Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-2680

Appeal MA10-171

Toronto Police Services Board

December 21, 2011

Summary: The appellant made a request for records from the Toronto Police Services Board regarding the theft of his car. In his request, he states that he seeks access pursuant to section 7 of the *Canadian Charter of Rights and Freedoms*. Partial access was granted to some records and other records were denied in full under sections 8(1)(l), 14(1), 38(a) and 38(b) of the *Act*. During mediation of the appeal, the appellant raised the additional issue of reasonable search. In this order, the appellant's claim that he is entitled to the records under the *Charter* is not upheld. Where the records contain the personal information of other individuals, the decision to deny access under section 38(b) is upheld. Portions of the records are ordered disclosed, as they do not contain personal information and are not otherwise exempt. The search for responsive records is upheld as being reasonable.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 2(1) (definition of personal information), 8(1)(l), 14(1), 38(a), 38(b), 17; *Canadian Charter of Rights and Freedoms*, s. 7.

Cases Considered: *Bennett v. British Columbia (Securities Commission)*, [1992] B.C.J. No. 1655 (C.A.); leave to appeal refused (1992) 97 D.R.R. (4th) vii (S.C.C.), *Blencoe v. British Columbia*, 2000 SCC 44, *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] S.C.J. No. 9, *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*, 39 O.R. (3d) 487, *Gosselin v. Quebec (Attorney General)*, [2002] S.C.J. No. 85, *Grant v. Cropley*, [2001] O.J. 749, *Kubby v. Canada (Solicitor-General)*, 2005 BCCA 640, leave to appeal dismissed [2006] S.C.S.A. No. 29.

OVERVIEW:

[1] This order disposes of the issues raised as a result of an access request made by the appellant under the *Municipal Freedom of Information and Protection of Privacy Act*, (the *Act*) to the Toronto Police Services Board (the police) for information relating to the investigation of the theft of the appellant's car. Specifically, the appellant's request was for the following information:

> …any and all information regarding the investigation and including the identities of any and all individuals involved with the theft of my car in any way. This information must also include any finger prints and identity matches found on any item removed from my car, by the Toronto Police Service for evidence. I am also requesting any identification documents found in a wallet of the unknown person, removed from my car by the responding Toronto Police Service officers. I am also requesting the badge numbers of the responding officers as well as any detectives and any other Police Service employees…who have been involved in the investigation.

[2] In addition, the information was requested under section 7 of the *Canadian Charter of Rights and Freedoms* (the *Charter*).

[3] The police granted partial access to the requested information. Access to some information was denied pursuant to sections 38(a)/8(1)(l) (facilitate commission of unlawful act), 14(1)(f) and 38(b) (personal privacy) of the *Act.* The matter was appealed to this office.

[4] During mediation, the police located additional records relating to the request and issued a supplementary decision denying the appellant access to these records in full pursuant to sections 14(1)(f) and 38(b) of the *Act.* Both of the decision letters and sets of records have been combined into this single appeal.

[5] Upon receipt of these records, the appellant raised the issue of whether the search for records relating to the name of the owner of a wallet that was found in his car was reasonable. Accordingly, it has been added as an issue in this appeal.

[6] In addition, during mediation, the appellant served a Notice of Constitutional Question on both the Attorney General of Canada and the Attorney General of Ontario with respect to his claim that he should receive the records pursuant to section 7 of the *Charter*.

[7] The matter then moved to the adjudication stage. The former adjudicator assigned to this appeal invited, and received, representations from the police and the

appellant. Representations were shared in accordance with the IPC's *Practice Direction 7*.

[8] This office also provided the Attorney General of Canada and the Attorney General of Ontario with the opportunity to provide representations. They did not provide representations.

[9] This appeal was then transferred to me to complete the inquiry and make a final disposition.

[10] For the reasons that follow, I am upholding the police's search, and decision, in part.

RECORDS:

[11] The records remaining at issue are pages 1, 3, 4, 6-8, and 18-26.

ISSUES:

A. Did the police breach section 7 of the *Charter* by denying access to the records at issue?

B. Do the records contain personal information?

C. Does the mandatory exemption at section 14(1) or the discretionary exemption at section 38(b) apply?

D. Does the discretionary exemption at section 38(a) in conjunction with section 8(1)(l) apply?

E. Did the police exercise its discretion under sections 8(1)(l), 38(a) and 38(b)?

F. Did the police conduct a reasonable search for records?

DISCUSSION:

A. Did the police breach section 7 of the *Charter* by denying access to the records at issue?

[12] The appellant has raised section 7 of the *Charter*. Section 7 provides that:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[13] To provide more clarity regarding this issue, I shall provide background information concerning the request.

[14] The appellant is seeking records relating to the theft of his car which was stolen and recovered by the police in 2006, specifically, the identities of the suspects and the evidence gathered by the police, including a compact disc and another individual's wallet that were found by the police when the car was located.

[15] The appellant states that, since the car theft, there have been a number of incidents involving his family and property. For example, the family cat was poisoned, eggs were thrown at his home, and another family car was vandalized. The appellant believes that these incidents may be related and may have been committed by the same individual(s) involved in the original car theft.

[16] The appellant would like the information contained in the records, so that he can identify the car thieves and "access the justice system" to obtain restraining orders against these individuals to protect his, and his family's rights to security, life and liberty.

[17] The appellant submits that section 7 of the *Charter* protects three separate sets of interests, namely the rights to "life, liberty and security of person," and further, that the state may only infringe upon these rights in accordance with the principles of fundamental justice. The appellant states that section 7 of the *Charter* has been triggered, as the police have refused to disclose who stole his car, what happened to the evidence, and why no charges were laid. As a result of protecting the "rights of the criminals," the appellant argues, he and his family have been deprived of their liberty and security interests, contrary to the principles of fundamental justice.

[18] In addition, the appellant submits that the section 7 infringement cannot be demonstrably justified in a free and democratic society as a reasonable limit as set out in section 1 of the *Charter*, as there is specific evidence such as fingerprints and the wallet to prove that these individuals were directly involved in the car theft and the other incidents.

[19] As a remedy, the appellant seeks the disclosure of all the records at issue, as well as "any and all information" regarding the individuals involved in the car theft. He also seeks an explanation from the police as to why no charges were laid.

[20] The police submit that a violation of rights guaranteed by section 7 of the *Charter* will occur where, at the hands of the state, a threat of physical restraint or imprisonment or the physical and mental integrity of the individual is at stake.[1]

[21] The police also submit that section 7 was designed to protect individuals facing regulatory or criminal proceedings imposed by the state in which the individual's life, liberty or security of person is at stake. They further submit that a denial of a request for information under the *Act* does not come within the scope or type of deprivation that section 7 is meant to protect.

[22] The appellant, according to the police, is not facing the threat of incarceration or deportation, his family is not at risk of being separated, nor is his innocence at stake. In addition, there is no suggestion that the police failed to provide emergency or other policing services to the appellant and, in any event, the provision of these services would fall outside the scope of an access request.

[23] The police submit that the onus rests on the appellant to demonstrate that his section 7 rights have been violated and establish a credible nexus between that violation and the police's refusal of his access request. They say that he has failed to establish that nexus because his assertion that he is unable to access the justice system without the names of the suspect(s) who he alleges stole his car and engaged in other mischief does not constitute the type of jeopardy contemplated by section 7 of the *Charter*.

[24] The police also state that there is no constitutional right that guarantees a victim's access to a suspect's identity or other personal information and there is a strong public interest in protecting investigative information. In addition, they point to Order PO-1706, where Adjudicator Laurel Cropley stated:

> In my view, the right to disclosure flows from the right to make full answer and defence in criminal, quasi-criminal, and arguably in regulatory proceedings, and only within the confines of those proceedings . . . In my view, there are no proceedings against the appellant under this Act, or any other Act which would trigger any disclosure obligations in a manner similar to those cited by the appellant.

[25] I note that in Order PO-1706, Adjudicator Cropley found that the appellant's *Charter* rights were not infringed as a result of non-disclosure under the *Act* and that there were no proceedings against the appellant under the *Act*.

[26] The police add that, if I accept that the police's refusal to disclose the suspect(s)' identity deprived the appellant of his section 7 *Charter* rights, I must consider whether

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[1] *Bennett v. British Columbia (Securities Commission)*, [1992] B.C.J. No. 1655 (C.A.); leave to appeal refused (1992) 97 D.R.R. (4th) vii (S.C.C.).

such deprivation failed to adhere to the principles of fundamental justice. In the context of administrative law, the principles of fundamental justice are satisfied if natural justice and procedural fairness have been followed.[2]

[27] The police state that procedural fairness has been satisfied in this request as the police clarified the request, met the appropriate notice requirements, disclosed as much information to the appellant as possible by severing information that fell under one or more exemptions or exceptions, considered all relevant factors in relation to the responsive records, and are participating in this appeal.

[28] In reply, the appellant states that another incident took place at his home in which a suspicious individual was peering into the window of the appellant's car. When approached by the appellant, the individual claimed to be intoxicated, but then ran away. The appellant indicates that he and his family have moved as a result of this incident.

[29] He also raises a number of questions that he wishes answered by this office. In particular, he seeks the legal test for section 7 of the *Charter* to override the *Act* and for precedents from this office on this issue. The appellant has been provided with a Notice of Inquiry outlining the facts and issues in this appeal, and inviting him to provide representations, which he has done. My analysis and decision concerning section 7 of the *Charter* is based on decisions of the Canadian courts, as applied to the evidence before me in this case.

[30] The appellant also suggests that the Attorney Generals of Ontario and Canada should be consulted for direction. As already noted, the Attorney Generals were invited to provide representations in this appeal, but choose not to do so.

[31] The appellant also submits that the personal security of a person is threatened when criminals come to a victim's residence, while they are at home, to rob them. In this regard, the appellant seeks a full oral hearing, in which he may call the police officers involved in this case and ask them questions under oath, including why charges were not laid.

[32] On this preliminary procedural issue, I find that the scope of the inquiry proposed by the appellant falls outside of the scope of this office's inquiry powers under the *Act*, which, under section 41, are directed at conducting an "inquiry to review the head's decision" related to the issue of access to records. In any case, although I have declined to hold the requested oral inquiry, I note that this office has provided both parties an opportunity to make representations. In addition, the appellant was provided with the police's representations and given an opportunity to respond to them. In this

[2] *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] S.C.J. No. 9. In addition, the Supreme Court of Canada held that common law procedural fairness under section 7 is context specific and will depend on the individual and state interests at stake.

context, I also note that the appellant has already had substantial access to the records of the police concerning the theft and recovery of his car and their investigation of that matter.

[33] Where an individual seeks to advance a claim that his or her rights under section 7 of the *Charter* have been infringed, the claimant must provide persuasive evidence in support of the claim.[3]

[34] The Supreme Court of Canada has held that the purpose of section 7 is to protect life, liberty and security of the person from deprivations that occur as a result of an individual's interaction with the justice system and its administration.[4]

[35] The Supreme Court of Canada's approach to the scope of section 7 has also developed such that the liberty interest "is no longer restricted to mere freedom from physical constraint". It is also engaged where "state compulsions or prohibitions affect fundamental life choices". However, the personal autonomy protected under section 7 "is not synonymous with unconstrained freedom."[5] Similarly, the Court's approach to the psychological component of "security of the person" extends to "*serious* *<u>state-imposed</u>* psychological prejudice."[6]

[36] In this case, the appellant argues that he requires the identities of those who were involved in the theft of his vehicle in any way, presumably in order to pursue one or more restraining orders, and that the police's failure to provide this information violates his section 7 rights. To support this *Charter* claim, he cites the following incidents: that his cat was poisoned some 7 months after the theft of his car, by persons unknown; that eggs have been thrown at his residence; that his wife's car was vandalized in 2010; and that also in 2010, he found a suspicious individual peering into his car when it was parked outside his home.

[37] After considering the representations of both parties, I do not accept the appellant's position that his section 7 *Charter* rights have been infringed as a result non-disclosure under the *Act*.

[38] In my view, the evidence provided by the appellant is not sufficient to establish a violation of section 7. In *Gosselin*, the Supreme Court held that the purpose of section 7 is to protect life, liberty and security of the person from deprivations that occur as a result of an individual's interaction with the justice system and its administration. To the extent that the interaction between the appellant and his circumstances with the

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[3] *Kubby v. Canada (Solicitor-General)* , 2005 BCCA 640 (at paras. 22-24), leave to appeal dismissed [2006] S.C.S.A. No. 29.
[4] *Gosselin v. Quebec (Attorney General)*, [2002] S.C.J. No. 85.
[5] *Blencoe v. British Columbia*, 2000 SCC 44, at paras. 49, 54.
[6] See note 5 at paras. 55-57, emphasis added.

access to information proceedings here might suffice for the purpose of the "justice system" analysis under *Gosselin*, there is simply no basis to conclude that the decision to deny the appellant access to the relevant information amounts to the kind of "serious state-imposed psychological prejudice" contemplated under section 7 of the *Charter*. Similarly, the appellant has not pointed to, let alone established, any "state compulsions or prohibitions" affecting his "fundamental life choices."

[39] Moreover, the appellant has not established that any of the harms he may have suffered in relation to the incidents that occurred after the theft of his vehicle in 2006 are even related to the access to information decision made by the police. At most, the appellant *speculates* that the various incidents are interconnected and that, armed with the theft-related records, he would be able to identify the alleged wrongdoers and obtain restraining orders against them.

[40] Nor is this the kind of case presented in *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police,*[7] where McFarland J. found that the failure by the Metropolitan Toronto Police to warn women that a serial rapist under investigation by the police was operating in a particular Toronto neighbourhood constituted a breach of the plaintiff's section 7 rights. In Doe, police knew and believed that the rapist would attack again and yet failed to take any steps to protect the plaintiff or other women like her. Rather, this case resembles a set of circumstances where it "would be inappropriate to hold government accountable for harms that are brought about by third parties who are not in any sense acting as agents of the state."[8]

[41] While I do not make, nor do I have the authority to make any such finding, I also note that, at most, the appellant's allegations about, for example, his family having to move their residence because of unchecked crime, if true, might provide some basis for a claim that the police may owe the appellant a common law or statutory duty of care with respect to the provision of police services. In this regard, while I acknowledge that the appellant has a number of concerns regarding the incidents he described, including concerns related to the police's response to them, I do not have the jurisdiction to consider whether the police's conduct was appropriate, nor to determine why no charges were laid. Moreover, as noted above, the appellant has substantial disclosure of the records prepared by the police in connection with the theft and recovery of his car. The disclosed portions of the records contain information about the state of the investigation and whether any suspects were identified.

[42] Finally, with respect to the "principles of fundamental justice" component of section 7, the Supreme Court of Canada has determined that:

> The question at the s. 7 stage is whether the principles of fundamental justice relevant to the case have been observed in substance, having

[7] 39 O.R. (3d) 487, [1998] O.J. No. 2681, (Ont. Ct. Gen. Div.).
[8] See note 5 at para. 59.

> regard to the context and the seriousness of the violation. The issue is whether the process is fundamentally unfair to the affected person. If so, the deprivation of life, liberty or security of the person simply does not conform to the requirements of s. 7.[9]

[43] The decision to deny the appellant access to the relevant records has been made in accordance with the rules, principles, and procedures established under the *Act*. In such circumstances, I am not prepared to find that any alleged breach of the right to liberty or security of the person is *not* in accordance with the principles of fundamental justice.

[44] Consequently, I find that section 7 of the *Charter* has not been breached by the police decision to deny access to the withheld portions of the records by way of the application of the exemptions claimed. In these circumstances, it is not necessary to consider section 1 of the *Charter*.

[45] I will now determine if the exemptions claimed by the police apply to the records at issue.

B. Does the record contain personal information?

[46] 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,

[9] See note 2 at para. 22.

(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 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;

[47] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

[48] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[10]

[49] The police state that the records contain the personal information of suspect(s) of a criminal investigation, whose identification and fingerprints were seized from the appellant's recovered car. In particular, the records contain information set out in the definition of personal information at section 2(1) of the *Act* and in particular, the following paragraphs of the definition: (c) (identifying number, symbol or other particular assigned to an individual); (d) (the address, telephone number, fingerprints or blood type of 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).

[50] The appellant did not make representations on this issue.

[10] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[51] I have carefully reviewed the records and I find that some of the records contain the personal information of the suspect(s), some contain the appellant's personal information, including his name and address, and some contain the personal information of another individual who was a victim of theft, including the details of the incident and the individual's name and address.

[52] In particular I find that pages 1, 3, 4, 8, 18, 19, 20 and 21 contain the personal information of the appellant and the suspect(s). Page 24 contains the personal information of the appellant and the other victim. Pages 22-26 contain the personal information of the appellant and others.

[53] However, I find that the severed information at pages 6, 7 and some of the information severed on page 8 of the records does not contain personal information, as it refers to evidence bag numbers and external reference identification numbers of objects. The police have not claimed any other exemptions in relation to this information. Therefore, I shall order the police to disclose the severed portions of pages 6, 7 and the relevant portion of page 8 to the appellant.

C. Does the mandatory exemption at section 14(1) or the discretionary exemption at section 38(b) apply?

[54] 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.

[55] Under the discretionary exemption found at section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. As all of the records at issue (except pages 6, 7, and 8) contain the personal information of the appellant and others, I will consider whether they are exempt under section 38(b).

[56] The mandatory exemption at section 14(1) can only apply where the record contains the personal information of individuals other than the requester, but does not contain the requester's information. Based on the analysis under "personal information," above, there are no such records at issue and section 14(1) does not apply.

[57] If the information falls within the scope of section 38(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

[58] Under section 38(b), sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met.

[59] 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 sections 14 or 38(b). I have reviewed these sections and find that none of them apply.

[60] If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 38(b). In *Grant v. Cropley,*[11] the Divisional Court said the Commissioner could:

> . . . consider the criteria mentioned in s.21(3)(b) [the equivalent provision in the provincial *Act* to section 14(3)(b)] in determining, under s. 49(b) [which is equivalent to section 38(b)], whether disclosure . . . would constitute an unjustified invasion of [a third party's] personal privacy.

[61] In the circumstances, it appears that the presumption at paragraph (b) could apply.

[62] The police rely on the presumed invasion of privacy at section 14(3)(b), as the personal information was compiled as part of a criminal investigation. The records contain the identification(s) and identification documents, including fingerprints, of individual(s) investigated for an alleged stolen car.

[63] The police state:

> The courts have held that there is a strong public interest in protecting law enforcement related documents.[12] Even where no criminal proceedings were commenced against suspects, the presumption in section 14(3)(b) is not negated.[13] Further, this presumption cannot be rebutted by any one or combination of factors set out in section 14(2).[14]

[64] In my view, all of the personal information contained in the records was compiled and is identifiable as part of an investigation into a possible violation of law and, accordingly, the presumed unjustified invasion of privacy in section 14(3)(b) applies.

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[11] [2001] O.J. 749.
[12] See *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] S.C.J. No. 23 at para. 44, *R. v. Basi*, [2009] 3 S.C.R. 389 and *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372 at para. 32.
[13] See Orders PO-1779, MO-1256, P-237, P-223 and M-198.
[14] See Order PO-1779 and *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div. Ct.). John Doe dealt with the provincial equivalent of section 14.

[65] Section 14(2) of the *Act* states, in part:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether … [followed by a number of listed factors].

[66] I have reviewed the listed factors at section 14(2) to determine whether any of them would apply to favour disclosure of the withheld personal information in the records, and I conclude that none of them does. I have also considered the circumstances raised by the appellant in connection with his arguments under section 7 of the *Charter*, but as noted in that discussion, I am not satisfied that the evidence establishes a link between the theft of his car and the subsequent events that he describes.

[67] Under the circumstances, weighing the appellant's right of access to his own personal information against the other individuals' right to protection of their privacy, I conclude that, based on section 14(3)(b), disclosure of the personal information at issue in this appeal constitutes an unjustified invasion of personal privacy. Subject to my analysis of the absurd result principle, below, and the exercise of discretion, I find that the undisclosed personal information in the records is exempt under section 38(b).

[68] The appellant submits that the absurd result principle applies. He states that disclosure of the information is consistent with the purpose of the legislation and the absurd result principle applies because the personal security and welfare of he and his family are in constant ongoing jeopardy. The appellant states:

> The personal safety and security of innocent persons under threat by criminals, outweighs the privacy concerns of said criminals, who fear legal repercussions from their illegal actions, by the victims exercising their rights to access to justice to be free from further victimization.

[69] The appellant appears to have misunderstood the concept of absurd result. In order for this principle to apply, the information at issue in this appeal must have been supplied by the appellant or within his knowledge, neither of which is the case in this appeal. Therefore, I find that the absurd result principle does not apply.

[70] Despite this finding, the institution may exercise its discretion to disclose the information to the appellant. I will consider the police's exercise of discretion further on in this order.

[71] Having found that section 38(b) applies to the personal information in the records, it is not necessary for me to make a finding in regard to the discretionary exemption at section 38(a) in conjunction with section 8(1)(l), which was Issue D in the

Issues section of this order. I have found that the withheld information on pages 6 and 7, and some of the withheld information on page 8 is not personal information, and it is therefore not exempt under section 38(b). As already noted, the police did not claim and additional exemptions for that information, and I will therefore order it disclosed.

E. Did the police properly exercise their discretion under section 38(b)?

[72] 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.

[73] In addition, 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.

[74] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[15] This office may not, however, substitute its own discretion for that of the institution.[16]

[75] The police state that they properly exercised their discretion in denying access to the records, as they considered whether the appellant's access rights prevail over the right to privacy of other individuals involved. The police submit that because of the nature of information collected by law enforcement institutions and the circumstances under which the information is collected, the balance is tipped towards protecting the privacy of affected parties.

[76] The police submit that law enforcement records are not simple business transaction records in which disclosure of another individual's personal information may not, on balance, be offensive.

[77] In this appeal, the police state they conducted a thorough investigation of the incident and found insufficient evidence to lay charges against anyone. The police submit that, given that no criminal or civil proceedings have been taken against the investigated individual(s), they continue to have a reasonable expectation that their personal information will not be disclosed.

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[15] Order MO-1573.
[16] Section 43(2).

[78] The police state:

> In deciding to withhold the information, the head considered the high degree of stigma attached to being investigated for an offence and the prejudice that could be suffered if the suspect(s) identity was made known to the appellant without consent or legal compulsion.

[79] In addition, the police state that they disclosed as much of the responsive records as could be reasonably severed without disclosing material that is exempt.

[80] The appellant submits that I must decide whether it was legislature's intention to allow criminals to use the *Act* as a shield to protect themselves from legitimate legal recourse by their victims. Having reviewed some of the IPC's orders, the appellant notes that it appears that the privacy rights of criminals is what matters to this office and not victims' rights to not be robbed and repeatedly victimized. In that regard, I note that the legislature chose to make the disclosure of personal information "that was compiled and is identifiable as part of an investigation into a possible violation of law" a presumed unjustified invasion of personal privacy.[17]

[81] The appellant also states that Canadian courts have repeatedly ruled that individuals have the right to procedural fairness and natural justice, and to have their day in court. In this case, the appellant states, he has the right to take the criminals, who robbed him and damaged his property, to court. To deny access to the requested information will deny his right to have his "day in court" against the perpetrator(s).

[82] The appellant then states that if the information is not ordered to be disclosed, the integrity of the criminal justice system and this office will be called into question, as victims of crime have a "right to know," and a right to access the justice system. In addition, the public has an interest in the proper administration of justice.

[83] These arguments are closely related to the appellant's position with respect to his claim under section 7 of the *Charter* and his arguments under section 38(b), and I have already addressed them in those contexts.

[84] Moreover, while I acknowledge the appellant's concerns, I accept the police's representations to the effect that they considered the particular and specific circumstances of this case and made decisions regarding disclosure based on a defensible balancing of the rights of the appellant to access his personal information and the other individuals' right to privacy. In addition, a great deal of information in pages 1, 3 and 4 have already been disclosed to the appellant, and I am satisfied that efforts were made by the police to maximize the amount of disclosure, while at the

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[17] Please see the discussion of section 14(3)(b), above.

same time considering the nature and type of personal information contained in the withheld portions of these records.

[85] Consequently, I uphold the police's exercise of discretion.

F. Did the police conduct a reasonable search for records?

[86] During mediation and after receiving the second decision letter from the police, the appellant raised the issue of reasonable search. In particular, he raised the issue of whether the search for records relating to the name of the owner of the wallet that was found in his car was reasonable.

[87] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 1.[18] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[88] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[19] To be responsive, a record must be "reasonably related" to the request.[20]

[89] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[21] 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.[22]

[90] The police advised in their representations that a reasonable search was conducted by an experienced staff member. After the request was received, the police clarified the scope of the appellant's request with him. At that time, the appellant advised the police that he was interested in access to the police report, the fingerprints, the suspect(s) names and the name of the owner of a wallet located in the appellant's car.

[91] The freedom of information analyst at the police then conducted the following search:

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[18] Orders P-85, P-221 and PO-1954-I.
[19] Orders P-624 and PO-2559.
[20] Order PO-2554.
[21] Orders M-909, PO-2469, PO-2592.
[22] Order MO-2246.

- the appellant's previous request file from 2008 was reviewed;
- legal services was contacted to inquire about the existence and status of any civil matters;
- the police's databases were searched using a "unified search" for related and relevant records;
- the forensic identification services unit was contacted for a copy of the fingerprints; and
- and one of the investigating Constables was contacted regarding questions about the property located in the appellant's car and ownership.

[92] In addition, a further search was conducted during mediation, in which further responsive records were located, resulting in the second decision letter sent to the appellant during mediation. The police also advise that there are no records that did exist, which no longer exist.

[93] The appellant provided no representations on the issue of reasonable search.

[94] During mediation, the appellant took the position that further responsive records ought to exist. However, he has not provided any representations or evidence on the issue. Therefore, he has not provided a reasonable basis for concluding that further records exist.

[95] Consequently, in the circumstances of this appeal, based on the detailed representations received from the police, and in the absence of evidence from the appellant, I am satisfied that the two searches conducted by the police for records responsive to the request were reasonable.

ORDER:

1. I order the police to disclose pages 6 and 7 in their entirety by **January 30, 2012** but not before **January 23, 2012**.

2. I order the police to disclose portions of page 8 by **January 30, 2012** but not before **January 23, 2012**. I have enclosed a copy of page 8 and highlighted the portions that are to be disclosed to the appellant.

3. I uphold the police's search as being reasonable.

4. In order to verify compliance with order provisions 1 and 2, I reserve the right to require that the ministry provide me with a copy of the record sent to the appellant.

Original signed by: December 21, 2011
Cathy Hamilton
Adjudicator