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

ORDER MO-2448

Appeal MA08-147

Saugeen Shores Police Services Board

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NATURE OF THE APPEAL:

The Saugeen Shores Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to an occurrence report related to an incident that took place on a specified date.

The Police identified one record as responsive to the request, and granted partial access to it. Access to the undisclosed information was denied pursuant to section 38(a) (discretion to refuse requester's information), together with sections 8(1)(e), 8(2)(a) and 8(2)(c) (law enforcement), and section 38(b) (personal privacy).

The requester, now the appellant, appealed the Police's access decision to this office. In his appeal letter, he noted that the record partially disclosed to him was an occurrence report for a different date than that requested. During the mediation stage of this appeal, the appellant sought to include access to the incorrectly identified occurrence report within the scope of the appeal, and the Police agreed. The scope of the original request was broadened accordingly. The Police located another occurrence report from the date originally specified by the appellant in his request, and issued a supplementary decision letter. The Police granted partial access to the second occurrence report, and claimed the same exemptions to withhold information as they did with the first occurrence report, specifically section 38(a), taken with section 8, and section 38(b).

The appellant expressed the view that the second occurrence report was missing some information and also contended that additional records should exist, including a record of a call that he made to the Police on the date of the second occurrence report. As the Police maintained that no such record exists, the adequacy of the Police's search for further responsive records was added as an issue in this appeal.

It was not possible to resolve this appeal through mediation, and it was transferred to the adjudication stage of the appeal process, where it was assigned to me to conduct an inquiry.

I began my inquiry by sending a Notice of Inquiry outlining the facts and issues to the Police, seeking their representations, which I received. At that time, the Police advised that they were withdrawing their reliance on section 38(a), together with sections 8(2)(a) and (c), and were now relying only on section 38(a), in conjunction with section 8(1)(e).

Subsequently, I sent a modified Notice of Inquiry to the appellant, along with the non-confidential representations of the Police seeking his submissions on the issues. I received representations from the appellant as well.

Upon review of the appellant's representations, I decided to seek reply representations from the Police with respect to the adequacy of the search conducted for responsive records. I also sought clarification from the Police as to whether or not they had discussed the issue of correction under section 36(2) of the *Act* with the appellant since the issue had been raised by the appellant in his representations. I provided the Police with the non-confidential representations of the appellant, and subsequently received representations in reply from them. The Police clarified that the right

of correction under section 36(2) of the *Act* had not been discussed with the appellant, but that the Police would be willing to respond to such a request.

After reviewing the reply submissions prepared by the Police, I decided to share them with the appellant for comment, particularly respecting the search issue. The appellant subsequently provided sur-reply representations for my consideration. Based on some of the concerns expressed in the appellant's representations, I asked staff from this office to contact him in order to clarify the scope of his current appeal and to advise that a new request to the Police would be necessary in reference to those matters, which related to the polling of Police databanks for the purpose of discerning an audit trail and also the correction of information under section 36(2) of the *Act*. As these two issues are not before me and are outside the scope of the present appeal, I will not be commenting upon them further in this order.

RECORDS:

Record 1 consists of an occurrence report, an occurrence summary, and related officer's notes dated July 31, 2007 (7 pages), while Record 2 consists of an occurrence summary and related officer's notes dated September 15, 2007 (3 pages).

DISCUSSION:

PERSONAL INFORMATION

In order to determine whether the personal privacy exemption in section 38(b) may apply, it is first necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) of the *Act*, and states, in part:

> "personal information" means recorded information about an identifiable individual, including, …
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual, …
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual, …
>
> (g) the views or opinions of another individual about the individual, and

> (h) the individual's name where 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 and PO-2225]. Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Order MO-2344].

In addition, to qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

The Police submit that the records at issue contain names, addresses, telephone numbers, birthdates and "information provided by the affected individuals," all of which fits within the definition of personal information. The appellant did not specifically address this issue in his representations. However, in other parts of his representations, the appellant appears to acknowledge that personal information about other individuals may appear in the records given the statement that he does not seek access to "personal identifiers or names of other individuals."

Analysis and Findings

Having reviewed the records at issue in this appeal, I find that they contain information about the appellant and about other individuals that satisfies the definition of "personal information" in section 2(1) of the *Act*. Specifically, I find that there is personal information about the appellant that falls within the ambit of the following paragraphs of the definition of personal information: (a) ethnic origin, age, sex and martial or family status, (c) license plate number [Order MO-1863], (d) address and telephone number, (g) views and opinions held by other individuals about the appellant, and (h) the appellant's name along with other personal information relating to him.

There is also personal information about other identifiable individuals in the records that falls under the following paragraphs of the definition: (a) age, sex, marital or family status, (d) addresses and telephone numbers, (e) personal opinions or views, and (h) names along with other personal information relating to these individuals.

In addition, as noted above, the appellant has indicated that he is not seeking access to the "personal identifiers or names of other individuals" that appear in the records. In Order M-982, Adjudicator Donald Hale provided the following interpretation of the term "personal identifier" in the context of an access request to another Police service:

> Section 2(1) of the *Act* defines "personal information", in part, as recorded information about an identifiable individual. As noted above, the appellant indicates that he is not seeking access to any personal information which relates to the "victims, sources or witnesses". Accordingly, the personal identifiers of these individuals, such as their names, addresses, telephone numbers, employment information, date of birth or place of origin are no longer at issue.
>
> It must be noted, however, that even with the personal identifiers of these individuals removed, much of the information contained in the records qualifies as their personal information within the meaning of section 2(1) of the *Act*. Following my review of the records, I find that in many situations, even where the personal identifiers have been removed, the records may still contain information which relates only to an identifiable individual…

In my view, the circumstances of the present appeal are similar to those before Adjudicator Hale in Order M-982. Based on the appellant's statement that he is not interested in seeking access to the "personal identifiers or names of other individuals," I find that the "personal identifiers" of the identifiable individuals other than the appellant may be removed from the scope of this appeal. Specifically, I conclude that the names, addresses, telephone numbers, birthdates, ages, sex and/or martial status of the four other identifiable individuals where they appear in Records 1 and 2 are no longer at issue. Accordingly, the only personal information of the other identifiable individuals remaining at issue is that which falls under paragraphs (e) and (h) of the definition of personal information in section 2(1) of the *Act* which I find accords with the "information provided" by two of these individuals to the Police.

I will now review the possible application of section 38(b) to the remaining personal information of the appellant and of the other individuals.

PERSONAL PRIVACY

The Police rely on section 38(b), taken together with the factors favouring non-disclosure in sections 14(2)(f) and 14(2)(h), to deny access.

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. In circumstances where a record contains both the personal information of the appellant and another individual, the request falls under Part II of the *Act* and the relevant personal privacy exemption is section 38(b) (Order M-352).
Section 38(b) reads as follows:

> A head may refuse to disclose to the individual to whom the information relates personal information:

> if the disclosure would constitute an unjustified invasion of another's personal privacy.

Some of the exemptions in the *Act*, including the personal privacy exemption, are mandatory under Part I but discretionary under Part II. Put another way, where a record contains "mixed" personal information (of both the appellant and another individual), section 38(b) in Part II of the *Act* permits an institution to disclose information that it could not disclose if Part I were applied (Order MO-1757-I), while retaining the discretion to deny the appellant access to that information if it determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy. Section 38(b) introduces a balancing principle, which involves weighing the requester's right of access to his own personal information against the other individual's right to protection of their privacy. On appeal, I must be satisfied that disclosure of the information **would** constitute an unjustified invasion of another individual's personal privacy (Order M-1146).

Under section 38(b), sections 14(1) to (4) provide guidance in determining whether the threshold for an unjustified invasion of personal privacy 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 under section 38(b). If any of paragraphs (a) to (c) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b).

Section 14(3) lists a number of presumptions against disclosure. The Divisional Court has stated that once a presumption against disclosure has been established under section 14(3), it cannot be rebutted by either one or a combination of the factors set out in 14(2) (*John Doe v. Ontario (Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767 (*John Doe*)) though it can be overcome if the personal information at issue falls under section 14(4) of the *Act*, or if a finding is made under section 16 of the *Act* that a compelling public interest exists in disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the exemption (see Order PO-1764). In this appeal, neither section 14(4) nor section 16 were raised before me, and I find that they do not apply in the circumstances.

Representations

According to the Police, the identified individual who contacted them regarding each of the two incidents was notified about the request in order to determine if they would provide consent to the disclosure of their personal information. The Police note that one individual did not respond while the other responded but declined to provide consent.

The Police submit that they are not relying on section 14(3)(b) to deny access since, in the case of both incidents, the information was received from these other individuals "as information only" and no investigation into a violation of law was undertaken.

With regard to the factors favouring privacy protection, the Police submit that sections 14(2)(f) (highly sensitive) and 14(2)(h) (supplied in confidence) are both relevant. The Police maintain that these factors were considered to be important in the circumstances of the request since:

> the complainant in Record 1 provided sensitive information to the Police. This information included the complainant's fears, concerns and actions taken… It would be distressing to the complainant if this information was released…

In addition, the Police submit that:

> It can be very difficult for persons to build up the courage to speak to the police about sensitive issues. These persons deserve confidentiality, if desired. If this information does not remain confidential, these persons may not be willing to approach police in the future. This would limit the ability of the police to serve the public.

With respect to the factor in section 14(2)(d) (fair determination of rights), the Police submit that it was not considered relevant in this matter because no proceedings were initiated against the appellant as a consequence of the information provided and it was "in no way used against [him]." The Police take the position that because the information was not used against the appellant, he does not need access to it in order to assure a fair determination of his rights.

At my request, the Police addressed the absurd result principle, noting that "the complainant" provided the information in Record 1 detailing her concerns and fears, and that the appellant is not aware of the content of the document. According to the Police, it would not, therefore, be absurd to withhold this information from him. As regards Record 2, the Police concede that:

> … it would be absurd to withhold this document, as the requester was present and aware of the details of the incident. The general content of the document was released to the requester. Only personal identifiers were severed.

With respect the application of section 38(b), the appellant states that because the appeal involves information related to a custody and access dispute, he is already aware of the personal information of the other individuals, "given the nature of the relationships." However, as noted previously, the appellant maintains that he is not interested in seeking access to "personal identifiers or names of individuals involved in the 15 September 2007 occurrence," but rather the substance of the complaint made on July 31, 2007, as described in the occurrence report of that date. The appellant expresses concern that this record contains false information about him, and indicates that he would seek to correct this information under the *Act*, but is unable to do so "without the chance to properly defend myself." Again, as stated previously, the issue of correction of personal information under section 36(2) of the *Act* is outside the scope of the present appeal.

The appellant provided submissions refuting the application of section 14(3)(b) to the information, but it is unnecessary to set them out in detail given the admission by the Police that the information in the records was not used in relation to an investigation into a possible violation of law, as required by that section.

Regarding the Police contacting affected persons with respect to obtaining their consent, the appellant submits:

> Failure to reply to a third party response notice should not, by default, automatically be interpreted as not providing consent to release information. This could just as easily be interpreted as the affected party not caring whether the information is released and choosing not to reply. The Police are not telepathic and should not be applying statutes based on assumption.

With regard to the factor in section 14(2)(f), the appellant acknowledges that the information sought is "sensitive," but states that he has already received copies of the individual's court submissions in the related custody matter, and that:

> These documents are extremely exhaustive and contain numerous accusations. [She] has provided me with these court documents and is well aware that I have knowledge of the material. I do not believe that disclosure of information that was provided to me by [her] during litigation could reasonably be expected to cause additional distress to the affected individual.

The appellant also disputes the Police claim that the information contained in the July 31, 2007 record should be characterized as confidential, "as there was a clear intent … to use its contents in a public court of law." The appellant suggests that the timing of this particular contact with Police is not coincidental and relates to corresponding court dates in the custody and access dispute in which he is "embroiled." According to the appellant, the individual who provided the information to Police "never intended for the information to remain confidential" and he argues that there is no evidence that she made such a request of the Police.

Respecting the relevance of the factor in section 14(2)(d), the appellant submits that it should carry more weight than sections 14(2)(f) and 14(2)(h) combined. The appellant disputes the Police's assertion that the information "was in no way used against [him]" and refers to its use in the related custody matter in the courts. According to the appellant, "the potential consequences arising from the use of this information is greater than any criminal or civil discipline, and that is the loss of one's child. No parent would disagree." Further, the appellant submits that his situation satisfies all four parts of the test for section 14(2)(d) outlined in the Notice of Inquiry:

> (1) the right in question is a legal right…: the right to defend myself in a family court of law concerning custody and access matters;
>
> (2) the right is related to a proceeding which is either existing or contemplated…: currently involved in a family court proceeding…;
>
> (3) the personal information [at issue] has some bearing on or is significant to the determination of the right…: the substance of the 31 July 2007 information provides the basis for the complainant's accusations, and attempts have already been made to use it in the court of law; and

(4) the personal information is required in order to prepare for the proceedings or to ensure an impartial hearing: one cannot prepare to defend oneself in a legal proceeding if they do not know the content of the material/allegations.

Regarding the possible relevance of the absurd result principle, the appellant states that it would be absurd to withhold the personal information "clearly within [his] knowledge," but reiterates that this type of personal information (personal identifiers) is not of interest to him. Respecting the disclosure of the "substance" of the July 31, 2007 report, the appellant relies on the arguments presented regarding the section 14(2) factors.

In reply and sur-reply, both the Police and the appellant provided additional submissions on the possible relevance of section 14(2)(d) of the *Act*, which mirror those provided in their earlier submissions. The Police express agreement that the "information only" July 31, 2007 report "should not be used in Family Court." The appellant contends that the fact that no criminal proceedings were commenced as a consequence of the events documented in Record 1 is irrelevant to the application of section 14(2)(d) in this appeal. The appellant also submits that the individual who provided the information to the Police "acquired a copy of this report and subsequently attempted to use its contents in court."

Analysis and Findings

Following a careful review of the records, and the circumstances in which they were produced, I find that disclosure of the personal information of other individuals remaining at issue under section 38(b) would constitute an unjustified invasion of their personal privacy.

Further, but with one important exception, it is unnecessary to consider whether the appellant's own personal information qualifies for exemption under section 38(b). I find that the disclosure of the personal information of the appellant that falls under paragraphs (a), (c), (d) and (h) to him would not be an unjustified invasion of another individual's personal privacy, as required under that section. Accordingly, I need only review the disclosure of certain portions of the appellant's own personal information to him under section 38(a). The exception to this finding is the personal information about the appellant provided by other individuals that consists of opinions or views about him [paragraph (g)], which must be reviewed under section 38(b).

On a preliminary point, I accept the evidence of the Police that the information was not gathered for the purpose of investigating a possible violation of law and I find that the presumption against disclosure at section 14(3)(b) has no application in the circumstances of this appeal. Accordingly, my decision rests on a weighing of the factors in section 14(2). In my view, the personal information now remaining at issue, which forms the "substance" of the request for Police assistance documented in Record 1 – the July 31, 2007 Police contact – can be characterized as "highly sensitive" for the purposes of section 14(2)(f) of the *Act*. Both the information and the context in which it was offered to the Police are inherently sensitive since it relates to a custody and access dispute between the appellant and another individual. There is some indication from the circumstances of this appeal, including in the appellant's own representations, that the relationship between him and the individual who gave the information to

the Police is a difficult one. Moreover, as I understand the situation, the adversarial nature of the relationship between the appellant and his former spouse extends to varying degrees to those close to her. Accordingly, the same concerns about the sensitive context and content are present with respect to the remainder of the personal information that relates to another identifiable individual contained in Record 2.

In the circumstances, I find that the disclosure of the personal information of other identifiable individuals, as well as their views and opinions about the appellant, contained in the records could reasonably be expected to cause significant personal distress to the individuals to whom it relates in the sense contemplated by section 14(2)(f) [Order PO-2518]. This factor weighs in favour of the protection of privacy, and I find that it should be accorded considerable weight.

I also find that the factor in section 14(2)(h) weighs in favour of protecting the privacy of individuals other than the appellant. In my view, the context and the surrounding circumstances of this matter are such that a reasonable person would expect that information supplied by these individuals would be subject to a high degree of confidentiality [PO-1910]. Having said this, however, I acknowledge that some degree of disclosure of the personal information of these other individuals is to be expected in any Family Court proceedings involving these parties. Balancing of these considerations, I find that this factor carries moderate weight in favour of protecting the privacy of the other identifiable individuals.

Turning to the consideration of the factors in section 14(2) which favour disclosure in this appeal, I find that section 14(2)(d) is relevant. As previously indicated, four requirements must be satisfied to establish the relevance of section 14(2)(d). First of all, I am satisfied that the personal information at issue touches upon a legal right of the appellant's, that is the determination of his custody and/or access rights respecting his child. Second, I am satisfied that the legal right arises in the context of an existing proceeding, namely the Family Court proceeding referred to by the appellant in his submissions and in the records themselves. Third, I am also satisfied that the personal information at issue in Record 1 may have some bearing on the determination of the identified legal right.

Under the fourth requirement of section 14(2)(d), I must be satisfied that the personal information at issue is required in order to prepare for the proceeding or to ensure an impartial hearing. In my view, it is with respect to this fourth requirement that the evidence falls short of being fully persuasive. The appellant submits that he cannot prepare to defend himself in this proceeding if he does not "know the content of the material/allegations." However, the appellant has also argued that his former spouse "acquired a copy of this report and subsequently attempted to use its contents in court" which, in my view, raises some doubt as to the appellant's alleged lack of awareness of the "material/allegations." In such circumstances, it is difficult to accept the appellant's position that the disclosure of the personal information of other individuals, or the opinions or views about him expressed by those individuals, is *required* to allow him to prepare for the identified proceeding or to ensure an impartial hearing. In saying this, I also note that there is nothing before me to suggest that the information the appellant seeks is unavailable through the framework of court procedures or related production processes. Past orders of this office have established that the existence of disclosure or production processes concurrently available to an appellant in court matters reduces the weight accorded to the section

14(2)(d) factor in certain circumstances [see Orders PO-2715 and PO-2778]. In my view, therefore, while I accept that the factor in section 14(2)(d) is a relevant consideration, I would accord it little weight.

Having balanced the competing interests of the appellant's right to disclosure of information against the privacy rights of other individuals, I find that the disclosure of those portions of Records 1 and 2 which contain the personal information of other individuals, and their views and opinions about him, would constitute an unjustified invasion of the personal privacy of those individuals.

The exception to this finding relates to a small portion of the text that appears in the officer's notes at page 5 of Record 1 and the corresponding Occurrence Summary at page 7 of Record 1, which has already been disclosed to the appellant. This same information also appears in the General Occurrence Report on page 1 of Record 1. In the circumstances, I find that it would be absurd to withhold these two additional portions of Record 1, as it is already clearly within the appellant's knowledge.

I must also address the appellant's arguments that due to the close nature of the relationships involved ("spousal, in-laws"), it would be absurd to withhold the personal information of other individuals that remains at issue. Whether or not the factors or circumstances in section 14(2) or the presumptions in section 14(3) apply, where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under either section 38(b) or section 14(1), because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Orders M-444 and MO-1323]. However, I note that the personal information at issue in Record 1 was not provided by the appellant, nor was he present when it was provided or compiled. Moreover, this is an appeal in which the appellant is not aware of the specific content of the information. In my view, this is a clear case where disclosure of the remaining personal information contained in the records would not be consistent with the purpose of the exemption, which is to protect the personal privacy of individuals other than the appellant [see Order PO-2285]. Accordingly, I find that the absurd result principle does not apply to the personal information of other individuals, or their views about the appellant.

Accordingly, subject to my review of the Police's exercise of discretion, I find that the discretionary exemption in section 38(b) applies to the personal information remaining at issue.

I must now review whether the appellant's personal information, apart from the views and opinions of other individuals about him, qualifies for exemption under the discretionary exemption at section 38(a). I will consider the exercise of discretion by the Police later in this order.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/ENDANGER LIFE OR PHYSICAL SAFETY

As previously stated, section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by a government body, while section 38 provides a number of exceptions to this general right of access. Under section 38(a), the Police have the discretion to

deny access to an individual's own personal information in instances where the exemption in section 8 would apply to the disclosure of that personal information.

The Police rely on section 38(a) with section 8(1)(e) to deny access to certain undisclosed portions of the records related to the July 31, 2007 incident. It is important to note that since I have upheld the application of section 38(b) in relation to the personal information of other identifiable individuals in the records, and some of the appellant's personal information, my review under section 38(a) is limited to certain portions of the text of Record 1 that contain other personal information about the appellant.

Section 8(1)(e) states:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > endanger the life or physical safety of a law enforcement officer or any other person;

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

> "law enforcement" means,
>
> (a) policing,
>
> (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
>
> (c) the conduct of proceedings referred to in clause (b)

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.)].

In the case of section 8(1)(e), the institution must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the institution must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated [*Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.)]. 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* fulfilment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

Representations

Given the Police's withdrawal of their initial reliance on section 8(2)(a) and (c) to deny access, the remaining representations on section 8(1)(e) are brief, and portions of them cannot be reproduced in this order for reasons of confidentiality. In addition, these representations are clearly aimed at withholding information about individuals other than the appellant, and relate to concerns expressed by others about the appellant.

The appellant's submissions on the possible application of section 8(1)(e) relate to the alleged failure of the Police to adduce sufficient evidence to establish a reasonable basis for believing that endangerment will result from disclosure of the information. The appellant submits that the Police have simply relied on the unproven contents of Record 1 in claiming the exemption and have not provided any independent, objective information to sustain the claim.

Analysis and Findings

The quality and cogency of the evidence that an institution must adduce to prove that the section 8(1)(e) exemption applies is not as stringent as with respect to the other section 8 exemptions, which require "detailed and convincing evidence," but the Police are still required to provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the Police must satisfactorily demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated [*Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.)].

As alluded to previously, my review of section 38(a), taken together with section 8(1)(e), is limited in scope, since I have upheld the application of section 38(b) with regard to "information provided" by the appellant's former spouse and another identifiable individual to the Police. More particularly, my review of this exemption relates solely to the appellant's own personal information, including such items as a physical description of him, his birth date, his motor vehicle and the identity of his legal counsel, as outlined in Record 1. On this basis, I am not satisfied that the disclosure of the appellant's personal information to him could reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person. Accordingly, I find that section 38(a), in conjunction with section 8(1)(e), does not apply to the appellant's personal information, and I will order that it be released to him.

EXERCISE OF DISCRETION

My finding that the personal information of other identifiable individuals qualifies for exemption under section 38(b) does not conclude the matter. The section 38(b) exemption is discretionary, and permits 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 such cases, 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)].

Representations

The Police submit that they considered the importance of protecting the privacy of individuals who provide information to them in the course of their work since a failure to do so would limit the amount of information received, with attendant consequences for the effectiveness of law enforcement. According to the Police, in exercising their discretion, they considered the adversarial nature of the relationship between the appellant and the other individuals whose information is contained in the records, and concluded that the sensitivity inherent in that information warranted withholding disclosure.

In his representations, the appellant suggests that the Police may have considered irrelevant factors in deciding to withhold his "legally defined" spouse's personal information from him. He states that to suggest, as the Police have done, "that they could not disclose her personal information to me in order to protect her confidentiality is absurd given the nature of the relationship." The appellant also disputes the suggestion that disclosure would run contrary to the purpose of the section 8 exemption by jeopardizing law enforcement. The appellant maintains that the Police erred in not considering the "fair determination of [his] rights" in their exercise of discretion since "they clearly documented" an upcoming family court hearing. Finally, the appellant argues that the Police had an obligation to investigate the accuracy of the statements made to them and that having failed to do so, "their discretionary use of section 38 in the current appeal should be reevaluated."

Analysis and Findings

To be clear, my review of the exercise of discretion by the Police is restricted to the portions of the records containing the personal information of other identifiable individuals for which I have upheld the application of section 38(b).

I have considered the submissions provided by the Police on the factors it took into consideration in exercising its discretion to not disclose the records, or portions of records, for which it had claimed exemption under section 38(b). I have also taken the appellant's submissions on the exercise of discretion into account. Finally, I have considered the overall circumstances of this appeal, including the content of the withheld portions of the records.

Having regard to the Police's representations, I am satisfied that they have properly taken into account only relevant factors in exercising their discretion to withhold the portions of the records that I have found subject to section 38(b), including the adversarial nature of the relationship between the appellant and the individuals whose personal information he seeks and with regard for the fact that the purpose of section 38(b) is to protect the privacy of identifiable individuals. I am also satisfied that the Police did not exercise their discretion in bad faith, for an improper purpose or take into account irrelevant factors.

In the circumstances, I find that the Police have properly exercised their discretion in deciding to withhold the personal information of other individuals that I have found exempt under section 38(b), and I will not interfere with it on appeal.

ADEQUACY OF SEARCH

The appellant has expressed concern that the Police may not have identified all of the records responsive to his request, particularly records relating to a call he made to the Police on September 15, 2007. Specifically, the appellant takes issue with the fact that Record 2 (an occurrence summary and related officer's notes dated September 15, 2007) indicates that the creation of that record was prompted by a telephone call to the Police by another individual.

General Principles

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

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

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

Previous orders of this office have established that when a requester claims that additional records exist beyond those identified by an 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 by the evidence before me that the search carried out was reasonable in the circumstances, this ends the matter. However, if I am not satisfied, I may order the Police to carry out further searches.

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

Representations

The Police submit that all occurrences reported to the Saugeen Shores Police Service on September 15, 2007 were checked, and the only occurrence related to the appellant or the address specified in his request was the incident referred to in Record 2. The Police add that they checked the Computer Aided Dispatch (CAD) log for the same incident and the name of the complainant recorded on it was not the appellant. The Police acknowledge that the appellant was "unhappy" with receipt of the September 15, 2007 incident report because "it did not indicate that he had been the caller." The Police explain that when the appellant's request for the September 15, 2007 9-1-1 tape was received on June 30, 2008, they contacted the Owen Sound Police Service dispatch, where such calls are routed through after-hours and on weekends. In response, the Police were informed that the tape had been destroyed after three months in accordance with that Police Service's Records Retention Policy. The Police note that a copy of the policy was provided to the appellant. The Police also included copies of the Owen Sound Police Service Records Retention Policy and the CAD Detail Logs with their representations to this office.

In his initial representations, the appellant points out that his request for the 911 tape was a different request and is not the subject of the current appeal, as he was satisfied by the explanation provided by the Police regarding the destruction of the tape. However, the appellant notes that the Police identified only a single telephone record responsive to the occurrence report of September 15, 2007 and expressed concern that the Police maintain that he was not the caller. Based in part on the differing level of detail for the July 31, 2007 versus September 15, 2007 incidents – Records 1 and 2 – the appellant believes that either the search to identify another record was inadequate or that there has been an error in Police record-keeping.

The appellant provided a copy of his cellular phone records, which indicate that he made outgoing calls to 911 and the Police. The appellant submits that he "provided the dispatcher with [his] name, telephone number, and reason for the call. I also provided the names of the affected parties and the address of the occurrence." The appellant points out that the date and time of the phone call on his cellular phone record coincides with the date and time recorded on the September 15, 2007 occurrence summary that was partially disclosed to him by the Police. The appellant takes the position that he has, therefore, provided a *reasonable* basis for concluding that:

> an additional police record should exist for this call of 15 September 2007… Moreover, a formal "occurrence report" for the 15 September 2007 occurrence should also exist as opposed to a minimally descriptive "occurrence summary."

The appellant referred to the reasons of Adjudicator Laurel Cropley in Order MO-1406 to support his claim that a "simple search of a police's database is not sufficient to be concluded [sic] as a reasonable effort to locate responsive records," in the absence of an accompanying explanation about whether paper records might exist or in what circumstances a police database would contain information about a contact with police. The appellant notes that the Police did not provide confirmation about how the search was conducted or any affidavit evidence to support their search efforts.

> Is it possible the occurrence report of 15 September [2007] may have been incorrectly recorded? The coinciding time of my outgoing phone call to the police and the incoming phone call to their station suggests this is a possibility. …What is the police's policy to ensure continuance and integrity of records? Is it possible the record was destroyed?

In reply representations, the Police provided an explanation as to the differences between an occurrence summary and an occurrence report, including the amount of detail and observing that some reports are completed with only an occurrence summary being prepared. According to the Police, the details of the incident and outcome are all included in the summary section and these types of reports are referred to as non-reportable. The Police submit that this is the type of report that was completed for the incident on September 15, 2007, where there was no additional information meriting the completion of a more detailed general occurrence report.

As to whether or not the appellant contacted the Police on September 15, 2007, the Police acknowledge that, based on his cellular phone records, it "appears very likely that [he] did contact the police about the incident" on that date, but that "the records do not show [that he] placed the call." Noting that the occurrence summary for that date was completed by a dispatcher, the Police add:

> These dispatchers are members of the Owen Sound Police Service. Owen Sound Police have already responded to our request and advised that the 911 records have been destroyed. I would assume that the first call was received from a different complainant than [the appellant]. This information was entered in the occurrence summary. When [the appellant] called about the same incident, it appears that the dispatchers did not enter that in the report (knowing that an officer was already attending to the incident). …
>
> None of the records have been lost, misfiled or deleted, except the 911 tapes (which were destroyed in accordance with the Owen Sound Police retention policy).

The Police also clarify that although the appellant may have dialled the number for their Police Service on this date, the call would automatically have been forwarded to police dispatch in Owen Sound, since this date fell on a weekend.

In sur-reply, the appellant questioned whether the record management system of Saugeen Shores or Owen Sound Police Services were searched, or if it was the record management system for both. The appellant then requested additional information relating to a polling of the Police's database and correction requested under section 36(2) of the *Act*. For the reasons already stated, these issues are not addressed 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 am persuaded by the available evidence and the overall circumstances of this appeal that the Police made a reasonable effort to identify and locate any existing records that are responsive to the appellant's request. Moreover, I accept that relevant Police staff conducted searches and that they were armed with knowledge of the nature of the records said to exist, at least partly because the appellant's interests were well conveyed through his request and his subsequent representations.

Although the appellant questions whether the record management system of Saugeen Shores Police Service or Owen Sound Police Service were searched, or both, I am satisfied that the appropriate databases were searched for responsive records. Based on the evidence before me, it appears that several separate searches for responsive records were conducted and I am satisfied that the questions raised about the origin of the 911 call were adequately addressed in the Police's representations. Specifically, I accept the evidence of the Police that a responsive record of the kind described carefully by the appellant, namely a September 15, 2007 Police contact identifying him as the caller, simply may not exist for the reasons suggested.

Accordingly, based on the information provided by the Police and the circumstances of this appeal, I find that the search for records responsive to the request was reasonable 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 information that I have highlighted in green on the copy of Record 1 provided to the Police with this order by sending a copy to the appellant **by September 25, 2009 but not before September 18, 2009.**

2. I uphold the decision of the Police to deny access to the remaining withheld responsive portions of the records.

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

4. I uphold the Police's search for records.

_Original signed by: _____ August 21, 2009_____
Daphne Loukidelis
Adjudicator