant's representations are also directed at impugning the credibility of the police officer who provided information to FOI staff about the alleged incident.

The appellant submits:

> … the Guelph Police originally reported my threats as 'aggressive comments to the officer suggesting I would like to fight him.' Those comments have morphed into a threat of physical violence. It should be noted that [the officer] cannot present a single shred of evidence to support his claims while I have respected members of the community who paint a totally different story where it related to this matter.

With his representations, the appellant provided five letters from individuals with knowledge of the circumstances surrounding the incident alleged by the Police to support reliance on the section 38(a) exemption. These letters address, among other points, the alleged threatening incident and lend support to the appellant's representations on the subject.

The appellant adds that it is his intention to address the concerns he has about the involvement of the F&CS workers through the appropriate regulatory bodies. He states:

> [I] can assure the IPC that I pose no threat to any of the individuals involved as I will allow the Bodies that oversee their professional conduct [to] hold them accountable for their actions.

As indicated in the introductory section of this order, the Police contacted this office with new information following the submission of representations by both parties. The Police reiterate the concern about releasing the identities of the "two females from [F&CS]" because of the appellant's "aggressive and hostile" behaviour toward the investigating officer and to staff of the FOI Unit (the writer). However, the Police concede that an internal investigation into the alleged incident between the investigating officer and the appellant concluded that this incident did not take place, as previously communicated to this office. The Police provide an explanation for the miscommunication but refer to other information said to support the initial claim of the exemption.

Analysis and Findings

In reviewing this exemption claim, the question to be asked is whether the Police have demonstrated that disclosure of the information at issue "could reasonably be expected to" lead to the specified result, i.e. endangerment of the F&CS workers, or the other worker.

Past orders of this office relating to this exemption have emphasized the need to consider both type of information at issue and the behaviour of the individual who is requesting the information. The lead authority on this exemption is a case of the Ontario Court of Appeal: *Big Canoe* v. *Ontario* (1999), 46 O.R. (3d) 395 (C.A.) (*Big Canoe).*

In *Big Canoe*, the Court refers to consideration of the quality of the information contained in the record and, more specifically, any "potentially inflammatory" character. I note that in the present appeal, only the names of the four individual remain at issue, along with small portions of text proximate to the names, and some limited personal information about the appellant himself. Other information located near the workers' names in the records constitutes the personal information of other identifiable individuals and is, therefore, exempt under section 38(b), taken with the presumption at section 14(3)(b). I have concluded, therefore, that the information remaining at issue is not itself inflammatory in nature.

In considering the perceived risk of threat from the appellant under this exemption, the Court in *Big Canoe* expressed the importance of establishing an evidentiary foundation for assertions of threatening behaviour by an appellant. In that case, the Court noted that the institution had:

> … provided a sworn affidavit indicating that the Requester had threatened persons in the OWA, including the deponent, and that the Requester had been legally restrained from entering certain premises of the WCB. The deponent was also familiar with the medical portion of the Requester's WCB file, which included reports expressing concerns that the Requester would act out his/her threats of violence against WCB staff. The evidence was uncontroverted.

I have asked myself whether the Police have satisfied me, by providing uncontradicted evidence, that disclosure of the information at issue could possibly result in a serious threat to the safety or health of an individual. In my view, they have not.

The evidence before me does not settle the issue as to the appellant's behaviour. From the very beginning, controversy existed as to whether the incident alleged to have founded the exemption claim in the first place even occurred. Certainly the five letters submitted by the appellant in addition to his own representations on the subject suggested it had not. The authors of several of these letters go so far as to suggest that such behaviour would be uncharacteristic of the appellant. In my view, the strength of the Police's claim to this exemption was diminished when the Police conveyed that their own investigation had established that the incident had not taken place, as alleged.

Furthermore, the Court in *Big Canoe* observed that the need for uncontradicted evidence as to the threat posed by an individual is greater when, as in the present appeal, the concerns related to the individual's past conduct.

It has been acknowledged by this office that individuals working in public positions will occasionally have to deal with "difficult" individuals. In a postscript to Order PO-1939, Adjudicator Laurel Cropley stated the following with regard to section 13 of the *Act*:

> In these cases, individuals are often angry and frustrated, are perhaps inclined to using injudicious language, to raise their voices and even to use apparently

> aggressive body language and gestures. In my view, simply exhibiting inappropriate behaviour in his or her dealings with staff in these offices is not sufficient to engage a section 20 [the provincial equivalent of section 13] or 14(1)(e) claim. Rather, … there must be clear and direct evidence that the behaviour in question is tied to the records at issue in a particular case such that a reasonable expectation of harm is established should the records be disclosed.

I agree with Adjudicator Cropley's comments. In the circumstances of the present appeal, I do not accept that the evidence tendered by the Police as to the appellant's behaviour meets the required threshold for exemption under section 13. Accordingly, I find that the names of the children's workers cannot be withheld under section 13 and I will order them disclosed.

Furthermore, there being no suggestion that the Police intended to withhold the appellant's own personal information from him under section 38(a) with section 13, nor any possibility that its disclosure to him could expose him to harm from himself, I see no reason to exempt it under this section.

EXERCISE OF DISCRETION

General principles

The exemptions in sections 38(a) and 38(b) of the *Act* are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner or her delegate may determine whether the institution failed to do so.

In addition, I may find that the institution erred in exercising its discretion where it does so in bad faith or for an improper purpose; where it takes into account irrelevant considerations; or where it fails to take into account relevant considerations.

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. I may not, however, substitute my own discretion for that of the institution [section 43(2)].

Relevant considerations

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
    - information should be available to the public

  - individuals should have a right of access to their own personal information
  - exemptions from the right of access should be limited and specific
  - the privacy of individuals should be protected

- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information

Representations

In later correspondence to this office, and in acknowledging that the alleged incident between the investigating officer and the appellant did not occur, the Police requested that I not take the alleged incident into account in my determination of the issues.

The Police provided the following rationale for their exercise of discretion:

> As demonstrated in his actions against [the investigating officer] with regards to this investigation, the appellant proves himself to be aggressive and hostile. Thus, we believe releasing any of the information of the [F&CS] workers would result in unfair harassment or harm against them.

On the issue of the exercise of discretion by the Police, the appellant submits that the Police had not raised a concern about his behaviour until he filed an appeal of their decision to not release

information. As I understand it, the appellant is suggesting that the Police took into account irrelevant factors in reaching their access decision.

Analysis and Findings

In Order P-58, former Commissioner Sidney Linden held that a head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the relevant principles of law. I agree.

In the present appeal, it could be argued that the Police's "appreciation of the facts" was lacking given that the alleged threatening incident involving the appellant was later established not to have taken place. However, I accept that as of the date of the Police's access decision, there existed a certain understanding of the facts that was only later shown to be deficient.

Having considered all of the circumstances, I am not persuaded that the Police exercised their discretion in bad faith or for an improper purpose. In addition, given the later communication from the Police, their specific request that I not take the incident into account, and the fact that they declined to reconsider the access decision in light of the new information, I am satisfied that the Police had turned their mind to the exercise of discretion once again. In the circumstances, and based on the representations provided by the Police, I am not persuaded that the Police erred by failing to take into account relevant considerations.

I would also note that the appellant has been provided with information relating to this matter by the Police and that he will receive more through the operation of this order. Although the information disclosed may not resolve all of his concerns about the F&CS workers, this is not determinative of the issue of exercise of discretion. In denying access to personal information of the other identifiable individuals, I find that the Police exercised their discretion under section 38(b) in a proper manner and I will not disturb it on appeal.

Consequently, I find that disclosure of the personal information of the nine other identifiable individuals in the records would constitute an unjustified invasion of their personal privacy and that the information is exempt under section 38(b) of the *Act*.

ORDER:

1. I uphold the decision of the Police sever the information from pages 4, 5, 6, 7, 8, 10, 11, 12, 13, 15, 16, 17 and 18 of the records on the grounds that it is non-responsive to the appellant's request. That information is marked in yellow highlighter on the copy of the records enclosed with this order and includes the three police "ten" codes not previously severed.

2. I uphold the decision of the Police to withhold the personal information of the nine identifiable individuals in the records. For greater certainty, I have highlighted the

personal information of these individuals **in orange highlighter** in the copy of the records enclosed with this order. This information is **not** to be disclosed.

3. I order the Police to disclose to the appellant those portions of the records containing the personal information of the appellant. For the sake of clarity, I have highlighted the relevant portions of the records **in green highlighter.**

4. I order the Police to disclose to the appellant only the names of the four individuals identified in the records with **green highlighter** which I have found not to be exempt under section 38(a) of the *Act*, together with section 13.

5. I order the Police to disclose the portions of the records highlighted in green, as per provisions 3 and 4 above, by **November 5, 2007** but not earlier than **October 30, 2007.**

6. In order to verify compliance, I reserve the right to require the Police to provide me with evidence that a copy of the records have been disclosed to the appellant as per the provisions of this order.

Original signed by: September 25, 2007
Daphne Loukidelis
Adjudicator