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

INTERIM ORDER MO-2269-I

Appeal MA-060178-2

Guelph Police Services Board

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NATURE OF THE APPEAL:

The Guelph Police Services Board (the Police) received a broad two-page request for information under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). On the first page, the requester (now the appellant) stated that she was seeking access to the following information:

> (1) All personal info or records/info in any form (phone, video, memos, reports, any records)
>
> (2) All … [nothing listed in the request under this item]
>
> (3) All anonymous phone calls made regarding drum noise complaints from above [a named individual] made to Police before my last information request (unfulfilled by prior request).

On the second page, the requester asked for "any and all information the Police have released or received concerning me. At any time." She further stated that this information includes the following:

> (3B) the "Memo from the Chief"
>
> (3C) Any and all records of complaints [including video] when I was assaulted by Police.
>
> (4) Any and all information received
>
> (5) who the information was received from
>
> (6) the content of all information/phone calls
>
> (7) what information was released to anyone
>
> (8) phone calls
>
> (9) video records [to chief, to Police, to board, anything]
>
> (10) records of any kinds whether I can describe them or not
>
> (11) all police reports/comments
>
> (12) phone calls concerning me or other communications
>
> (13) Everything … All records or information from me, about me, or reports
>
> ….
>
> Including all records of Police Services Board.

Appeal MA-060178-1

The appellant did not receive a decision letter from the Police with respect to her request. She then wrote to this office to appeal the Police's failure to respond to her request within 30 days, as required by section 19 of the *Act*. Consequently, this office opened a "deemed refusal" appeal (MA-060178-1).

After being notified of this appeal, the Police issued a decision letter to the appellant, denying her access to any records pursuant to section 4(1)(b) (frivolous or vexatious request) of the *Act*. Given that the Police were no longer in a possible deemed refusal position, Appeal MA-060178-1 was closed.

Appeal MA-060178-2

The appellant then appealed the Police's decision to characterize her request as "frivolous or vexatious" under section 4(1)(b) of the *Act*. This office opened appeal MA-060178-2, which is the present appeal.

During the mediation stage of the appeal process, the appellant left several voicemail messages with the mediator, providing further details with respect to her request. In particular, she stated that the information she is seeking includes:

- A memo from the Chief of Police, relating to the appellant's arrest on November 4, 2003.
- Videotapes showing her being assaulted by police officers at the Crown Attorney's office and at the courthouse.
- Information relating to an incident in which the appellant was removed from a store by two police officers.
- Two 911 calls of an incident in which teenagers were throwing stones at her.
- Five calls to the Police by the appellant regarding someone playing the drums.
- The appellant's telephone complaint regarding a political fundraiser outside her home.
- Numerous telephone messages left by the appellant with the Chief of Police, asking him to deal with abuse by her landlord.

During mediation, the Police decided to withdraw their reliance on section 4(1)(b) of the *Act*. They located 109 pages of records responsive to the appellant's request, including incident reports, occurrence reports, and the notes of several police officers, including the Chief of Police.

The Police then issued a revised decision letter to the appellant that provided her with access to most information in these records. They denied her access to the remaining portions of the records pursuant to the discretionary exemption in section 38(b) (personal privacy) of the *Act*. In addition, the Police indicated on the records themselves that they are relying on the presumptions in sections 14(3)(a) (medical history) and 14(3)(b) (investigation into violation of law).

The Police denied the appellant access to other portions of the records pursuant to the law enforcement exemption in section 8(1)(c) (investigative techniques and procedures). However, the records containing information that is subject to a section 8(1)(c) exemption claim also appear to contain the appellant's personal information. Consequently, the discretionary exemption in section 38(a) (refuse to disclose requester's own information), in conjunction with section 8(1)(c), is at issue.

Finally, the Police stated that some portions of the records have been withheld because they are not responsive to the appellant's request.

The Police's revised decision letter also indicated that in order to obtain copies of audiotapes of telephone calls and voicemail messages, the appellant would have to pay a fee of $10.00 per audiotape. The appellant informed the Police that she was unable to pay the fees for the audiotapes. The Police agreed to waive these fees. These tapes were combined onto one audiocassette and disclosed to the appellant.

The Police's revised decision letter further advised the appellant that the following records identified in her request do not exist or could not be located:

- Memo from the Chief of Police relating to her arrest.
- Videotapes showing the appellant being assaulted by police officers.
- Records of telephone calls made by the appellant relating to incidents of stone throwing, complaints regarding someone playing the drums, or a complaint regarding a political fundraiser.

Moreover, after further discussion with the mediator, the Police provided the appellant with a complete copy of the notes of the Chief of Police (pages 103 to 109 of the records). Consequently, these pages are no longer at issue in this appeal.

The appellant advised the mediator that she believes additional records should exist. In addition, she claims that portions of the police officers' notes are not legible.

This appeal was not settled in mediation and was moved to the adjudication stage for an inquiry, where the issues to be determined are:

- Whether the records contain "personal information," as that term is defined in section 2(1) of the *Act*, and if so, to whom it relates.

- Whether the discretionary exemptions in sections 38(a) or (b) of the *Act* apply to the information at issue.

- Whether the Police exercised their discretion in applying these exemptions, and if so, whether this exercise of discretion should be upheld.

- Whether the Police conducted a reasonable search for records responsive to the appellant's request, as required by section 17 of the *Act*.

- Whether the personal information that the Police disclosed to the appellant is in a "comprehensible form," as required by section 37(3) of the *Act*.

I decided to start my adjudication of this appeal by sending a Notice of Inquiry, setting out the facts and issues, to the Police. In response, the Police submitted representations to this office. The Police asked that limited portions of their representations be withheld from the appellant because of confidentiality concerns.

I then sent a Notice of Inquiry to the appellant, along with the non-confidential portions of the Police's representations. The appellant provided her representations over the telephone to an adjudication review officer. This telephone conversation was recorded on a CD, with the appellant's consent.

I have carefully reviewed both the Police's written representations and the appellant's oral representations and will be taking their submissions into account in reaching my decision.

RECORDS:

The information at issue consists of the undisclosed portions of 102 pages of records, including incident reports, occurrence reports, and the notes of police officers.

DISCUSSION:

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. 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. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

The Police submit that the records at issue contain the personal information of the appellant and other individuals, including her neighbours and landlord; witnesses to incidents she was involved in; a social worker; a security guard; a store manager; an emergency room nurse; and an emergency room doctor.

I have carefully reviewed the records at issue and find that they contain the personal information of the appellant and her neighbours.

The records also contain information relating to several individuals who were acting in an employment or professional capacity when they had contact with the appellant, including a property manager, a security guard, a store manager, several police officers, a social worker, a nurse, and an emergency room physician.

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].

The property manager, the security guard and the store manager were interviewed as witnesses by the Police as a result of encounters with the appellant that occurred while they were at work. In my view, the information in the records relating to these individuals reveals something of a personal nature about them. Consequently, I find that this information is their personal information.

However, the information in the records relating to the police officers, the social worker, the nurse and the emergency room physician does not reveal something of a personal nature about these individuals. They provided health and social services to the appellant and had contact with her in a manner that was strictly related to their employment or professional duties. Consequently, I find that the information relating to these individuals is their professional rather than their personal information.

On the whole, the Police have disclosed to the appellant the professional information in the records relating to their officers. However, the Police have withheld the names of two police officers (pages 89, 90 and 91), the social worker (page 91), the nurse (page 93) and the emergency room physician (pages 90-91). The personal privacy exemptions in the *Act* can only apply to information that qualifies as "personal information." Accordingly, section 38(b) cannot apply to the names of these individuals, who came into contact with the appellant strictly in their professional capacities. As the Police have not claimed any other exemptions for this information, it must be disclosed to the appellant.

I will now consider whether the remaining portions of the records that the Police have withheld qualify for exemption pursuant to sections 38(a) and (b) of the *Act*.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/LAW ENFORCEMENT

General principles

The Police have denied the appellant access to portions of the records pursuant to the discretionary exemption in section 38(a), in conjunction with section 8(1)(c) of the *Act*.

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.]

Even if the information at issue falls under one of the listed exemptions, the institution must still exercise its discretion in deciding whether or not to disclose the information to the requester.

Some of the records at issue contain the personal information of the appellant, police codes, police zone numbers and other related information. The Police have exercised their discretion to disclose most of the appellant's own personal information to her, but have withheld some of her personal information, police codes, zone numbers and other related information under section 38(a), in conjunction with section 8(1)(c) of the *Act*.

Section 8(1)(c) states:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

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.)].

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*].

Analysis and findings

The appellant's personal information

The Police have withheld information on page 20 of the records containing the appellant's personal information. This includes information about the approach the Police should take whenever complaints are received from the appellant. In addition, the Police have withheld information on pages 89, 90 and 94 that details the approach that the Police took in dealing with the appellant in specific incidents documented in the records and other information.

The Police submit that this information falls within section 8(1)(c) of the *Act* because it reveals investigative techniques and procedures currently in use or likely to be used in law enforcement.

In order to meet the "investigative technique or procedure" test in section 8(1)(c), the institution must show that disclosure of the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. The exemption normally will not apply where the technique or procedure is generally known to the public [Orders P-170, P-1487].

I have reviewed the withheld information on pages 20, 89, 90 and 94 of the records and find that it does not reveal "investigative techniques and procedures." For example, some of the withheld information appears to describe techniques and procedures for "handling" this particular appellant, as opposed to techniques and procedures for "investigating" a possible breach of the law. Consequently, I am not persuaded that the withheld information falls within the scope of section 8(1)(c).

Even if I was to accept that the withheld information in the records reveals "investigative techniques and procedures," I am not persuaded that disclosing them to the public could reasonably be expected to hinder or compromise their effective utilization.

Except in the case of section 8(1)(e), where section 8 uses the words "could reasonably be expected to," the 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.)].

In their representations, the Police concede that disclosing the techniques used with respect to this particular appellant may not be "particularly worrisome," but submit that disclosing this information would set a precedent that would enable other individuals to gain access to information that could put the Police at risk. In my view, the Police's submissions on this issue amount to speculation of possible harm, which is not sufficient to meet the threshold set out in section 8(1)(c). They have not provided me with the "detailed and convincing" evidence required to establish that the harms contemplated by section 8(1)(c) could reasonably be expected to occur if the withheld information in these pages is disclosed to the appellant.

I find, therefore, that section 8(1)(c) does not apply to the information on pages 20, 89, 90 and 94 of the records. Consequently, this information does not qualify for exemption under section 38(a), and I will order that it be disclosed to the appellant.

Police codes

The records at issue also contain police "900" codes, police zone numbers and other related information, which the Police have withheld from disclosure. The Police submit that section 8(1)(c) of the *Act* applies to this information. In her broad two-page request, the appellant did not specifically ask for this information. However, during the mediation stage of the appeal

process, the appellant indicated that she was pursuing police "900" codes. I find, therefore, that these codes are responsive to the appellant's request and are at issue in this appeal.

There is no evidence before me to suggest that the appellant is seeking police zone numbers and other related information. Consequently, I find that this information is not responsive to the appellant's request and may be severed on that basis from the records at issue.

Police codes, which include both "10" codes and "900" codes, are internal codes that are used primarily in communications between police dispatchers and officers on patrol.

The appellant states that she is only interested in accessing the specific "900" codes that appear in the records relating to her and particularly wants to know whether there is a "900" code that the Police use for people whom they label as mentally ill. She asserts that the police officers who came to her home on one occasion were "outright aggressive," and that she wishes to scrutinize the information in the records to determine whether they were acting "presumptively," based on a specific "900" code.

The Police submit that the "900" codes in the records must be withheld from disclosure because they are not known to the general public and disclosing them could reasonably be expected to harm law enforcement investigations:

> Releasing this information could compromise law enforcement investigations as the public would have knowledge of our typing systems and decipher the codes in print or over the air. This knowledge in the hands of unfavourable individuals could be expected to hinder and compromise its usage.

In Order MO-2199, Assistant Commissioner Brian Beamish found that "900" codes are exempt from disclosure under section 8(1)(l) of the *Act*:

> A number of decisions of this office have consistently found that Police ten codes or "900" codes, and zone and sector codes qualify for exemption under section 8(1)(l) of the *Act* (see for example Orders M-393, M-757 and PO-1665). These codes have been found to be exempt because of the existence of a reasonable expectation of harm to an individual or individuals and a risk of harm to the ability of the police to carry out effective policing in the event that this information is disclosed. I adopt the approach taken by previous orders of this office. I have carefully reviewed the representations of the parties and find that the Police have provided me with sufficient evidence to establish a reasonable expectation of harm with respect to the release of this information.

Sections 8(1)(l) of the *Act* states the following:

> 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.

Although this office has previously found that "900" codes are exempt under section 8(1)(l), this is not the discretionary exemption claimed by the Police in the circumstances of this appeal. Instead, the Police have claimed that the discretionary exemption in section 8(1)(c) of the *Act* applies to the "900" codes in the records at issue.

Section 8(1)(c) gives an institution the discretion to refuse to disclose information that could reasonably be expected to reveal investigative techniques and procedures currently in use or likely to be used in law enforcement. However, "900" codes are internal police communication codes, not investigative techniques or procedures. Consequently, I find that section 8(1)(c) does not apply to the "900" codes in the records at issue.

However, given the sensitivity of these codes, I am not prepared to order the Police to disclose them to the appellant without providing them with an opportunity to reconsider their exemption claim. I have decided to issue an interim order in this appeal and provide the Police with an opportunity to issue a revised decision to the appellant that claims a different discretionary exemption with respect to the "900" codes in the records at issue.

In addition, if the Police choose to issue a revised decision, they must also submit representations to this office on two issues. First, they must provide submissions that support any new discretionary exemption claim with respect to the "900" codes. Second, they must provide submissions that explain why I should accept a new discretionary exemption claim at this late stage of the appeal. Section 11.01 of this office's *Code of Procedure* (the *Code*), which governs new discretionary exemption claims, states the following:

> In an appeal from an access decision, excluding an appeal arising from a deemed refusal, an institution may make a new discretionary exemption claim only within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

If the Police choose to make a new discretionary exemption claim, it will clearly not be made within 35 days after the Police were notified of the appeal, as required by section 11.01 of the *Code*. The Police should provide representations that explain why I should accept the new discretionary exemption claim at this stage of the appeal.

If the Police choose not to issue a revised decision letter to the appellant and provide this office with representations on the matters described above, I will order that the "900" codes be disclosed to the appellant by the date specified in the provisions at the end of this order.

I will now consider whether the remaining information at issue qualifies for exemption under section 38(b) of the *Act*.

PERSONAL PRIVACY

General principles

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.

Under section 38(b), where a record contains the 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 institution may refuse to disclose that information to the requester.

Sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold under section 38(b) is met.

If the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt from disclosure under section 38(b).

Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. If paragraph (a), (b) or (c) of section 14(4) applies, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b).

Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 38(b).

The Divisional Court has stated that once a presumed unjustified invasion of personal privacy is established under section 14(3), it can only be overcome if section 14(4) or the "public interest override" at section 16 applies. It cannot be rebutted by one or more factors or circumstances under section 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

If no section 14(3) presumption applies, section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy under section 38(b) [Order P-239]. The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2) [Order P-99].

Section 38(b) is a discretionary, not a mandatory exemption. If the personal information at issue falls within the scope of section 38(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a 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.

Analysis and findings

I have reviewed the records at issue, which contain the personal information of both the appellant and other individuals. Some portions of the records only contain the personal information of the appellant. The Police have disclosed most of this personal information to her but have also withheld some of it.

In the previous section of this order, I found that portions of pages 20, 89, 90 and 94 of the records containing the appellant's personal information did not qualify for exemption under section 38(a) of the *Act*.

The Police have withheld additional portions of the records containing only the appellant's personal information under section 38(b) of the *Act*. This withheld information appears on pages 31, 43, 44, 52, 54 and 91 of the records. The Police indicated on the records themselves that the presumption in section 14(3)(a) of the *Act* applies to this information. This provision states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> > relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

However, in their representations, the Police do not explain why section 38(b), in conjunction with the specific presumption in section 14(3)(a), applies to this information. In particular, they have not provided any submissions to support an argument that disclosure of this information would constitute an "unjustified invasion" of another individual's personal privacy.

I have reviewed the undisclosed portions of the records containing only the appellant's personal information and find that disclosure of this information to the appellant would not constitute an "unjustified invasion" of another individual's personal privacy, as required by section 38(b). Although some of this personal information could relate to a medical, psychiatric or psychological condition, as set out in section 14(3)(a), disclosure of this information *to the appellant herself* cannot constitute an invasion of another individual's personal privacy. Accordingly, the appellant's personal information on pages 31, 43, 44, 52, 54 and 91 of the records is not exempt under section 38(b), and I will order that it be disclosed to her.

The records also contain personal information relating to several individuals who either had contact with the appellant or were interviewed as witnesses by the Police with respect to

incidents involving her. These individuals include her neighbours, a property manager, a security guard, a store manager and other individuals. In some portions of the records, the personal information of these individuals is intertwined with the appellant's personal information (e.g., comments made by other individuals about her). Other portions of the records only contain the personal information of these other individuals.

The Police claim that the presumption in section 14(3)(b) of the *Act* applies to this information. This provision 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;

The Police submit that this presumption applies in the circumstances of this appeal:

> Some of the personal information in these matters [was] compiled and is identifiable as part of an investigation into a possible violation of law with the specific laws investigated being Fraud, Assault Causing Bodily Harm, Theft Under $5000 and Criminal Harassment.

I find that the Police were called to investigate incidents which gave rise to the creation of the records at issue. The personal information of the appellant and the other individuals cited above was compiled by the Police and is identifiable as part of their investigations into possible violations of the *Criminal Code*. Consequently, I find that the section 14(3)(b) presumption applies to this personal information.

As noted above, the Divisional Court stated in *John Doe* that once a presumed unjustified invasion of personal privacy is established under section 14(3), it can only be overcome if section 14(4) or the "public interest override" at section 16 applies. I have considered the exceptions in section 14(4) of the *Act* and find that the personal information remaining at issue does not fall within the ambit of this section. Moreover, the "public interest override" in section 16 does not apply, because the appellant has a private, not a public interest, in seeking access to the records at issue, and she has not raised the application of this provision.

In her representations, the appellant states that the *Act* gives her the right to access her own personal information and to request a correction of any errors. She submits that she cannot request a correction of any false information about her in the records if the Police withhold portions of the records containing her personal information.

The appellant further asserts that both the common law and the Canadian Charter of Rights and Freedoms give individuals the right to face their accusers. She submits that she has the right to know whether the Police have accepted the allegations of her accusers as fact.

In my view, the appellant's submissions amount to an argument that the factors in sections 14(2)(d) and (g) of the *Act* are applicable. These provisions 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;
>
> (g) the personal information is unlikely to be accurate or reliable;

However, the Divisional Court stated in *John Doe* that once a presumed unjustified invasion of personal privacy is established under section 14(3), it cannot be rebutted by one or more factors or circumstances under section 14(2). Although I appreciate that the appellant is seeking access to this information because she questions its accuracy and also believes that she has a right to "face her accusers," the factors in section 14(2) cannot be applied to rebut the presumption in section 14(3)(b) of the *Act*.

Accordingly, I find that those portions of the records containing the intertwined personal information of the appellant and other individuals qualify for exemption under section 38(b) of the *Act*. Similarly, those portions of the records containing only the personal information of individuals other than the appellant qualify for exemption under section 38(b). In short, disclosure of this personal information to the appellant would constitute an unjustified invasion of the personal privacy of other individuals. Subject to my discussion below on the issue of exercise of discretion, I uphold the Police's decision to withhold these portions of the records from the appellant.

EXERCISE OF DISCRETION

The exemptions in sections 38(a) and (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 may determine whether the institution failed to do so.

In this interim order, the Police's decision to apply the section 38(a) exemption to portions of the records (the "900" codes) has not been fully resolved. Consequently, it is not necessary, at this time, to assess whether the Police exercised their discretion properly in applying that exemption.

However, I have partly upheld the Police's decision to apply the section 38(b) exemption to other portions of the records. I will, therefore, assess whether the Police exercised their discretion properly in applying that exemption.

The Commissioner may find that the institution erred in exercising its 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 either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

The Police submit that they have properly exercised their discretion in applying the section 38(b) exemption. The appellant submits that the Police acted in bad faith, because they did not address her access request for nine months. She further asserts that they have been disparaging to her on the telephone. However, she does not address whether the Police exercised their discretion properly in applying the section 38(b) exemption.

In my view, the Police exercised their discretion based on proper considerations. I am not persuaded that they failed to take relevant factors into account or that they considered irrelevant factors in applying the section 38(b) exemption. I find, therefore, that their exercise of discretion was proper.

SEARCH FOR RESPONSIVE RECORDS

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).

The appellant claims that the Police did not conduct a reasonable search for the records she is seeking, and that additional records exist.

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

In their representations, the Police provide a detailed account of the steps they undertook to locate and retrieve records that are responsive to the appellant's broad, two-page request.

They state that the search for records was overseen by the legal assistant in the Police's Freedom of Information (FOI) branch. This individual started by conducting a search of "LEGACY" and "NICHE," which are the Police's records management databases. As a result of these searches, the legal assistant determined that the Police have records relating to 15 occurrences involving the appellant since 1993.

The legal assistant then sent a memo to all 22 officers who were involved in the 15 occurrences relating to the appellant and asked them to locate and forward their notes to her. Sixteen officers forwarded their notes to the FOI branch. The other officers either did not have notes relating to the specific incidents involving the appellant or did not actually attend to the calls relating to such incidents.

The legal assistant then contacted the Chief of Police, who provided the notes he transcribed of messages left by the appellant on his voicemail. In her request, the appellant also asked for the "Memo from the Chief." The Chief advised the legal assistant that no such memo exists. However, the Police found reference, in the notes of officers, to a memo that was circulated with respect to a "suspect description" of a male who allegedly assaulted the appellant. The Police state that "the appellant was informed of these findings."

The Police further state that after they disclosed severed versions of the records at issue to the appellant, which included occurrence reports, incident reports and officers' notes, the appellant left five voicemail messages with the FOI legal assistant, complaining about various issues. For example, she asserted that videotape footage must exist of her meetings with various officers when she visited the police station. The Police advised her that no such footage exists because those meetings did not take place in those areas of the station that are subject to video surveillance.

In her oral representations, the appellant submits that the Police must have a recording of the telephone calls that she made to them to complain about teenagers throwing stones at her, drums

being played, and a political fundraiser taking place outside her building. She also asserts that they must have a recording of a telephone call that an executive assistant to a Member of Parliament (MP) made to them with respect to her.

The Police state that the legal assistant in its FOI branch contacted the Staff Sergeant responsible for the Police's Communications Centre with respect to records relating to numerous calls made by the appellant to the Police. The Staff Sergeant informed the legal assistant that calls to the Police's Communications Centre are recorded on tapes in two-week blocks. He stated that unless the appellant provided the dates and times of her calls, it would be impossible to locate tapes relating to the specific incidents.

The appellant submits that the Police have never asked her to provide the dates and times of these calls. However, she states that the phone call from the MP's executive assistant to the Police would have been made before 5:00 p.m. on October 10, 2003.

In her oral representations, the appellant was not able to provide this office with the dates and times of the other telephone calls that she made to the Police with respect to the incidents involving teenagers throwing stones at her, drums being played, and a political fundraiser taking place outside her building. However, she subsequently mailed several documents to this office. The first document appears to list telephone calls that the appellant made to the Police, including the dates and times of these calls. However, this document does not indicate the reason for each of these calls. A second document includes a reference to her phone calls to the Police with respect to teenagers throwing stones at her but does not identify the date and time of these calls.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

A reasonable search would be one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request [Order M-909].

I have carefully considered the parties' representations. In my view, it is evident that the Police have devoted substantial time and resources to locating and retrieving records related to the appellant's broad request. An experienced employee conducted searches of the appropriate databases and required both officers and the Chief of Police himself to provide responsive records, which have been disclosed to the appellant, either in whole or in part.

As noted above, section 17(1)(b) of the *Act* requires a requester to provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record. In my view, the appellant has not provided the Police with sufficient detail to enable them to locate recordings of her telephone calls to them with respect to the incidents involving teenagers throwing stones at her, drums being played, and a political fundraiser taking place

outside her building. Consequently, I am not prepared, at this time, to order the Police to conduct further searches for these recordings.

However, the appellant has indicated that the phone call from the MP's executive assistant to the Police would have been made before 5:00 p.m. on October 10, 2003. Consequently, I will order the Police to conduct a search of their Communications Centre to locate the recording of this phone call. In addition, they must provide representations to this office that detail the outcome of their search efforts, including whether the time frame provided by the appellant ("before 5:00 p.m.") is sufficiently detailed to enable them to locate the records. If the Police locate a responsive record, they must issue a decision letter to the appellant, indicating whether access to this record will be provided.

In my final order on this appeal, I will take this additional search into account in determining whether the Police have conducted a reasonable search for responsive records, as required by section 17 of the *Act*.

COMPREHENSIBLE FORM

Section 37(3) of the *Act* requires that institutions provide requesters with their personal information in a "comprehensible" form. This provision states:

> Where access to personal information is to be given, the head shall ensure that the personal information is provided to the individual *in a comprehensible form* and in a manner which indicates the general terms and conditions under which the personal information is stored and used. (Emphasis added.)

The appellant submits that portions of the police officers' notes that were disclosed to her are not legible. She suggests that this issue could be resolved if the Police read the notes to her over the telephone, and she would record the conversation.

The Police state that the handwritten notes of some officers may be challenging to read but submit that the same information is found in other records disclosed to the appellant:

> Notes of the individual officers may be difficult to decipher based on their handwriting style. Some officers' notes are more legible than others as some individuals have neater writing. The appellant was provided with copies of typed occurrence reports which mirror the officers' notes. The notes provide the foundation for the occurrence reports and as such the occurrence reports contain the same information as found in the officers' notes.

In Order 19, former Commissioner Sidney Linden found that section 48(4) of the *Freedom of Information and Protection of Privacy Act*, which is the provincial equivalent to section 37(3), only requires an institution to ensure that the average person can comprehend the records. It

does not create a further duty on the institution to assess a specific requester's ability to comprehend a particular record.

In Order M-199, Inquiry Officer Holly Big Canoe considered whether section 37(3) of the *Act* required the Metropolitan Toronto Police Services Board to make typewritten transcriptions of handwritten records. She applied former Commissioner Linden's reasoning in Order 19 and found that the average person could comprehend the handwritten records at issue in the appeal before her. Consequently, she concluded that there was no obligation on the Police to create a typewritten copy of the records.

In the circumstances of this appeal, I have carefully reviewed the severed version of the records that the Police submitted to this office, which includes the officers' notes. Although some officers' handwritten notes are more challenging to read than others because of their particular handwriting style, they are, for the most part, comprehensible to the average person. In short, I find that the Police have provided the appellant with these records in a comprehensible form, as required by section 37(3) of the *Act*.

After providing her oral representations in this appeal, the appellant left a further voicemail message with this office which raised a new issue. She stated that she cannot understand one of the audiotapes that the Police provided to her because the sound is "distorted." She offered to play the audiotape over the telephone to the adjudication review officer to prove that the sound is not comprehensible.

Unfortunately, I cannot independently assess whether Police have provided the appellant with this audiotape in a comprehensible form, as required by section 37(3) of the *Act*, unless the appellant provides me with the specific audiotape that she is referring to. Although I appreciate the appellant's offer to play the tape over the telephone to an adjudication review officer, I am not persuaded that this mode of transmission would enable me to properly assess whether the tape is in a comprehensible form.

Consequently, if the appellant wishes me to consider this issue in the final order that I will be issuing on this appeal, I am inviting her to mail me the impugned audiotape, which must be received in this office by the date specified in Order Provision 8, below. I will return the audiotape to her after considering whether the Police have provided it in a comprehensible form, as required by section 37(3) of the *Act*. If the appellant does not wish to pursue this issue further, she is not required to submit the audiotape to this office.

ORDER:

1. I order the Police to disclose the names of the two police officers (pages 89, 90 and 91), the social worker (page 91), the nurse (page 93) and the emergency room physician (pages 90-91).

2. I order the Police to disclose those portions of the records containing the appellant's personal information that I have found are not exempt under sections 38(a) or (b) of the *Act*. These portions are found on pages 20, 31, 43, 44, 52, 54, 89, 90, 91 and 94.

3. I am providing the Police with a copy of the pages referred to in Order Provisions 1 and 2 and have highlighted in green those portions that must not be disclosed to the appellant because they are exempt or not responsive to her request. For the purposes of this interim order, I have also highlighted in green any "900" codes, which the Police are not required to disclose at this time. To be clear, the portions of these pages that I have not highlighted in green must be disclosed to the appellant.

4. I order the Police to provide the appellant with a copy of the pages referred to in Order Provisions 1 and 2 by **March 3, 2008.**

5. I order the Police to decide whether to issue a revised decision letter to the appellant with respect to the "900" codes in the records at issue. If the Police decide to issue a revised decision letter that claims a new discretionary exemption with respect to the "900" codes, they must:

   (a) issue this revised decision letter to the appellant by **February 15, 2008**, and

   (b) provide this office, by **March 3, 2008**, with representations that: (i) support any new discretionary exemption claim, and (ii) explain why I should accept the new discretionary exemption claim at this late stage of the appeal, with particular reference to section 11.01 of this office's *Code of Procedure*.

6. If the Police decide not to issue a revised decision letter to the appellant with respect to the "900" codes in the records at issue, I order them to disclose those portions of the records to the appellant by **March 3, 2008**.

7. I order the Police to conduct a search of their Communications Centre for a recording of the telephone call from an MP's executive assistant that the appellant alleges was made before 5:00 p.m. on October 10, 2003. If the Police locate a responsive record, they must issue a decision letter to the appellant by **March 3, 2008**. In addition, the Police must provide this office with a copy of their decision letter, if any, and representations that detail the outcome of their search efforts, by the same date.

8. I am inviting the appellant to mail me the audiotape that she claims is not comprehensible. The audiotape must be received in this office by **March 3, 2008.**

9. In order to verify compliance with this order, I reserve the right to require the Police to provide me with a copy of the records that they disclose to the appellant.

January 31, 2008

Colin Bhattacharjee
Adjudicator