

Information and Privacy Commissioner,  
Ontario, Canada



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

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## **ORDER MO-2981**

Appeal MA12-352

Belleville Police Services Board

November 21, 2013

**Summary:** The police received a request under the *Act* for access to all reports, notes and materials involving an identified individual and/or the requester as recorded by a named police officer during a specified period of time. The police identified 13 pages of responsive records, consisting of occurrence reports and police officer's notes. Initially, the police denied the requester access to the information in full, advising her that the records remain part of an open and ongoing investigation and are, therefore, outside the *Act*. The requester (now the appellant) filed an appeal of that decision. During mediation, the police issued revised decisions to the appellant, granting partial access to the records, claiming that the withheld portions of the records are exempt under section 38(a), in conjunction with sections 8(1)(c) (investigation techniques and procedures) and 8(2)(a) (law enforcement report), and section 38(b) (personal privacy). In this order, the adjudicator finds that the appellant has a right of access to some of the personal information at issue, pursuant to section 54(c) of the *Act*. However, the adjudicator upholds the police's decision to withhold the remaining portions of the records under section 38(b) and finds that the police did not err in their exercise of discretion.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1), 14(1), 14(2), 14(3)(a), 14(3)(b), 38(b) and 54(c).

### **OVERVIEW:**

[1] The Belleville Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

All reports, notes and materials involving a [named individual] and/or [the requester] that [named Staff Sergeant] were involved/party to during the period from April 16, 2012 to June 28, 2012. Any and all records related.

[2] The police identified 13 pages of responsive records: two general occurrence reports, two supplementary occurrence reports and 8 pages of police officers' notes. The police issued an access decision to the requester, denying access to the responsive records in full. The police advised the appellant that the requested records "remain part of an open and ongoing investigation and as such fall outside of the *Act*."

[3] The requester, now the appellant, appealed the police's decision to this office.

[4] During mediation, the police issued a revised decision, denying access to the records in full pursuant to the discretionary exemption in section 38(a), read with the law enforcement exemptions in sections 8(1)(a), (b), (e), (f), (l) and 8(2)(a), the solicitor-client privilege exemption in section 12, and the discretionary personal privacy exemption in section 38(b) of the *Act*. In support of their section 38(b) claim, the police raised the application of the presumption in section 14(3)(b) (investigation into violation of law) and the factor in section 14(2)(f) (highly sensitive). The police also claimed that the appellant's request was frivolous and vexatious pursuant to section 20.1(a) of the *Act*, on the basis that the appellant made an earlier request under the *Act* that was also under appeal (MA12-261-2, which was resolved by Order MO-2974). The police asserted that the appellant's request in this appeal formed part of a pattern of conduct that amounts to an abuse of the right of access or that responding to the request would interfere with the operations of the police.

[5] During mediation, the police identified an additional page of records responsive to the appellant's request. The police also advised that the investigation had been completed and that no charges were laid. As a result, the police issued a second access decision, granting the appellant partial access to the responsive records. The police advised the appellant that portions of the records were withheld under the discretionary exemptions in section 38(a), read with sections 8(1)(c) (investigative techniques and procedures) and 8(2)(a) (law enforcement report), and the discretionary personal privacy exemption in section 38(b). In support of its section 38(b) claim, the police raised the application of the presumptions in sections 14(3)(a) (medical history) and 14(3)(b) of the *Act*.

[6] The parties were unable to resolve the appeal through mediation and the file was transferred to the adjudication stage of the appeals process for a written inquiry.

[7] The adjudicator assigned to conduct the inquiry invited the police to submit representations in response to a Notice of Inquiry, and they did so. The appellant was then invited to make submissions in response to those of the police and she also submitted representations on the issues in this appeal.

[8] Following the completion of the inquiry, this appeal was transferred to me to complete the order. In the discussion that follows, I uphold the police's decision to withhold certain portions of the records at issue. I find that the information at issue consists of "personal information" within the meaning of section 2(1) of the *Act* and that some of the information at issue is exempt under section 38(b). However, I find that the appellant has a right of access to some of the personal information at issue under section 54(c) of the *Act* and order the police to disclose it to her. With regard to the information exempt under section 38(b), I find that the police exercised their discretion under section 38(b) properly and uphold their decision to deny access to the undisclosed portions of the records.

## **RECORDS:**

[9] The undisclosed portions of 10 pages of records remain at issue. They consist of two general occurrence reports (pages 1-2 and page 3), two supplementary occurrence reports (page 4 and page 5) and a police officer's notes from three different dates (pages 6, 8, 10-11 and 14).

## **ISSUES:**

- A. Do the records contain "personal information" as defined in section 2(1) and if so, to whom does it relate?
- B. Does the discretionary exemption at section 38(b) apply to the information at issue?
- C. Did the police exercise their discretion under section 38(b)? If so, should I uphold the exercise of discretion?

## **DISCUSSION:**

### **A. Do the records contain "personal information" as defined in section 2(1) and if so, to whom does it relate?**

[10] Under the *Act*, different exemptions may apply depending on whether a record at issue does or does not contain the personal information of the requester.<sup>1</sup> Where a record contains the requester's own information, access is addressed under Part II of the *Act* and the exemptions at section 38 may apply. Where a record contains the personal information of individuals other than the appellant, access is addressed under Part I of the *Act* and the exemptions found at sections 6 to 15 may apply.

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<sup>1</sup> Order M-352.

[11] In order to determine which sections of the *Act* may apply, it is necessary to first determine whether the occurrence report 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.

[12] 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.<sup>2</sup>

[13] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.<sup>3</sup>

[14] The police submit that the information remaining at issue contains personal information that relates solely to an individual other than the appellant (the affected party). The police submit that the information severed from the records relates to the identity and actions of the affected party, who was acting in a personal capacity at the time the records were created.

[15] The police submit further that the information included in the occurrence reports and in the officer's notes consists of personal information, including the affected party's name, statements made by the affected party that contain his personal information, including his personal views and opinions, and instructions the police gave to the affected party.

[16] The police acknowledge that the appellant is aware of the identity of the affected party. In any case, the police submit that the personal information of the affected party, particularly his personal views and opinions, must be protected from disclosure.

[17] In her representations, the appellant submits that the records contain personal information relating to her, the affected party and her son.

[18] Based on my review of the records at issue, I find that the withheld portions of the records contain "personal information", as that term is defined in section 2(1) of the *Act*.

[19] In particular, I find that the records at issue include the appellant's personal information, including her personal views or opinions (paragraph (e)), the opinions or views of individuals as they relate to her (paragraph (g)) and her name, along with other personal information about her (paragraph (h)). As the occurrence reports and police officer's notes relate to incidents that the appellant was involved in, I find that they can be considered to contain her personal information, within the meaning of that term in section 2(1) of the *Act*.

[20] In addition, I find that the records contain the personal information of other identifiable individuals involved in the incidents. These identifiable individuals are the appellant's husband, her son and the affected party. With regard to the appellant's

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<sup>2</sup> Order 11.

<sup>3</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

husband, I find that the personal information consists of his personal view or opinions (paragraph (e)), the opinions or views of individuals as they relate to him (paragraph (g)) and his name, along with other personal information about him (paragraph (h)).

[21] With regard to the appellant's son, I find that some of the personal information contained in the records consists of his date of birth (paragraph (a)), information relating to his medical history (paragraph (b)), the opinions or view of individuals as they relate to him (paragraph (g)) and his name, along with other personal information about him (paragraph (h)).

[22] Finally, I find that some of information remaining at issue in this appeal consists of the personal information of the affected party and includes, specifically, his personal opinions or views (paragraph (e)) and his name, along with other personal information about him (paragraph (h)).

[23] As I have found that the records contain the personal information of the appellant and/or the affected party and her son, I will consider whether they qualify for the personal privacy exemption at section 38(b) in Part II of the *Act*.

**B. Does the discretionary exemption at section 38(b) apply to the information at issue?**

[24] Section 38(b) of the *Act* is the discretionary personal privacy exemption under Part II of the *Act*. Section 38(b) provides:

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

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

[25] Because of the wording of section 38(b), the correct interpretation of "personal information" in the preamble is that it includes the personal information of other individuals found in the records, which also contain the requester's personal information.<sup>4</sup>

[26] In other words, 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.

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<sup>4</sup> Order M-352.

[27] In the circumstances of this appeal, it must be determined whether disclosing the personal information of the appellant and the third party would constitute an unjustified invasion of the affected party's personal privacy under section 38(b).

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

[29] In determining whether the exemption in section 38(b) applies, sections 14(1), (2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of the personal information in the records would result in an unjustified invasion of another individual's personal privacy. Section 14(2) provides some criteria for the police 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; and section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. In addition, if the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy under section 38(b).

### ***Section 14(3)***

[30] The police submit that the discretionary personal privacy exemption in section 38(b) applies to the information at issue. The police submit that none of the exceptions in sections 14(1)(a) through (e) or section 14(4) apply to the information at issue. The police also submit that the presumptions listed in sections 14(3)(a) and (b) of the *Act* apply to the information at issue in this appeal. Section 14(3) states, in part:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

(a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

(b) 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.

[31] The police state that, as a law enforcement agency, it is mandated under the *Police Services Act* to investigate offences under the *Criminal Code* of Canada. The police submit that the records, occurrence reports and the investigating officers notes, were prepared or compiled by a member of the police in relation to an investigation into

a possible violation of law, specifically the offence of Criminal Breach of Court Order in section 127 of the *Criminal Code* of Canada.

[32] The police submit that even though no criminal charges were laid, Order P-242 states that the presumption in section 14(3)(b) only requires that there be an investigation into a possible violation of law.

[33] In addition, the police submit that the presumption in section 14(3)(a) applies to the severances on pages 3, 4, 11 and 14. The police submit that the information at issue on these pages was provided by the affected party and are not the appellant's personal information.

[34] The police submit that the personal information remaining undisclosed in the records pertains exclusively to the affected party, who was interviewed by a police officer during the investigation.

[35] In response, the appellant submits that the disclosure of the information at issue would not result in an unjustified invasion of personal privacy. The appellant alleges that the affected party has made a number of false accusations about her and submits that it is important for her to have access to the information the affected party provided to the police to determine and challenge its accuracy. The appellant submits that this is particularly important as she and the affected party may be involved in future legal proceedings.

[36] The appellant also acknowledges that she has had contact with the police and submits that they have not provided her with a thorough level of service. With regard to the incidents that are the subject of these records, the appellant submits that the police failed to investigate her complaint and there is no mention of her complaint in the portions of the records disclosed to her.

[37] Based on my review of the records and the representations of the parties, I find that the presumption in section 14(3)(b) applies to the information at issue. As the police note, this office has found that the presumption in section 14(3)(b) may apply even if no criminal proceedings were commenced against any individuals. The presumption only requires that there be an investigation into a possible violation of law.<sup>5</sup> The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.<sup>6</sup>

[38] I have reviewed the occurrence reports and the investigating officer's notes and it is clear from the circumstances that the personal information contained in the records was compiled and is identifiable as part of the police's investigation into a possible violation of law, namely the *Criminal Code* of Canada. Although no criminal

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<sup>5</sup> Orders P-242 and MO-2235.

<sup>6</sup> Orders MO-2213 and PO-1849.



proceedings were commenced against any of the individuals involved in the incidents, I find that the presumption in section 14(3)(b) still applies to all of the personal information in the records.

[39] Therefore, I find that the personal information in the records was compiled and is identifiable as part of an investigation into a possible violation of law, and falls within the presumption in section 14(3)(b).

[40] With regard to the presumption in section 14(3)(a), the police submit this presumption applies to some of the severed portions on pages 3, 4, 11 and 14 of the records. I agree with the police that the presumption in section 14(3)(a) applies to some of the severances on pages 3, 4, 11 and 14 of the records. I have reviewed the records and find that portions of pages 3, 4, 11 and 14 relate to the medical treatment and condition of the appellant's son. Accordingly, I find that the presumption in section 14(3)(a) applies to these portions of the records as the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation of an identifiable individual.

[41] However, I note that section 54(c) of the *Act* states that any right or power conferred on an individual by the *Act* may be exercised by a person who has lawful custody of the individual, where the individual is less than 16 years of age. From my review of the records and representations of the parties, it appears that the appellant has lawful custody of her son, who is a minor. As a result, the appellant may exercise a right of access to the personal information relating exclusively to her son. I have reviewed the information remaining at issue and I find that portions of the personal information severed on pages 3, 4, 11 and 14 relate exclusively to the appellant's son. Specifically, the personal information that relates exclusively to the appellant's son consist of his name and descriptions of his medical condition. Accordingly, I find that disclosure of this information to the appellant would not result in an unjustified invasion of the appellant's son's personal privacy under section 38(b).

### ***Section 14(2)***

[42] In situations where the records are claimed to be exempt under section 38(b), section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of privacy under section 38(b).<sup>7</sup>

[43] The police rely on the application of the considerations favouring non-disclosure in sections 14(2)(e), (f) and (h). In her representations, the appellant raises the application of the factor favouring disclosure in section 14(2)(a). These sections state:

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<sup>7</sup> Order P-239.

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,

- (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;
- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
- (f) the information is highly sensitive;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence.

[44] In the confidential portions of their representations, the police provide information regarding the acrimonious relationship between the appellant and the affected party. The police also provide a brief history of their interactions with the appellant. Based on my review of these representations, I find that the factors listed in sections 14(2)(e), (f) and (h) of the *Act* apply and weigh against the disclosure of the information at issue to the appellant. Due to the nature of the relationship between the appellant and the affected party, I find that it is reasonable to believe that the affected party would be exposed unfairly to pecuniary or other harm if the information at issue is disclosed, thereby engaging the application of the factor in section 14(2)(e). In addition, I find that section 14(2)(f) applies to the information at issue. In the unique circumstances of this appeal, there is a reasonable expectation of significant personal distress to the affected party if the information is disclosed.<sup>8</sup>

[45] I am also satisfied that the affected party provided the information at issue in confidence to the police during an investigation into a complaint against him. Upon review of the records and representations, it appears that the affected party provided his account of the circumstances at issue in the records with the expectation that his statements would be kept confidential. Accordingly, I find that section 14(2)(h) applies in favour of non-disclosure.

[46] In her representations, the appellant describes her history with the police and submit that they have not provided her with a thorough level of service in response to her earlier complaints. With regard to the incidents described in the records, the appellant submits that her complaint was not properly investigated and that her complaint was not even mentioned in the portions of the records that were disclosed to her. In light of the circumstances surrounding the investigation of her complaint, the

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<sup>8</sup> Orders PO-2518, PO-2617, MO-2262 and MO-2344.

appellant submits that the factor favouring disclosure in section 14(2)(a) applies and that the record should be released in order to subject the police to public scrutiny.

[47] Previous orders have established that section 14(2)(a) contemplates disclosure in order to subject the activities of the government (as opposed to the views or actions of private individuals) to public scrutiny.<sup>9</sup> Previous orders have also confirmed that this factor exists because the public has a right to expect that expenditures of employees of government institutions during the course of performing their employment-related responsibilities are made in accordance with established policies and procedures, carefully developed in accordance with sound and responsible administrative principles.<sup>10</sup>

[48] In the circumstances of this appeal, I am not satisfied that the factor in section 14(2)(a) applies to the information at issue. Based on my review, I am not satisfied that its disclosure would subject the police to public scrutiny. The withheld portions of the record contain the personal information of the appellant and affected party, including his personal opinions or views regarding the appellant and the incidents. The information at issue does not contain details regarding the manner in which the police handled the appellant's complaint or how it conducted its investigation. Therefore, I find that the factor in section 14(2)(a) does not apply to the information at issue.

[49] I also find that none of the other factors favouring disclosure apply to the information at issue.

[50] Consequently, I find that the presumption in section 14(3)(b) applies to all of the personal information at issue and the presumption in section 14(3)(a) applies to some of the severed information on pages 3, 4, 11 and 14. In addition, I find that there are no factors favouring disclosure and that the factors in sections 14(2)(e), (f) and (h) favouring non-disclosure apply. Accordingly, I am satisfied that the disclosure of this information would constitute an unjustified invasion of the personal privacy of the affected party whose personal information is contained in the records and that the personal information is exempt under section 38(b). I uphold the application of the discretionary exemption at section 38(b) with respect to the personal information that remains undisclosed in the records, with the exception of the personal information that relates exclusively to the appellant's son on pages 3, 4, 11 and 14 of the records, subject to my finding in regard to the police's exercise of discretion.

[51] The information at issue was withheld under both the section 38(b) and section 38(a), in conjunction with sections 8(1)(c) and 8(2)(a) (law enforcement), exemptions. Because I have found that some of the information is exempt under section 38(b), I do not need to consider whether it is also exempt under section 38(a).

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<sup>9</sup> Order P-1134.

<sup>10</sup> Orders P-256 and PO-2536.

[52] With regard to the information that is exclusively the appellant's son's, I do not need to consider whether it is exempt under section 38(a), as the appellant, having lawful custody over her son, would have a right of access to his personal information.

**C. Did the police exercise their discretion under section 38(b)? If so, should I uphold the exercise of discretion?**

[53] 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, I may determine whether the institution failed to do so.

[54] In addition, I 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.

[55] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>11</sup> This office may not, however, substitute its own discretion for that of the institution.<sup>12</sup>

[56] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:

- the purposes of the *Act*, including the principles that information should be available to the public, individuals should have a right of access to their own personal information, exemptions from the right of access should be limited and specific and the privacy of individuals should be protected;
- the wording of the exemption and the interests it seeks to protect;
- whether the requester is seeking his or her own personal information;
- whether the requester has a sympathetic or compelling need to receive the information;

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<sup>11</sup> Order MO-1573.

<sup>12</sup> Section 43(2).

- whether the requester is an individual or an organization;
- the relationship between the requester and any affected persons;
- whether disclosure will increase public confidence in the operation of the institution;
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person;
- the age of the information; and
- the historic practice of the institution with respect to similar information.

[57] The police submit that they exercised their discretion under section 38(b) in making the decision to deny the appellant access to the information at issue. The police also submit that they relied on the presumptions in sections 14(3)(a) and (b) in their consideration of whether the disclosure of the personal information at issue would result in an unjustified invasion of personal privacy.

[58] The police acknowledge that the appellant has a right to access her own personal information. The police state that they endeavoured to respect the spirit of the *Act* at all times, where it involved the appellant's right to access. In the circumstances of this request, the police submit that they were aware of their responsibility to respect the affected party's right to privacy and believe that a balance was struck between these two competing considerations.

[59] The police also submit that they exercised their discretion in good faith, for a proper purpose and took into account all relevant factors.

[60] The police indicate that, during mediation, they advised the appellant that the personal information remaining at issue was that of the affected party or her son, and not the appellant's own personal information. The police state that they made every effort to provide the appellant with all of her personal information. The police submit that none of the redacted portions of the record have a bearing on the appellant's ability to make use of the advice provided to her by the police to avoid further incidents in the future. The police also submit that they showed a display of good faith by issuing a revised decision when the criminal investigation was concluded in attempt to provide the appellant with all of her personal information.

[61] In her representations, the appellant submits that while the police did exercise their discretion, this office should not uphold that decision. The appellant did not

provide any further explanation as to why I should not uphold the police's exercise of discretion.

[62] I have reviewed the circumstances surrounding this appeal and the representations of both parties on the manner in which the police exercised their discretion. I note that the majority of the information in the records was disclosed to the appellant and that very little of the appellant's personal information was withheld. The majority of the information that was withheld consists of the personal information of the affected party. Based on my review of the police's representations and the records, I am satisfied that the police weighed the appellant's interest in obtaining access to information against the protection of the affected party's personal privacy. Accordingly, I am satisfied that the police did not err in the exercise of their discretion to refuse to disclose the personal information contained in the records that relates solely to the affected party.

[63] Therefore, I uphold the police's decision to withhold those portions of the records that qualify for exemption under section 38(b) of the *Act*.

**ORDER:**

1. I order the police to disclose the personal information that relates exclusively to the appellant's son on pages 3, 4, 11 and 14 of the records to the appellant by **December 30, 2013**, but not before **December 23, 2013**. I have enclosed a highlighted copy of the records with the police's copy of this order, with the additional information to be disclosed highlighted in pink.
2. I uphold the police's decision to withhold the remaining information at issue from disclosure.
3. In order to verify compliance with provision 1, I reserve the right to require the police to provide me with a copy of the information disclosed to the appellant.

Original Signed By: \_\_\_\_\_  
Justine Wai  
Adjudicator

\_\_\_\_\_ November 21, 2013