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

ORDER MO-2348-F

Appeal MA06-316-2

Ottawa Police Services Board

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NATURE OF THE APPEAL:

This is the final order to address the outstanding issues in Appeal MA06-316-2. The introductory section of this order provides only a synopsis of the appeal's background. A more detailed history can be found in Interim Order MO-2191-I, issued May 3, 2007.

Background

In April 2006, the requester submitted a request to the Ottawa Police Services Board (the Police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to "all police records" containing his own personal information.

In a letter dated May 25, 2006, the Police informed the requester that because "you are only trying to gain access to your own personal information … you can obtain your own information by purchasing a copy of the reports through our Records Section." The Police provided contact information about the Records Section and returned the fee submitted by the requester. The requester's efforts to obtain information through the Records Section were unsuccessful.

Consequently, the requester submitted another request to the Police, which contained more detail about the records of interest to him. The response he received was similar to the previous one, in that he was told, once again, to contact the Records Section.

The requester then contacted this office. In a September 5, 2006 letter, the requester stated:

> While much of the information I require could be obtained by these means [through the Records Section], doing so is cost prohibitive and does not ensure that I will receive all the information to which I am entitled. Therefore, I would prefer to obtain these documents through official channels, if at all possible. Owing to the difficulties I have already experienced, I fear that I will not be able to do this without your intervention. Consequently, I have written to formally request your assistance in this matter.
>
> Along with a complete copy of my police file, I was hoping to obtain an index of the personal information data banks, a description of the contents of each, and a copy of any tags documenting the inconsistent use of the information within them. (I believe provisions for these requests exist under section 34 and section 35 of the *Act*).

In addition, the appellant described how he believed his appeal could be resolved, in part, as follows:

> … In requesting a complete copy of my police file, Ottawa Police Services is obligated to inform me if information is withheld due to exemptions under the *Act*. In obtaining this information by the alternative means the Ottawa Police Services insist I use [the Records Section], I no longer am informed of exemptions and no longer retain a right to appeal them…

This office opened Appeal MA06-316-1 as a "Deemed Refusal" appeal. Following discussion between staff from this office and Police FOI staff, the Police agreed to issue a decision to the appellant in accordance with the requirements of the *Act*.

In a letter dated September 21, 2006, the Police informed the requester that access to the requested information was denied under section 15(a) of the *Act* on the basis that the records or the information contained in the records has been published or is currently available to the public. The letter included information about accessing the records, which were not specifically identified, through the Records Section.

Appeal MA06-316-1 was closed upon the issuance of the decision letter.

Appeal MA06-316-2

The requester, now the appellant, appealed the September 21, 2006 decision and Appeal MA06-316-2 was opened.

During the mediation stage of this appeal, the Police submitted a list of the categories of documents maintained in its record-holdings and their retention periods to this office. During this same period, discussion with the appellant resulted in clarification of his request. One component of the clarified request (as conveyed to the Police) remains relevant and was previously described by the mediator in the following manner:

> [The appellant] stated that in the fall of 1999 (he is not aware of the exact date) he was involved in an incident where he was removed by the Ottawa Police from a [specified location] in the City of Ottawa. He is requesting all Police records related to the matter, including officer's notes, witness statements, incident reports, and medical reports. He stated he would like "anything the police have."

After this appeal was transferred to the adjudication stage of the appeal process, I sent a Notice of Inquiry to the Police initially, to seek representations on the issues. I asked the Police to provide submissions on several preliminary issues in addition to the application of the section 15(a) exemption to the identified records, and the manner in which the Police exercised their discretion in claiming it. I specifically requested that the Police provide representations to address the following:

- the Police's interpretation of the scope of the appellant's request;
- the details of the Police's search for records responsive to the request; and
- the identification of records responsive to the request and at issue in the appeal, given that no records had been identified, nor any copies provided to this office, as of the date of the Notice of Inquiry.

In response, the Police provided representations to this office and enclosed 61 pages of records with a note attached that stated: "Copies of reports available to the appellant. I have highlighted the information that would not be disclosed to the appellant." The Police did not, however, indicate what exemptions they were relying upon to withhold the information. In the circumstances, I concluded that I should issue an Interim Order "to provide some clarity around the preliminary issues respecting the scope of the appellant's request and the adequacy of the Police's response to it, including the decision letters, under the *Act*."

Interim Order MO-2191-I, issued on May 3, 2007, expressly excluded review of the adequacy of the searches conducted by the Police, exemptions that might ultimately claimed by the Police in relation to the records submitted to this office, and any other issues that might be outstanding in Appeal MA06-316-2.

In Interim Order MO-2191-I, I made the following finding regarding the scope of the appellant's request:

> I find that the appellant's request clearly contemplates the identification of all records pertaining to him in the Police's record holdings, including those which may be located in the Professional Standards Section. Without limiting any future consideration of the adequacy of the Police's searches in this appeal, I will order the Police to expand their search to include any records held by the Professional Standards Section.

Appeal MA06-316-2 since Interim Order MO-2191-I

The decision letter issued to the appellant by the Police pursuant to Interim Order MO-2191-I advised him that the only records in the Police's custody or control that contained his personal information were the reports previously identified through a search of the Records Management System. These were the same records provided to this office with the representations of the Police prior to the issuing of the Interim Order.

The Police granted partial access to the previously identified records, which consist of several occurrence reports and related documents dating from 1991 to 2004. Access to portions of the records was denied pursuant to section 38(b) (personal privacy), relying specifically on the presumption in section 14(3)(b), and section 38(a) in conjunction with section 8 (law enforcement). The Police also referred to the jurisdictional exclusion in section 52(3) (employment related records), although they did not specifically claim its application. With respect to the 1999 incident, the Police maintained that records, if any had existed, had most likely been purged in accordance with its retention policy.

After taking time to consider his options, the appellant advised this office that he wished to pursue access to the undisclosed information in the records. The appellant also advised that he remained unsatisfied with the search conducted by the Police with regard to the part of his request relating to the 1999 incident. The appellant suggested that "if records from 1991 exist, then records from 1999 or 2000 must also exist."

Accordingly, I issued a Supplementary Notice of Inquiry to the Police seeking representations on the possible application of the exemptions, as well as the issue of reasonable search. I also sought to clarify the Police's position on the exclusion for employment and labour relations records in section 52(3) of the *Act*. I received representations from the Police on the issues, including confirmation that the Professional Standards Branch had identified no records responsive to the appellant's request.

Next, I provided a complete copy of the Police's representations to the appellant, along with a modified Supplementary Notice of Inquiry, and invited submissions from him. The appellant submitted representations. The appellant advised that he was withdrawing his appeal of the partial denial of access to two of the records. Accordingly, access to Records 5 and 6 is no longer at issue in this appeal. However, the appellant also provided a specific Police incident number which he said was connected to the 1999 incident, and which he had obtained through his own inquiries with other Police staff.

I determined that the Police must be given an opportunity to respond to the appellant's submissions on the search for responsive records, as well as the possible application of section 38(a) with section 8 to the remaining records. Accordingly, I sent the non-confidential representations of the appellant to the Police, along with a letter identifying the issues regarding which I sought additional submissions.

The Police submitted representations to me and, concurrently, sent another revised decision letter to the appellant because they had located the specific occurrence report from 1999, and other related records, sought by him. The Police granted partial access to these records (identified as Record 7), but withheld small portions of pages 4 and 11 based on the personal privacy and law enforcement exemptions. At the same time, the Police reconsidered their decision with respect to some of the other records and disclosed additional information.

Accordingly, this order will address the denial of access to portions of the records pursuant to sections 38(b), together with section 14(3)(b), and 38(a), with section 8, as well as the adequacy of the Police's search for records responsive to the request.

RECORDS:

Portions of the following records remain at issue in this appeal:

- Record 1 - Occurrence Report - September 2004 (page 3);
- Record 2 - Occurrence Report - August 2002 (pages 2 - 7);
- Record 3 - Occurrence Report - August 2002 (pages 3 - 6, & 8)
- Record 4 - Occurrence Report - August 2002 (pages 1 & 4)
- Record 7 - Occurrence Report, and related officer's notes - December 1999 (pages 4 & 11)

DISCUSSION:

PERSONAL INFORMATION

For the purpose of deciding what sections of the *Act* apply, 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].

Findings

I have reviewed the records to determine if they contain personal information and, if so, to whom it relates. Having done so, I find that all the records contain the appellant's personal information as they comprise recorded information which is about him.

Some of the records also contain information about other identifiable individuals, mainly those individuals involved in the incidents reported in Records 2 and 4. Although three of these individuals have been identified in their professional capacities, I find that the incidents were of a personal nature and that the involvement of these individuals was in their personal, rather than strictly professional, capacities. Accordingly, I find that the information relating to these other identifiable individuals satisfies the definition of personal information under section 2(1) of the *Act*.

Notably, I find that there is information about the appellant on page 3 of Record 2 that falls within paragraph (g) of the definition of personal information in section 2(1) of the *Act*. On this particular page, the Police have severed several paragraphs on the basis that section 38(b), in conjunction with the presumption against disclosure in section 14(3)(b), applies. However, the withheld information includes the appellant's personal information. In my view, it is 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, since no other exemption has been claimed by the Police in relation to the appellant's personal information on page 3 of Record 2, I will order that it be disclosed to him.

As regards the information in Records 2 and 4, which I have found to be the personal information of the other identifiable individuals, I will consider whether it qualifies for exemption under the discretionary exemption at section 38(b) of Part II of the *Act*.

Given my finding that all of the records contain the appellant's personal information, I will also be reviewing the possible application of section 38(a), together with the law enforcement exemption in section 8, to the information withheld by the Police under that exemption.

SECTION 38(b) - RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/PERSONAL PRIVACY OF ANOTHER INDIVIDUAL

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). This exemption is 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].

In this appeal, the Police have withheld portions of pages 2 to 5 and 7 of Record 2 and page 1 of Record 4 on the basis that these portions contain the personal information of other individuals.

Under section 38(b), the Police 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 Police may also have chosen 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 parties do not claim that section 14(4) applies in the circumstances of this appeal, and I find that it does not.

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).

With regard to the severances made to pages 2 to 5 and 7 of Record 2 and page 1 of Record 4 under section 38(b), the Police rely on the presumption in section 14(3)(b) of the *Act*. This section 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.

Representations

The representations provided by the Police on their claim of section 38(b) in conjunction with section 14(3)(b) are brief. Echoing the wording of the exemption, the Police submit that the information withheld from each of the records was compiled and is identifiable as part of an investigation into a possible violation of the *Criminal Code of Canada*.

The appellant acknowledges that "many of the records still under dispute have been compiled as part of a police investigation," and that "section 14(3)(b) may apply." However, the appellant maintains that section 38(b) cannot apply to the undisclosed information because "there are other factors, that once considered, will justify any perceived invasion of privacy." The appellant submits that other provisions of the personal privacy exemption apply and warrant the disclosure of the records in their entirety. As I understand it, the appellant is arguing that section 14(1)(d) (authorized by statute) and 14(1)(f), combined with the factor in section 14(2)(a) (public scrutiny), justify disclosure because the personal privacy exemption should not be inappropriately relied on to "conceal wrongful torts". It appears that the appellant is concerned that the information withheld by Police relates to certain misconduct by Police officers and others against him, particularly in reference to the 1999 incident.

Analysis and Findings

In order for section 14(3)(b) of the *Act* to apply, 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 was compiled and is identifiable as part of an investigation by the Police that was conducted with the view to determining whether or not a violation of law 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 Records 2 and 4, and that its disclosure is presumed to constitute an unjustified invasion of their personal privacy.

I acknowledge the appellant's views about why section 14(3)(b) should not apply. I have specifically considered the appellant's representations on the exception in section 14(1)(d), and I find that it does not apply in the circumstances of this appeal. Furthermore, once established, a presumption under section 14(3) does not cease to apply for the reasons described by the appellant in confidential portions of his representations; nor can any combination of factors in section 14(2) trump its application. 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. As previously stated, section 14(4) has not been raised and, in my view, neither it nor the public interest override in section 16 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 other identifiable 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) - LAW ENFORCEMENT

The Police have withheld information from page 3 of Record 1, page 6 of Record 2, pages 3 to 6, and 8 of Record 3, page 4 of Record 4 and pages 4 and 11 of Record 7 pursuant to section 38(a), in conjunction with several paragraphs of section 8(1). This information consists of strings of numbers and codes.

The relevant parts of section 8(1) state:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;
>
> (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;
>
> (l) facilitate the commission of an unlawful act or hamper the control of crime.

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.)].

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.)].

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*].

Representations

The representations provided by the Police under the heading for their section 38(a) submissions do not address the application of the exemption, but rather refer to "the fundamental privacy rights of other individuals" being paramount over the appellant's access rights, and the impossibility of obtaining consent for the release of the information to the appellant due to the passage of time.

When I sought clarification as to the reliance on the law enforcement exemption, including more particularized representations on the application of the individual subsections, the Police responded by stating:

> Information regarding the appellant that was attached to a police report contained information from CPIC (Canadian Police Information Centre) [and] is provided and maintained by the Royal Canadian Mounted Police. This information is for Police use only and cannot be divulged. The Ottawa Police is held accountable under the CPIC Policy and we do not have the right to release the information from CPIC to any individual.
>
> To release the information from the CPIC could jeopardize the security of the tables of the computer system and the confidentiality and credibility of the system which is used throughout Canada and other countries by law enforcement agencies. We must strive to protect the security of such a system to prevent possible misuse or potential dangers by leaving the information or the system viewable or accessible to the public.

The argument above appears to relate to section 8(1)(i). However, the representations contain no further explanation regarding the connection of the number strings and/or codes to the three subsections of section 8(1) of the *Act* relied on to withhold that information.

In the appellant's submission, the Police have not met the burden of proof required to establish that the information has been properly withheld under section 38(a). The appellant states:

> After examining the representations offered by [the Police], I remain uncertain as to which of the exemptions under section 8 they seek to enforce. In conjunction with this, [the] Police have yet to provide any evidence to support their assertions of harm, despite the fact that section 42 of the *Act* clearly outlines their responsibilities in the matter. …
>
> The institution has not provided any detailed or convincing evidence to support exemptions under … 8(1)(i). To exempt information on this basis, the institution must demonstrate to a relative degree of certainty that harm will result from disclosure. … I also insist that any explanation presented not merely rely on

> fanciful speculation formulated from the content of the record, but show a direct causal relationship of how such harm will result. …
>
> If the institution intends to deny access based on section 8(1)(l), it has yet to provide any reasonable explanation as to how the disclosure process will facilitate the commission of an unlawful act or hamper the control of crime. … In failing to establish a reasonable expectation of harm, I request that this exemption be rejected.

Analysis and Findings

The information withheld by the Police pursuant to section 38(a), together with sections 8(1)(g), (i) and/or (l) consists of codes and number strings, some with letters. In my view, the failure of the Police to identify and explain the purpose of these number strings and codes leaves their status indeterminate for the purpose of this appeal. There is one exception and that is the code appearing on page 11 of Record 7, which is clearly a police "ten-code." Moreover, although the Police have referred in a general way to information provided by the RCMP through CPIC that was "attached to a police report," they have not specifically identified that information.

I agree with the appellant about the insufficiency of the evidence tendered by the Police to support the application of section 38(a) with the law enforcement exemption. In my view, the Police's representations do not explain or establish a connection between the information at issue and a reasonable expectation of harm resulting from its disclosure. In the circumstances of this appeal, and with one exception described below, I find that the Police have not provided the requisite detailed and convincing proof that disclosure would result in interference with the gathering of law enforcement intelligence information (section 8(1)(g)); endangering the security of a system for which protection is required (section 8(1)(i)); or facilitating the commission of an unlawful act or hampering the control of crime (section 8(1)(l)), as contemplated by those exemptions.

With regard to the ten-code appearing on page 11 of Record 7, I note that previous orders of this office that have found police operational codes, including ten-codes, to be exempt under section 38(a), taken with the law enforcement exemption in section 8(1)(l) of the *Act* (see Orders M-393, M-757, MO-1428, PO-2409, MO-2101 and PO-2571). In light of the existing precedent of this office, even absent submissions specific to the issue by the Police in the present appeal, I find that disclosure of the police ten-code appearing on page 11 of Record 7 could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime as set out in 8(1)(l) of the *Act*.

Subject to my discussion of the exercise of discretion of the Police, below, I find that the undisclosed information on page 11 of Record 7 is exempt under section 38(a) of the *Act* in conjunction with section 8(1)(l). However, I find that the remaining information withheld by the Police in Records 1 to 4 and 7 pursuant to section 38(a) with section 8(1)(g), (i) and/or (l) does not qualify for exemption, and I will order it disclosed to the appellant.

EXERCISE OF DISCRETION UNDER SECTION 38(a) and (b)

I have found that the police ten-code in Record 7 and the personal information of other identifiable individuals in Records 2 and 4 qualify for exemption under sections 38(a) and 38(b). This does not, however, conclude the matter. These exemptions 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.

The Commissioner, or her delegate, may also 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; or 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)].

This office has identified a number of considerations that may be relevant in exercising its discretion. It should be noted that not all those listed below 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
- 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

Representations

With respect to the exercise of discretion under section 38(b), the Police submit that they considered the following factors:

- the appellant's right of access to his own personal information in the records;
- the appellant's interest in the information supplied by other individuals balanced with the right to privacy of those individuals and their assurance that the Police will safeguard their information; and
- the purpose of the personal privacy exemption taken together with the desire to preserve the public's confidence in the ability of the Police to keep information supplied in the course of a law enforcement investigation private.

The Police submit that in balancing the factors, they concluded that the privacy rights of the other individuals whose information appears in the records outweighed the appellant's right of access.

The Police did not offer any representations specific to the exercise of discretion under section 38(a).

The appellant's submissions on the exercise of discretion by the Police include the following statements:

- disclosure was intended to subject the institution to public scrutiny for the questionable conduct of its employees;
- a denial of access would prevent the appellant from examining the records for erroneous information which left uncorrected might unfairly damage his reputation and lead to future harm; and
- his need for access outweighs the need to protect the privacy of other individuals.

Analysis and Findings

I have considered the submissions provided by the Police on the factors taken into consideration in exercising its discretion to not disclose the records, or portions of records, for which it had claimed exemption under sections 38(a) and (b). I have also considered the circumstances of this appeal, including the content of the records, in relation to the exercise of discretion under both section 38(a) and section 38(b).

In the circumstances of this appeal, I am satisfied that the Police exercised their discretion with consideration of relevant factors and principles. I take note that the Police considered the balancing of the appellant's right of access and the protection of privacy of other individuals. In my view, this much is evident by the amount of information the appellant has already received

through the initial, and subsequent, disclosures. Overall, I am satisfied that the Police exercised their discretion under sections 38(a) and 38(b) of the *Act* properly, and I will not interfere with it on appeal.

Consequently, I find that disclosure of the personal information of the 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*. I also uphold the Police's exercise of discretion under section 38(a) with respect to the information withheld from page 11 of Record 7.

REASONABLE SEARCH

The appellant asserts that the Police did not conduct an adequate search for records responsive to his request. The appellant also suggested that responsive records might include those provided to the Police by an outside agency without his permission.

General Principles

In appeals, such as this one, that involve a claim that additional responsive records exist, the issue to be decided is whether the Police have conducted a reasonable search for the records as required by section 17 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the Police's search will be upheld. If I am not satisfied, further searches may be ordered.

The *Act* does not require the Police to prove with absolute certainty that further records do not exist. However, the Police must provide sufficient evidence to show that reasonable efforts were made to identify and locate responsive records that are in the custody or under the control of the institution.

A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request [Orders M-282, P-458, M-909, PO-1744 and PO-1920]. Furthermore, although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

In this appeal, the adequacy of the searches conducted by the Police was an ongoing and complicated matter, and I received several different sets of representations on this issue. The representations set out below represent select excerpts.

Representations

Submissions of the Police

The Police take the position that the only information about the appellant in their custody or control "was in our data base from our Records Management System." The Police provided an

outline of the Records Management System (RMS), a listing of their Personal Information Banks, and a general description of their record-keeping practices.

> Our Records Branch is in care and control of documents, attachments, statements, reports, court files, and many other types of documents that would accompany a Police report.

The Police explain that the RMS contains information regarding all police calls, starting with 911 contacts which can be recorded and accessed by computer for a period of six months. The Police add that if the call is sent to dispatch and assigned to an officer, an occurrence report may be generated. Further, if an occurrence report is generated, additional information will be added to the police report and "it will be shown as a GO" in RMS. The Police state:

> If no occurrence report is submitted or required, it will show as a CP to indicate that it was a Call to Police only and that the police attended, dealt with the matter but did not require a police occurrence report.

The Police also provide a detailed description of the RMS system menu options, including means of searching for different types of records or entries in the system.

> … [O]ur records are only kept for a determined amount of time. The retention period of our records is determined by the type of report and each report is coded and entered into our computer system. The coding indicates the number of months a record is retained and then it is automatically purged from our computer system. When our reports reach their maturity date, and are purged from our computer system, our Purge Section … [reviews] the file and … manually [purges] the records, as well as any other records that [may] have been attached during its retention.
>
> Once a report has been purged from our computer RMS, there could still be records that would have been kept manually in our records branch. [These] records would be kept in cases such as criminal investigations, motor vehicle accidents, cases of fraud, assaults, etc. Typically, witness statements and other documentation would be retained to support the reports and investigative files for the period necessary to satisfy the retention period.

The list of personal information banks provides a retention and disposal period for each category of record maintained by the Police. This list was provided to the appellant. According to the list, the retention periods for records identified or sought in this appeal are: Public Complaints ["2 years to permanent"]; Discipline ["2 years to permanent"]; and Investigative Case Records ["3 years then microfilm"].

1999 Incident

In addition to the more general description of their records retention and storage policies and practices, the Police provided me with several different explanations for why records related to

the 1999 incident identified by the appellant may not exist. The Police stated the following with respect to the 1999 incident:

> Any reports dating back to 1999 or prior would be microfilmed reports that were kept on microfilm prior to the amalgamation with the various Police Services, such as Gloucester, Nepean and some detachments of the Ontario Provincial Police. The amalgamation took place with Ottawa Police from January 1995 until December 1999. All records from all police services were downloaded onto our Records Management System and would still be visible if the files were still active if they had not been purged in accordance with our Retention Policy.

Following the location of Record 7, based on information provided by the appellant, the Police indicated that they would have expected these records to have been destroyed based on the retention schedule. As to the existence of other records related to this incident that may have been provided to the Police by another agency, the Police state

> According to the appellant, the type of report would have been classified as a disturbance or an ill/injured person. These records are typically kept for only 24 or 36 months, respectively. …
>
> If documents had been received from another agency, they would have been attached to the Main File in our Records if the officer or the investigator felt it was necessary to retain the documents. I might add [that] there are many files, reports and documents that are sent to this Police Service that are not retained to support a report or charge. If an original file is sent to our attention and it is not required, the staff will go to great lengths to return it to its originator. If it is a copy it will be shredded.

Professional Standards Branch

The appellant sought records from the Professional Standards Branch regarding a complaint he allegedly made about the conduct of police officers involved in the 1999 incident. For some time during the processing of this appeal, it was not clear from the submissions of the Police if the Professional Standards Branch (PSB) held records related to the appellant. It was only with the final representations provided by the Police that they confirmed that the searches conducted in their Professional Standards Branch had identified no records responsive to the appellant's request. The Police state:

> Records could not be provided because No Records Exist for the portion of the original request for the reports filed by the appellant to our [PSB].

The Police explained that the retention period for PSB records is two years for matters resolved informally and for discipline matters, unless there is a conviction registered against the officer in which case the records are retained for five years. The Police add:

> If the appellant did file a complaint about the officer(s) that dealt with him in 1999-2000 at the [specified location of the incident], it would no longer be on file as it would have been dealt with shortly after the complaint was dealt with. I have been assured that all records from that time period have been purged and destroyed.
>
> When the [PSB] receives a complaint, it must be [filed] within a six month period of the alleged offence/conflict. If the appellant was dealt with in 1999 or 2000 he would have had to file the complaint no later than June 2001. The file would have been destroyed no later than December 2003, if the investigation would have taken as much as 6 months to complete.

Record(s) Provided by Outside Agency

During the adjudication of this appeal, the appellant contacted this office several times. Most recently, the appellant advised a staff member from this office that he had new information related to a contact he claimed a certain agency had with the Police in 2000. The appellant suggested that the search be broadened to include records related to this agency contact.

With respect to this type of records, the Police state:

> If documents had been received from another agency, they would have been attached to the Main File in our Records branch along with the occurrence report.

The Police acknowledge that they are aware of the appellant's concern that the Police had other records from outside agencies in their "possession." The Police submit that the appellant is relying on the appeal process under the *Act* to assure him that the only records the Police had were created by the Police, and not by some outside agency that had provided them without his consent.

Submissions of the Appellant

The appellant's most recent representations on this issue are prefaced with the following statement:

> There is considerable evidence to support the contention that a reasonable search for records has not been conducted.

The focus of this last set of representations from the appellant was the 1999 incident. As highlighted above, the records related to this incident were finally located by the Police as a consequence of the appellant's explanation and direction provided to them during this inquiry. In view of the subsequent identification and disclosure of the incident records, the appellant's fully detailed submissions on this point are not reproduced in this order.

The appellant expresses concern with the position taken by the Police that:

> All records directly relating to the [1999] incident have been purged from their system. Despite their insistence that they adhere to a strict retention policy, [the] Police have recently released records into my possession that predate them. I fail to understand how [the] Police can justify the existence of these records, while also maintaining that others more recent have been destroyed – especially after I have since been informed by other police officers that they have not.
>
> Whether these mistakes were intentional or not, the Police have undermined my confidence in their ability to respond to my request. Although I have acted in good faith and met the obligations required of me under section 17 of the *Act*, [the] Police have yet to reciprocate.

The appellant also requested that this office take certain other steps that might restore his confidence in the Police, including: ordering new searches for records by an investigator appointed on his behalf, expanding the scope of the existing request, and searching the record holdings of other institutions or agencies. As the scope of the appellant's request in this appeal has been determined previously by Interim Order MO-2191-I, I will not deal with these points further in this order.

Analysis and Findings

As previously stated, in appeals involving a claim that additional records exist, the issue to be decided is whether an institution has conducted a reasonable search for responsive records as required by section 17 of the *Act*. Furthermore, although requesters are rarely in a position to indicate precisely which records an institution has not identified, a reasonable basis for concluding that additional records might exist must still be provided.

I have considered the representations of both parties. I am also mindful of the overall circumstances of this appeal, including the ongoing issue with identifying the 1999 incident report and related records.

The scope of the appellant's request was the subject of ongoing discussion between the parties, and was clarified by me in Interim Order MO-2191-I. Record 7, which consists of an occurrence report and officer's notes relating to the 1999 incident, has been disclosed to the appellant, with the exception of one very small portion for which I have upheld the application of section 38(a), along with section 8(1)(l) of the *Act*.

Not surprisingly, however, the fact that the appellant felt justified, and even required, to conduct independent inquiries of his own into the existence of those records from 1999, and then was vindicated by their eventual location, has contributed to his ongoing concern that there may be other records not yet identified by the Police.

However, there is a balancing of factors that must be brought to my review of an institution's search for responsive records in the course of an inquiry under the *Act*. On one hand, the

appellant must provide a reasonable basis for showing that such records may exist. As I have already stated, the appellant was able to establish that an additional specific record responsive to his request did exist. That record having been located and disclosed nearly in its entirety, however, it remains only for me to consider whether there is a reasonable basis for the appellant's belief that additional records exist.

I am mindful that the Police conducted searches armed with knowledge of the nature of the records said to exist because the appellant was able to provide very specific direction in this regard. And ultimately, the issue comes down to whether or not I am satisfied that the Police made a *reasonable* effort to identify and locate any *existing* records that might be responsive to the appellant's request.

To reach my decision, I considered whether the Police engaged an experienced employee or employees to undertake to locate the specific records. Based on the information provided by the Police and the representative from the Professional Standards Branch, I am satisfied that the Police did so.

I have also reached my decision with reference to the retention schedules described by the Police in their representations. Specifically, I am satisfied that additional records cannot, in all likelihood, be located because records relating to the appellant can reasonably be expected to have been destroyed after two years in accordance with the Police records retention schedule.

The *Act* requires that personal information be maintained for a specified period of time as set out in Section 30 and Regulation 823 (section 5). In particular, sections 30(1) and (4) of the *Act* provide:

> (1) Personal information that has been used by an institution shall be retained after use by the institution for the period prescribed by regulation in order to ensure that the individual to whom it relates has a reasonable opportunity to obtain access to the personal information.
>
> (4) A head shall dispose of personal information under the control of the institution in accordance with the regulations.

Section 5 of Regulation 823 provides:

> Personal information that has been used by an institution shall be retained by the institution for the shorter of one year after use or the period set out in a by-law or resolution made by the institution or made by another institution affecting the institution unless the individual to whom the information relates consents to its earlier disposal.

From this perspective, I accept the position posited by the Police that any complaint the appellant may have made to the Professional Standards Branch regarding allegations about his treatment by Police during the 1999 incident would have destroyed in accordance with the policy. Moreover, I am satisfied that any other records that may have been provided by outside agencies

to the Police would similarly have been either destroyed or returned to the source if they date from this time period. Through the mechanism of the Police's retention schedule, it appears to be too late to recover records that would otherwise be responsive to the appellant's request. In my view, the continued existence of Record 7 related to the 1999 incident was more likely a matter of inadvertence.

In Order MO-2200, Adjudicator Catherine Corban considered the adequacy of a search for responsive records in the context of having previously ordered an institution to conduct additional searches. Adjudicator Corban stated the following:

> The appellant's representations raise legitimate questions as to why additional responsive records cannot be located and, in my view, support a reasonable conclusion that such records should exist. However, as identified above, the issue that I must address is not whether additional records exist with absolute certainty or even that additional records *ought* to exist, but rather, whether the Township has made a *reasonable* effort to identify and locate responsive records, as required by section 17.
>
> In the current appeal, the Township has conducted a number of searches for records responsive to the appellant's request and only one document has been found. In my view, the Township's representations and affidavits (sworn copies of the affidavits have been provided to me by the Township), have provided me with sufficient evidence to conclude that an experienced employee expended a reasonable effort to search for and identify records that are reasonably related to the request. **In the circumstances, I do not think that any useful purpose would be served in ordering the Township to conduct yet another search** [emphasis added]**.**

Although in the present appeal I have not ordered any additional searches, the combined effect of this inquiry process and the appellant's independent efforts to locate the 1999 record place the parties in this appeal in a position similar to that faced by Adjudicator Corban in Order MO-2200. In these circumstances, I agree with Adjudicator Corban that no useful purpose would be served by ordering additional searches for records that, in all likelihood, have been destroyed in accordance with the Police's retention schedule.

I understand that the appellant may be frustrated by my finding in this regard, and I am not unsympathetic to the dissatisfaction he may have experienced with the long, complicated, course of this appeal. In a review of the adequacy of the Police's search under the *Act*, however, there are limits to my authority and the remedies available to the parties through an inquiry.
Based on the evidence before me, and having carefully considered the circumstances of this appeal, I am satisfied that the Police have made a reasonable effort to identify and locate responsive records. Accordingly, I find that the Police have conducted a reasonable search for the purposes of section 17 of the *Act*, and I dismiss this part of the appeal.

ORDER:

1. I order the Police to disclose the following to the appellant by **October 30, 2008**:

   a. the undisclosed portions of page 3 of Record 2 highlighted in green on the copy of the record enclosed with the Police's copy of this order; and

   b. the undisclosed portions of page 3 of Record 1, page 6 of Record 2, pages 3 to 6 and 8 of Record 3, page 4 of Record 4, and page 4 of Record 7.

2. I uphold the Police's decision to deny access to the following information:

   a. the undisclosed portions of pages 4, 5 & 7 of Record 2, page 1 of Record 4 and page 11 of Record 7;

   b. page 2 of Record 2 in its entirety; and

   c. the portions of page 3 of Record 2 not ordered disclosed to the appellant pursuant to Order Provision 1, above.

   These records, or portions of records, should **not** be disclosed to the appellant.

3. In order to verify compliance with the terms of this order, I reserve the right to require the Police to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

4. I uphold the Police's search for responsive records and dismiss this part of the appeal.

Original Signed by: September 24, 2008
Daphne Loukidelis
Adjudicator