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

INTERIM ORDER MO-2574-I

Appeal MA07-144-2

Hamilton Police Services Board

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This interim order addresses a number of issues remaining from Interim Order MO-2434-I, issued by Adjudicator Jennifer James on June 29, 2009.

BACKGROUND OF THE APPEAL:

A detailed background of this appeal was provided by Adjudicator James in Interim Order MO-2434-I. Briefly summarized, the appellant made a series of complaints to the Hamilton Police Service between 1995 and 2004 relating to allegations of earlier abuse against him, and to concerns about how the Police conducted their investigations.

On August 4, 2005, the appellant submitted a request to the Hamilton Police Services Board (the Police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for "every scrap of information regarding me … and all information regarding [the Police] investigations of my case and any other contacts and information gotten during the period from 1995 to the present". In response to that request, the Police granted the appellant partial access to responsive records, and the appellant appealed the Police's decision on the basis that additional responsive records ought to exist. In that appeal, issues regarding whether the Police conducted a reasonable search for records were addressed by me in Interim Orders MO-2084-I, MO-2122-I, MO-2196-I and Final Order MO-2203-F.

The appellant then submitted a second request to the Police, dated April 5, 2007, for related information, and this appeal deals with the appellant's second request.

NATURE OF THE APPEAL:

The appellant submitted a seven-page request under the *Act* for access to records relating to the requester's complaints and the Police's initial and subsequent investigations. The request was for access to all records for the period of October 2, 1995 to April 5, 2007 [the date of the second request] relating to:

- any investigations concerning the requester, named individuals, and the Children's Aid Society; and

- the requester and various organizations such as the Professional Standards Branch, the Ontario Civilian Commission on Police Services (OCCPS) and the Police's Freedom of Information office.

The appellant also asked the Police to make certain corrections to their records. The remaining portions of the request relate to questions the appellant had about the Police's conduct in their investigation of his complaints.

After addressing issues regarding the method of payment of the request fee, the Police issued a decision letter granting the appellant partial access to certain responsive records, and denying access to other records or portions of records on the basis of the exemptions in sections 14(1) and 38(b) (personal privacy), as well as section 38(a) (discretion to refuse requester's own

information), in conjunction with sections 8(2)(a), 8(1)(e) and 8(1)(l) (law enforcement) of the *Act*.

The decision letter also addressed issues regarding records contained in any Professional Standards Branch files, stating that they were excluded from the scope of the *Act* under section 52(3)3 of the *Act*, and issues regarding records relating to an OCCPS investigation.

With respect to the correction request, the Police advised the appellant that his requested correction would be attached to the record as a statement of disagreement in accordance with section 36(2)(b) of the *Act*.

The requester (now the appellant) appealed the Police's decision and the current appeal (MA07-144-2) was opened.

Mediation resolved certain issues regarding the fee, but did not resolve the other issues, and this file was transferred to the inquiry stage of the process. In Interim Order MO-2434-I, Adjudicator James identified that, after mediation, the following issues remained:

- Are the Police required to process the portion of the request that relates to OCCPS records?
- Does section 52(3) exclude the Professional Standards Branch records from the application of the *Act*?
- Does the discretionary exemption at section 38(a) in conjunction with law enforcement exemptions found at sections 8(1)(e), 8(1)(l) and 8(2)(a) of the *Act* apply to the records at issue?
- Does the discretionary exemption at section 38(b) in conjunction with the factors favouring non-disclosure of personal information at sections 14(2)(e), 14(2)(f) and 14(2)(i) of the *Act* apply to the records at issue?
- Did the institution exercise its discretion under sections 38(a) and 38(b) of the *Act*? If so, should this office uphold the exercise of discretion?
- Did the Police conduct a reasonable search for records?
- Should the Police correct the appellant's personal information under section 36(2)?

Adjudicator James commenced her inquiry by sending a Notice of Inquiry to the Police, initially, inviting the Police to provide representations on a number of issues. The Police provided brief representations in response. Adjudicator James then wrote to the appellant and invited him to provide representations on why Adjudicator James should conduct an inquiry into issues that appear to have already been decided by this office in earlier appeals. The appellant also provided representations in response.

Adjudicator James then decided to issue Interim Order MO-2434-I, addressing certain issues raised in this appeal.

Interim Order MO-2434-I

In Interim Order MO-2434-I, Adjudicator James stated:

> Given the Police's response to the Notice of Inquiry and the appellant's response to my letter, I have decided that an Interim Order is required before I seek the appellant's representations on the application of the exemptions to the records identified as responsive to the request. In my view, it is important to first address the preliminary issues respecting the adequacy of the Police's decision regarding the OCCPS records and whether the Professional Standards Branch records fall within the scope of the *Act*. This order will also address whether the Police's search for responsive records was reasonable.

Adjudicator James then reviewed and addressed these issues, set out her summary of findings as follows:

> I found that the Police are in a deemed refusal position pursuant to section 22(4) with respect to the portion of the appellant's request for OCCPS records. As a result, I will order the Police to issue a final decision letter to the appellant regarding access to the OCCPS records.
>
> I dismissed the portion of the appellant's appeal which sought access to Professional Standards Branch records.
>
> With respect to the reasonable search issue, I dismissed the portion of the appellant's appeal seeking additional notes prepared by the detective. However, I found that the Police's search for records relating to the processing of the appellant's freedom of information access request was not reasonable. Accordingly, I will order the Police to search for these records and to provide an affidavit to this office. The Police will also be ordered to issue a decision letter to the appellant, if additional records are located. If the Police's further search does not locate additional records relating to the processing of the appellant's access request, the Police must notify the appellant in writing.
>
> Upon my receipt of the Police's affidavit, I will send a Notice of Inquiry to the appellant. The Notice of Inquiry will seek the appellant's representations regarding the Police's further search and the application of exemptions at section 38(a) in conjunction with sections 8(2)(a), 8(1)(e) and 8(1)(l) and section 38(b) in conjunction with sections 14(2)(e), 14(2)(f) and 14(2)(i). The appellant will also be given an opportunity to provide representations regarding the late raising and application of the discretionary exemptions at sections 8(1)(c), 8(1)(g) and 8(2)(c) and whether the Police properly exercised their discretion.

The order provisions in Interim Order MO-2434-I reflect the findings set out in the above summary.

Subsequent actions on this file

Following the issuance of Interim Order MO-2434-I, the Police issued a revised decision letter to the appellant, dated July 29, 2009. In that decision, the Police stated:

- full access was granted to certain records because consent was received from an affected party;

- further access was granted to additional portions of the records, as the Police decided to exercise their discretion under section 38(a) and (b) to grant additional access. Access to small remaining portions of certain records continued to be denied on the basis of section 38(b) and 38(a) in conjunction with sections 8(1)(e) and (l);

- access was granted to an identified letter from a third party;

- records relating to the processing of the appellant's freedom of information access request were located;

- further additional searches were conducted, but no additional records were located;

- access to OCCPS records was not granted, as these records fell outside the scope of the *Act* on the basis of the exclusion in section 52(3).

Along with the decision letter, the Police provided the appellant with numerous records, including those to which additional access was granted beyond the initial disclosure, as well as many records relating to the processing of the appellant's freedom of information access request, as required by Interim Order MO-2434-I.

Also following Interim Order MO-2434-I, the Police provided this office with an affidavit regarding the searches conducted for responsive records, as required by that interim order.

Following receipt of the revised decision letter, the appellant indicated that he wished to continue this appeal.

With respect to the decision regarding access to the OCCPS records, the appeal of that decision resulted in the opening of a new appeal (MA07-144-3, which has since closed), and any issues regarding OCCPS records are not at issue in this current appeal.

Adjudicator James then sent a Notice of Inquiry to the appellant, asking that he address issues regarding access to the withheld portions of the records, correction of the records, and issues

regarding the adequacy of the further searches conducted for responsive records. The appellant provided lengthy representations in response.

This file was subsequently transferred to me to complete the inquiry.

Preliminary matter

As a preliminary matter, I note that the appellant raises issues regarding the material most recently provided to him. One of his main concerns appears to be that not all of the records released to him earlier were provided in this new package of material. For example, the appellant focuses on a document identified as "Appendix A", and asks why this document was not included in the material released to him in July of 2009.

On my review of this matter, it is my understanding that the material released to the appellant in July of 2009 includes records relating to the processing of his earlier freedom of information request. It also includes copies of records where additional portions of those records were disclosed, but not copies of records previously released where no additional disclosure is provided (for example, "Appendix A"). In these circumstances, I agree that there would be no need for the Police to provide the appellant with copies of severed records identical to those provided earlier.

RECORDS:

The records identified as responsive to the request in this appeal are the following:

- Approximately 116 pages of records relating to the processing of the appellant's earlier freedom of information access request. Access to these records appears to have been granted in full, and these records are not at issue in this appeal.

- An eight page letter from a third party. Access to this record was granted, and this record is not at issue in this appeal.

- Seven pages relating to matters arising in 2006 (including a supplementary occurrence report, two emails, and a witness statement). Access to these records was granted to the appellant.

- 73 pages of records relating to matters addressed between 1995 and the earlier request, responsive to the earlier request. The records remaining at issue consist of the withheld portions of an identified occurrence report, officer's notes and correspondence. Access was granted to much of this information. The portions of these 73 pages that remain at issue are identified below.

The portions of the 73 pages remaining at issue:

I have carefully reviewed the 73 pages remaining at issue. Large portions of many of these pages have now been disclosed to the appellant, and some pages were disclosed in full.

Many of the records (particularly officer's notebook entries) contain information not responsive to the request, as they deal with matters not relating to the appellant. There is no suggestion that the appellant is interested in this information, and those portions of records are not, accordingly, at issue in this appeal.

Some records listed in the 73 records are duplicate copies. Specifically, pages 51-69 are duplicates of pages 28-38 and 40-47 respectively. I will not review duplicate copies, and pages 51-69 are therefore not at issue in this appeal.

Accordingly, the pages or portions of pages remaining at issue are: Portions of pages 3, 5, 6, 8, 9, 15, 16, 17, 18, 19, 20, 25, 26, 29 and 33 and all of pages 4, 7, 12, 13 and 14.

DISCUSSION:

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if 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;

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 have relied on the exemption in section 38(a) and (b) to deny access to the withheld portions of the records and, by doing so, take the position that the records contain the personal information of the appellant, and that portions of the records also contain the personal information of other identified individuals. The appellant does not specifically address this issue in his representations.

I have reviewed the records at issue in detail, and am satisfied that they contain the personal information of the appellant. The request itself is for access to records relating to the appellant's complaint and the related investigations conducted by the Police. On my review of the records, I find that many of the records identify the appellant by name, and contain information relating to the appellant which would reveal other personal information about him. Accordingly, I find that the records contain the appellant's personal information as that term is defined in section 2(1) of the *Act*.

I also find that almost all of the withheld portions of the records remaining at issue contain the personal information of other identifiable individuals. Some of these records identify the other individuals by name, and include their dates of birth, addresses, telephone numbers, statements made, as well as other personal information relating to those individuals. Portions of some of the records also identify other individuals by name and address. I am satisfied that portions of a number of the records at issue contain the personal information of other identifiable individuals.

Lastly, some small portions of the withheld records which were withheld on the basis of the exemption in section 38(a) and 8(1)(l) only contain the personal information of the appellant.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

While 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 exceptions to this general right of access.

Under section 38(a), the institution has the discretion to deny an individual access to his or her own personal information where the exemptions in sections 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that information.

In this case, the Police rely on section 38(a) in conjunction with section 8(1)(e) and (l) to deny access to small portions of the records.

LAW ENFORCEMENT

General Principles

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* fulfilment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

Section 8(1)(l) - facilitate commission of unlawful act

The Police take the position that the portions of the records that contain police 10-codes, patrol zone information and/or statistical codes fall within the scope of section 8(1)(l), which reads:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > facilitate the commission of an unlawful act or hamper the control of crime.

The appellant does not address this issue.

A number of previous orders have found that police codes qualify for exemption under section 8(1)(l), because of the reasonable expectation of harm which may result from their release (for example, M-393, M-757, M-781, MO-1428, PO-1665, PO-1777, PO-1877, PO-2209, and PO-2339). This includes 10-codes as well as codes which reveal identifiable zones from which officers are dispatched for patrol and other law enforcement activities. In the circumstances of this appeal, I am satisfied that the information that the Police have severed from the records on the basis of section 8(1)(l) could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime.

Therefore, I find that section 38(a), in conjunction with section 8(1)(l), applies to the police codes in the records. Specifically, the police codes severed from pages 18, 19, 29 and 33 qualify for exemption under section 8(1)(l) and, as a result, are exempt under section 38(a) of the *Act*.

Because the only remaining withheld portions of pages 19, 29 and 33 were the police code information, I uphold the decision of the Police to withhold the severed portions of these records and I will not be addressing them further.

Having found that the police codes qualify for exemption under sections 38(a) and 8(1)(l), it is not necessary for me to review the possible application of section 8(1)(e), as the police codes are the only records for which this exemption has been claimed.

INVASION OF PRIVACY

I have found above that all of the records contain the personal information of the appellant, and that portions of a number of records contain the personal information of other identifiable individuals. I will now review the possible application of section 38(b) to the records and portions of records which do not otherwise qualify for exemption.

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 exceptions to this general right of access.

Under section 38(b) of the *Act*, where a record contains the personal information of both the requester and other individuals and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information.

Section 38(b) of the *Act* introduces a balancing principle. The institution must look at the information and weigh the requester's right of access to his or her own personal information against another individual's right to the protection of their privacy. If the institution determines that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 38(b) gives the institution the discretion to deny access to the personal information of the requester.

In determining whether the exemption in section 38(b) applies, sections 14(2), (3) and (4) of the *Act* provide guidance in deciding 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(2) provides some criteria for the institution to consider in making this determination. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

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

A section 14(3) presumption 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 exemption. [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.

Operation of the presumption in section 14(3)(b)

In this appeal, the Police rely on the "presumed unjustified invasion of personal privacy" in section 14(3)(b) of the *Act*, which reads:

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

The appellant does not directly address the application of section 14(3)(b) to the records.

Analysis and findings

The records or parts of records remaining at issue consist of the undisclosed portions of police occurrence reports, police notebooks, correspondence and other documents. I have reviewed each of the pages remaining at issue to determine whether the section 38(b) exemption applies, and make the following findings:

Page 3 - the three-line severance on this page contains the names and other personal information (i.e.: marital status) of three identified individuals other than the appellant. I am satisfied that this information qualifies for exemption under section 38(b).

Page 4 - this page contains only the names and addresses of four identifiable individuals, and I am satisfied that this information qualifies for exemption under section 38(b).

Pages 5 and 6 - consist of a supplementary occurrence report, which contains a narrative. Almost all this supplementary occurrence report was disclosed, except for the names and addresses of some identifiable individuals, and a brief description by the officer of the circumstances of two of these individuals. I find that this severed information qualifies for exemption under section 38(b).

Page 7 - is a copy of a letter sent from the Police to a corporate third party. It includes a number of police file numbers, including the file number relating to the appellant. In my view, the file numbers relating to incidents not involving the appellant relate to other individuals, and ought not to be disclosed. However, the other portions of the letter and the file number relating to the

appellant do not contain the personal information of other identifiable individuals. I find that, if the file numbers relating to other individuals are severed from this letter, the remaining portions of this letter do not qualify for exemption under section 38(b), and ought to be disclosed to the appellant.

Pages 8 and 9 - these two pages are the first pages of a four-page narrative contained in a supplementary occurrence report. The only portions of this report not disclosed to the appellant consist of two names on page 8 and a name on page 9, and I am satisfied that this information qualifies for exemption under section 38(b).

Pages 12 to 17 - consist of three pages of information relating to an identified process, and a three-page document identified as "Appendix A". Pages 12-14 were withheld in full, and I am satisfied that these pages relate primarily to named individuals other than the appellant. In my view, these pages qualify for exemption under section 38(b). With respect to Appendix A (pages 15-17), large portions of these three pages have been disclosed to the appellant. The portions of this record remaining at issue contain the names and identifying information about individuals other than the appellant, as well as summaries of statements made to the police by these other individuals. In the circumstances, I am satisfied that the information severed from these pages qualifies for exemption under section 38(b).

Page 18 - is the first page of a two-page narrative contained in an occurrence report. The only portion of this record not disclosed is the names of two individuals. I find that this severed information qualifies for exemption under section 38(b).

Pages 20 to 24 - consist of the notebook entries of an identified detective. All of the responsive portions of these notebook entries have been disclosed to the appellant, except for two names, a date of birth, and an address contained on page 20. I am satisfied that this severed information qualifies for exemption under section 38(b).

Pages 25 and 26 - consist of the notebook entries of another identified detective. All of the responsive portions of these two pages of notebook entries have been disclosed to the appellant, except for names, dates of birth, and addresses contained on page 25, and two names severed from page 26. I find that this severed information qualifies for exemption under section 38(b).

In my view, all of the severed information in these records (except for the information contained in the portion of the page 7 letter which I have ordered disclosed) was compiled and is identifiable as part of law enforcement investigations undertaken by the Police into possible violations of the law. As such, I find that the presumption in section 14(3)(b) applies to the personal information of individuals other than the appellant contained in these records, for which the section 38(b) claim has been made.

As noted above, as a result of the decision in *John Doe*, it has been well-established that a presumption under section 14(3) cannot be rebutted by any of the factors under section 14(2), either alone or taken together. Accordingly, I find that the disclosure of the personal information of individuals other than the appellant contained in the records would constitute a presumed

unjustified invasion of the personal privacy of the individuals referred to in these documents. Those portions of the records are, therefore, exempt from disclosure under section 38(b).

EXERCISE OF DISCRETION

I have found that certain records or portions of records qualify for exemption under sections 38(a) and 38(b). As noted, these exemptions are discretionary. Once it is found that records qualify for exemption under this section, the Police must exercise their discretion in deciding whether or not to disclose it. On appeal, the Commissioner may determine whether the institution failed to do so.

The Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In such a 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)].

On my review of all of the circumstances surrounding this appeal, I am satisfied that the Police have not erred in the exercise of their discretion to apply sections 38(a) and (b) to the withheld portions of the records. I note that the Police have carefully severed the records, disclosing to the appellant large portions of the records and, with one exception, withholding only those portions which I have found qualify for exemption under sections 38(a) and (b). In the circumstances, I am satisfied that the Police properly exercised their discretion to apply the section 38(a) and (b) exemptions, and I uphold the Police's exercise of discretion.

CORRECTION OF PERSONAL INFORMATION

Introduction

Section 36(1) gives an individual a general right of access to his or her own personal information held by an institution. Section 36(2) gives the individual a right to ask the institution to correct the personal information. If the institution denies the correction request, the individual may require the institution to attach a statement of disagreement to the information. Section 36(2) reads:

> Every individual who is given access under subsection (1) to personal information is entitled to,
>
> (a) request correction of the personal information where the individual believes there is an error or omission therein;

(b) require that a statement of disagreement be attached to the information reflecting any correction that was requested but not made;

(c) require that any person or body to whom the personal information has been disclosed within the year before the time a correction is requested or a statement of disagreement is required to be notified of the correction or statement of disagreement.

Sections 36 (2)(a) and (b) provide two different remedies for individuals wishing to correct their own personal information. Section 36(2)(a) entitles individuals to *request* that their own personal information be corrected; institutions have the discretion to accept or reject the correction request. Section 36(2)(b), on the other hand, entitles an individual to *require* an institution to attach a statement of disagreement to the information at issue when the institution has denied the individual's correction request. Thus, section 36(2)(a) is discretionary, whereas section 36(2)(b) is mandatory.

Where the institution corrects the information or attaches a statement of disagreement, under section 36(2)(c), the appellant may require the institution to give notice of the correction or statement of disagreement to any person or body to whom the personal information has been disclosed within the year before the time the correction is requested or the statement of disagreement is required.

The following passage from *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy/1980, vol. 3* (Toronto: Queen's Printer, 1980) (the Williams Commission Report) is helpful in understanding the purpose and operation of the *Act's* correction provisions:

> The ability to correct information contained in a personal record will be of great importance to an individual who discovers that an agency is in default of its duty to maintain accurate, timely and complete records. In this way, the individual will be able to exercise some control over the kinds of records that are maintained about him and over the veracity of information gathered from third-party sources.
>
> Although the report refers to the individual's "right" to correct a file, we do not feel that this right should be considered absolute. Thus, although we recommend rights of appeal with respect to correction requests, agencies should not be under an absolute duty to undertake investigations with a view to correcting records in response to each and every correction request. The privacy protection schemes which we have examined adopt what we feel to be appropriate mechanisms for permitting the individual to file a statement of disagreement in situations where the governmental institution does not wish to alter is record. In particular cases, an elaborate inquiry to determine the truth of the point in dispute may incur an expense which the institution quite reasonably does not wish to bear. **Moreover, the precise criteria for determining whether a particular item of information**

> **is accurate or complete or relevant to the purpose for which it is kept may be a matter on which the institution and the individual data subject have reasonable differences of opinion.** [emphasis added]
>
> If the request for correction is denied, the individual must be permitted to file a statement indicating the nature of his disagreement. We recommend that an individual who has been denied a requested correction may exercise rights of appeal to an independent tribunal. The tribunal, in turn, could order correction of the file or simply leave the individual to exercise his right to file a statement of disagreement. [pp. 709-710]

As noted above, one of the purposes of section 36(2) is to give individuals some measure of control over the accuracy of their personal information in the hands of government. Both the *Act* and the Williams Commission Report support the view that the right to correction in section 36(2) is not absolute.

Correction request

In this appeal, the appellant requested that the Police correct certain records pursuant to section 36(2). The appellant's material relating to the correction request is set out in a two-page letter, and consists of three parts. These three parts can be summarized as follows:

1) The appellant asks that the police records relating to his 1995 complaint be changed. The police records identify one type of criminal activity relating to the complaint, and the appellant asks that the police records be changed to identify another criminal activity, which he states was the substance of the actual complaint. The appellant's request then identifies in detail the information he provided to a member of the Police in 1995 relating to the allegations.

2) The appellant asks that the records be changed to reflect the fact that a named police officer did not investigate the appellant's complaint using the evidence provided by the appellant. He then reviews in detail the discrepancies he notes in various records relating to the investigation of his complaints, and then identifies three Police officers by name and states "I want the [Police's] own records of those officers and any other who were involved … to reflect the negligence of all involved."

3) The appellant asks that the records relating to the 1995 complaint be changed to state that an identified third party was both "complicit" and "complacent" in its actions.

With respect to the appellant's correction request, the Police advised the appellant that his two-page letter, which identifies his correction requests, would be attached as a statement of disagreement to the occurrence report relating to the 1995 complaint. The appellant stated that he was not satisfied with only attaching a statement of disagreement to his file, as there are inaccuracies that he wishes to have formally corrected in his records.

Analysis and findings

This office has previously established that in order for an institution to grant a request for correction, the following three requirements must be met:

1. the information at issue must be personal and private information; and

2. the information must be inexact, incomplete or ambiguous; and

3. the correction cannot be a substitution of opinion (Order 186).

In each case, the appropriate method for correcting personal information should be determined by taking into account the nature of the record, the method indicated by the requester, if any, and the most practical and reasonable method in the circumstances [Order P-448].

Part 1 - Is the information that the appellant seeks to have corrected personal and private information?

The right of correction applies only to personal information that relates to the individual seeking the correction, in this case the appellant. The definition of "personal information" is set out above.

The records at issue which the appellant requests be corrected are records relating to his complaint to the Police made in 1995, and certain subsequent investigations. From my review of the records at issue, and in keeping with my finding above, I find that the records contain the appellant's personal information.

Part 2 - Is the information at issue inexact, incomplete or ambiguous?

For section 36(2)(a) to apply, the information must be "inexact, incomplete or ambiguous". The section will not apply if the information at issue consists of an opinion [Orders P-186, PO-2079].

The appellant's two-page correction request (summarized above) goes into considerable detail about what he believes are the differences and omissions in the records. His representations also refer to his concerns about the content of the records, and also identify his dissatisfaction with how the Police conducted their investigation.

In Order M-777, Senior Adjudicator John Higgins dealt with a correction request involving a "security file" which contained incident reports and other allegations concerning the appellant in that case. The nature of those records is similar to those at issue in this appeal, that is, records in which the Police have recorded allegations and information reported to them. In Order M-777 the appellant submitted that the Commissioner's office has an obligation to investigate his allegations that contents of the records were inaccurate, decide what actually transpired and "correct" the records. Senior Adjudicator Higgins stated:

> … the records have common features with witness statements in other situations, such as workplace harassment investigations and criminal investigations. If I were to adopt the appellant's view of section 36(2), the ability of government institutions to maintain whole classes of records of this kind, in which individuals record their impressions of events, would be compromised in a way which the legislature cannot possibly have intended.
>
> In my view, records of this kind cannot be said to be "incorrect" or "in error" or "incomplete" if they simply reflect the views of the individuals whose impressions are being set out, whether or not these views are true. Therefore, in my view, the truth or falsity of these views is not an issue in this inquiry. …
>
> … these same considerations apply to whether the records can be said to be "inexact" or "ambiguous". There has been no suggestion that the records do not reflect the views of the individuals whose impressions are set out in them.

Similarly, in Order MO-1438, which addressed a correction request related to narrative portions of an appellant's General Welfare Assistance file, Adjudicator Laurel Cropley stated:

> Although I noted that the entries appear to be consistent with matters at issue at the time they were created, this finding is not central to the issues to be determined. In this case, the question is, do the statements reflect the views or observations of the case supervisor as they existed at the time they were created?

Adjudicator Cropley found that in the circumstances of that appeal, the information in the records was an accurate reflection of the author's perception of the events as they existed at the time they were created.

I agree with the reasoning taken in the above decisions and adopt it for the purpose of this appeal.

In the current appeal, the records relating to parts 1 and 3 of the appellant's correction request relate to information contained in an occurrence report completed by an investigating officer in 1995 as a result of a complaint initiated by the appellant. The occurrence report records the investigating officer's description of the information based on his own observations, and what was communicated to him by the appellant. The corrections that are requested by the appellant in parts 1 and 3 of his correction request relate to the investigating officer's usage of specific terms and inclusion or exclusion of specific facts.

The records at issue in this appeal relating to parts 1 and 3 of the appellant's correction request are similar in nature to those at issue in Orders M-777 and MO-1438. In my view, the specific information that the appellant is requesting be corrected in parts 1 and 3 of his request cannot be said to be inexact, incomplete or ambiguous. The information in the occurrence report reflects the views and observations of the investigating officer about the matter, which was based on his perception as well as information that was provided to him by the parties. I accept that the language contained in the occurrence report should be determined by the investigating officer

based on the reporting requirements and standards established by the particular police service involved.

I acknowledge that the appellant has a different perception of what was said and what occurred, and wants the record to reflect these additional facts or impressions. However, an occurrence report is not simply a rendition of a complainant's perception of events. Rather, it is the investigating officer's report of an incident based on his observations and on the statements made by relevant parties, and it is drafted in a way that conforms to police terminology.

On this basis, I find that the records relating to parts 1 and 3 of the correction request are not inexact, incomplete and ambiguous and, therefore, do not meet the second requirement for correction referred to above. Accordingly, I find that the Police's denial of the appellant's correction request should be upheld.

With respect to part 2 of the correction request, the appellant is requesting that the records be "corrected" to reflect the appellant's view that the Police were negligent in the performance of their duties. In this regard, the appellant is not asking that information in certain records be corrected because it is "inexact, incomplete or ambiguous." Rather, what the appellant is asking for is to change these records by adding certain information, including comments on the behaviour of the officers, to these records. The right of correction does not allow for the addition of the type of information which the appellant hopes to make to the record. As a result, I find that the decision by the Police to deny the appellant's correction request was reasonable.

As all three requirements for the granting of a correction request have not been met, I am satisfied that the Police acted reasonably in refusing to grant the request and make correction to the record. I will therefore uphold the decision made by the Police.

Statement of disagreement be attached to the information

As noted above, section 36(2)(b) stipulates that, upon request, an institution is required to attach a statement of disagreement to the information reflecting any correction that was requested but not made. An individual must first ask for a correction, and if the correction is not made, may *require* that a statement of disagreement be attached to the information.

As noted above, the Police were prepared to attach a statement of disagreement, in the form of the two-page correction request provided by the appellant, to the record. Clearly, that option is still available to the appellant, and this order does not preclude him from requesting that the Police do so in accordance with section 36(2)(b) of the *Act*.

REASONABLE SEARCH

In appeals involving a claim that additional records exist, as is the case in this appeal, 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 decision of the Police will be upheld. If I am not satisfied, further searches may be ordered.

A number of previous orders have identified the requirements in reasonable search appeals (see, for example, Orders M-282, P-458, P-535, M-909, PO-1744 and PO-1920). In Order PO-1744, acting-Adjudicator Mumtaz Jiwan made the following statements with respect to the requirements of reasonable search appeals:

> … the *Act* does not require the [institution] to prove with absolute certainty that records do not exist. The [institution] must, however, provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request (Order M-909).

I agree with acting-Adjudicator Jiwan's statements.

Where a requester provides sufficient detail about the records that he/she is seeking and the institution indicates that further records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records that are responsive to the request. The *Act* does not require the institution to prove with absolute certainty that records or further records do not exist. However, in my view, in order to properly discharge its obligations under the *Act*, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

Scope of my review of the reasonable search issue

As identified above, the request resulting in this appeal was made on April 5, 2007 and was the second request made by the appellant.

Records relating to the appellant's first request

The appellant's first request was made on August 4, 2005. Although issues regarding access to the responsive records were not addressed in earlier appeals (and the issues regarding access to those responsive records are addressed in this appeal), issues regarding whether the searches conducted for responsive records relating to that request were addressed by me in Interim Orders MO-2084-I, MO-2122-I, MO-2196-I and Final Order MO-2203-F. Furthermore, Adjudicator James confirmed in Interim Order MO-2434-I that issues regarding the reasonableness of the searches for those records were not being re-visited. I confirm that finding. In my view, any issues regarding the reasonableness of the searches for records relating to the period of time covered by the first request (that is - prior to August 4, 2005) have been addressed and are not at issue in this appeal.

Records created after the appellant's first request but prior to the appellant's second request (records dated between August 4, 2005 and April 5, 2007)

The appellant's second request (resulting in this appeal) was made on April 5, 2007.

In Interim Order MO-2434-I, Adjudicator James addressed a number of issues relating to the searches conducted for responsive records. I will now review the search issues as they relate to the various categories of records covered by the second request.

1. Records prepared by a named detective

In Interim Order MO-2434-I Adjudicator James addressed the issue of whether the Police's search for responsive investigative records created by a named detective was reasonable. She summarized her finding as follows:

> In summary, I find that Interim Order MO-2084-I already addresses the issue of whether the Police conducted a reasonable search for notes prepared by the detective for the period of time between October 2, 1995 to August 4, 2005. I also find that the appellant has failed to establish a reasonable basis for concluding that the detective created any further notes responsive to the request after August 4, 2005. Accordingly, I dismiss this portion of the appeal.

In light of this finding, I will not review issues regarding whether the Police's search for responsive investigative records created by a named detective was reasonable.

2. Records relating to the processing of the appellant's freedom of information request

In Interim Order MO-2434-I Adjudicator James addressed the issue of whether the Police's search for records relating to the processing of the appellant's freedom of information request was reasonable. She summarized her finding as follows:

> I am not satisfied that the Police provided sufficient evidence demonstrating that their search for responsive records relating to the appellant's access request was reasonable. Accordingly, I will order the Police to conduct a further search for records relating to the processing of the appellant's access requests for the period of August 4, 2005 to April 5, 2007, the period of time between the first and second request.

As a result of this finding, Adjudicator James ordered the Police to conduct a further search for these records, and to provide her with affidavit evidence relating to the searches, as particularized in order provision 3 of Interim Order MO-2434-I.

As identified above, following Interim Order MO-2434-I, the Police provided additional material to the appellant. The Police also provided an affidavit to Adjudicator James as required. Adjudicator James then shared the relevant portions of the affidavit with the appellant and, in the

Notice of Inquiry sent to the appellant, invited him to address the search issues relating to these records.

The appellant provides extensive representations in response to the Notice of Inquiry; however, he does not address issues relating to the further searches for records relating to the processing of the appellant's freedom of information request.

In the circumstances, I find that the appellant has failed to establish a reasonable basis for concluding that the searches conducted for records relating to the processing of the appellant's freedom of information request were not reasonable. Accordingly, I dismiss this portion of the appeal.

3. Other records created between August 4, 2005 and April 5, 2007

The affidavit and other material provided by the Police which describe the additional searches conducted for responsive records is somewhat confusing. It identifies in detail the earlier searches conducted for records responsive to the first request (prior to August 4, 2005). However, with respect to records created between August 4, 2005 and April 5, 2007, the Police representations on the nature and extent of the searches conducted are not very detailed.

Furthermore, as identified above, following Interim Order MO-2434-I, the Police provided additional material to the appellant. This material included seven newly-released pages which relate to a further Police investigation, conducted by a different officer, in June and July of 2006. While these records were disclosed to the appellant, it appears that they were identified as responsive records for the first time when they were included in the package of material provided to the appellant in July of 2009.

In my view, this raises a question regarding the reasonableness of the searches conducted by the Police for investigative records responsive to the request created between August 4, 2005 and April 5, 2007. On my review of the affidavit provided by the Police, I am not satisfied that it identifies with sufficient detail the nature of the searches conducted for responsive investigative records created during this time; nor does it explain how the seven pages of newly-identified records were located and identified as responsive. Furthermore, the appellant questions why these additional records do not include any notes or notebook entries relating to this further investigation, undertaken in June and July of 2006.

In the circumstances, I am not satisfied that I have been provided with sufficient evidence to satisfy me that the searches for investigative records created between August 4, 2005 and April 5, 2007 were reasonable. Accordingly, I will order the Police to conduct a further search for responsive investigative records created between August 4, 2005 and April 5, 2007 (the period of time between the first and second request), and to provide me with detailed, specific information regarding the nature of the search conducted and the results of the search. In addition, I will also order the Police to provide me with specific information relating to:

- where and how the seven (7) additional pages relating to the 2006 investigation, disclosed in July of 2009, were located;

- what searches led to the identification of the seven (7) additional pages relating to the 2006 investigation;

- whether searches were conducted for notebook entries and notes regarding the 2006 investigation referred to in the seven (7) additional pages;

- whether any other searches were conducted to determine if other investigations were conducted between August 4, 2005 and April 5, 2007; and

- what the results of any such searches were.

ADDITIONAL MATTER

The appellant's lengthy representations continue to focus largely on questions he has about the specifics of the Police's investigations. These same issues were raised by the appellant earlier, and I concur with the manner in which Adjudicator James addressed these issues in Interim Order MO-2434-I, when she stated:

> Most of the appellant's evidence focuses on questions he has about the Police's investigation into his initial and subsequent complaints.
>
> Understandably, the appellant has had a difficult time accepting the Police's conclusion that there was not sufficient evidence to lay charges. The appellant's complaint involves serious allegations of abuse. To the appellant's disappointment, his complaint did not result in charges being laid.
>
> However, this office does not have the jurisdiction to review the Police's conduct regarding their handling of the appellant's initial and subsequent complaints. This office also does not have the jurisdiction to review any subsequent investigations the Police undertook to investigate any complaints the appellant made about individual police officers.

ORDER:

1. I order the Police to disclose a severed copy of page 7 to the appellant by sending the appellant a copy by **December 29, 2010**. I have provided the Police with a highlighted copy of this record, highlighting those portions which should not be disclosed.

2. I uphold the Police's decision to deny access to the remaining records or portions of records.

3. I order the Police to conduct a further search for additional responsive investigative records created between of August 4, 2005 to April 5, 2007 (the period of time between the first and second request).

4. I order the Police to provide me with additional information regarding the seven (7) newly-released pages relating to the 2006 investigation which have been identified as responsive. This information should include:

   - where and how the seven (7) additional pages relating to the 2006 investigation were located;

   - what searches led to the identification of the seven (7) additional pages;

   - whether searches were conducted for notebook entries and notes regarding the 2006 investigation referred to in the seven (7) additional pages;

   - whether any other searches were conducted to determine if other investigations were conducted between August 4, 2005 and April 5, 2007; and

   - what the results of any such searches were.

5. I order the Police to provide me with the additional information referenced in order provision 4, as well as information relating to the additional search conducted pursuant to order provision 3, within **35 days** of the date of this Interim Order. This information should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 2 Bloor Street East, Suite 1400, Toronto, Ontario, M4W 1A8. The information provided to me may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for the submitting and sharing of representations is set out in IPC Practice Direction 7.

6. If as a result of the further search, the Police identify any additional records responsive to the request, I order the Police to provide a decision letter to the appellant regarding access to these records in accordance with sections 19, 21 and 22 of the *Act*.

7. I remain seized of this matter with respect to compliance with this interim order or any other outstanding issues arising from this appeal.

Original Signed by: November 30, 2010
Frank DeVries
Adjudicator