Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2958

Appeal MA11-472

Toronto Police Services Board

October 4, 2013

Summary: The police received a request for records relating to an incident at a retail store. The police issued a decision with respect to two responsive records: an occurrence report and a record of appearance. The appellant appealed the decision to this office. During mediation, the police advised that the investigation was concluded and issued a revised decision to the appellant, granting partial access to the records. The police claimed the exemptions in section 38(a), read with section 8(1)(l), and section 38(b), read with section 14(1), to withhold portions of the records. This order upholds the police's decision to withhold certain portions of the records at issue. However, the police are ordered to disclose other information withheld under section 38(a), in conjunction with section 8(1)(l), as well as the event number on pages 1 and 7 of the records. The police are also ordered to conduct a new search for additional records responsive to the appellant's request.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1), 8(1)(l), 14(1), 17(1), 38(a) and 38(b)

Orders and Investigation Reports Considered: Orders 134, MO-2378, P-880, PO-1730, PO-2254

OVERVIEW:

[1] The Toronto Police Services Board (the police) received a request, pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for

information relating to an incident at a store involving an alleged theft and assault (the incident).

[2] The appellant described the records he was seeking as follows:

> While shopping at a [named] store upon leaving the exits I was approached by two security guards who accused me of shoplifting and assaulted.

[3] The police issued a decision denying access to the responsive records in full. The police advised the requester that the subject matter of the request was under investigation, and that the law enforcement exemptions in sections 8(1)(a) (law enforcement matter) and (b) (law enforcement investigation) of the *Act* preclude dissemination of information prior to the conclusion of a police investigation. The police suggested that the requester contact the officer in charge and upon conclusion of the investigation, resubmit his request.

[4] In addition, the police advised the requester that they also relied on section 38(a), in conjunction with sections 8(1)(a), (b) and (l) (commission of an unlawful act or control of crime), and section 38(b), read with section 14(1) (personal privacy) of the *Act*. In support of their reliance in section 38(b), in conjunction with section 14(1), the police applied the presumption in section 14(3)(b) (investigation into violation of law) to the records.

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

[6] During mediation, the police advised the mediator that the incident relating to the request was no longer under investigation. As a result, the police confirmed that they no longer rely on the law enforcement exemptions in sections 8(1)(a) and 8(1)(b) and issued an amended access to the appellant, granting partial access to the following two records:

- an occurrence report – 9 pages
- a record of appearance – 3 pages

[7] The police advised the appellant that they applied the exemptions in section 38(a), read with section 8(1)(l), and section 38(b), read with section 14(1), to withhold portions of the responsive records. With regard to the report date that was severed from the record of appearance, the police stated that this information was not responsive to the appellant's request.

[8] After the revised decision was issued, the mediator contacted two individuals whose information is contained in the records (the affected parties). One individual did

not respond and the other individual did not consent to the disclosure of his information.

[9] In addition, during mediation, the appellant advised the mediator that he sought access to the complete police file, including all witness statements, police officer's notes, photos and other records relating to the investigation of the incident. The appellant indicated that this includes all information marked as non-responsive in the record of appearance.

[10] The police advised the mediator that they consider witness statements, police officers' notes, photos and other records relating to the investigation of the incident to be outside the scope of the appellant's original request. The police suggested that the appellant submit a new access request for these records or have the issue of scope of the request proceed to the adjudication stage of the appeal process for this appeal.

[11] Subsequently, the appellant confirmed his interest in obtaining access to the names of the affected parties and any information they may have provided to the police during the investigation. The appellant advised the mediator that he is not interested in the birth dates, contact information or driver's license numbers of the affected parties. The appellant also confirmed that he is interested in the report date severed from the record of appearance. Finally, the appellant stated that he views the witness statements, police officers' notes, photos and any other records relating to the investigation of the incident to be within the scope of his request and, therefore, responsive to his original request.

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

[13] The adjudicator originally assigned to conduct the inquiry invited the police and affected parties to make submissions and both did so. The police made representations on all of the issues in this appeal and the affected parties made submissions on whether the records at issue contain personal information and whether the disclosure of that personal information would constitute an unjustified invasion of their personal privacy. The appellant was then invited to make submissions in response, but he did not submit any representations to this office.

[14] 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. However, I order the police to disclose the information withheld under section 38(a), in conjunction with section 8(1)(l), as well as the event number on pages 1 and 7 of the records. I also order the police to conduct a new search for additional records responsive to the appellant's request.

RECORDS:

[15] The records at issue consist of the following: a nine page occurrence report and a three page record of appearance.

ISSUES:

A. What is the scope of the request? What records are responsive to the request?

B. Does the occurrence report contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

C. Does the discretionary exemption at section 38(a), read in conjunction with the section 8(1)(l) exemption apply to the information at issue in the occurrence report?

D. Does the discretionary exemption at section 38(b) apply to the information at issue in the occurrence report?

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

DISCUSSION:

A. What is the scope of the request? What records are responsive to the request?

Scope of the Request

[16] During mediation, the appellant advised the mediator that he sought access to the complete police file, including all witness statements, police officer's notes, photos and other records relating to the investigation of the incident. The appellant indicated that this includes all information marked as not responsive in the record of appearance.

[17] The police submit that they consider witness statements, police officers' notes, photos and other records relating to the investigation of the incident to be outside the scope of the appellant's original request.

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

> (1) A person seeking access to a record shall,

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

[19] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[1]

[20] To be considered responsive to the request, records must "reasonably relate" to the request.[2]

[21] The appellant's original request read as follows:

> While shopping at a [named] store upon leaving the exits I was approached by two security guards who accused me of shoplifting and assaulted.

[22] In their representations, the police submit that they "processed the appellant's request believing that the appellant wished to receive the following police records related to the above-mentioned incident: [numbered occurrence report] and [numbered record of appearance]."

[23] However, during mediation, the police submit that neither the mediator nor the appellant addressed the scope of the appellant's request. Rather, the police submitted that the mediator focussed solely on whether the investigation into the incident that is the subject of this request had been concluded. The police note a number of instances during the mediation process in which they allege that the issue of scope could have been raised, but was not.

[24] The police submit further that even after the investigation was closed and they issued a revised decision, granting partial access to the two reports, the issue of scope was not raised as an issue in the appeal by either the appellant or the mediator. In

[1] Orders P-134 and P-880.
[2] Orders P-880 and PO-2661.

fact, the police submit that the issue of scope was only raised by the mediator and the appellant nearly five months after the appellant received the revised decision letter.

[25] It is the police's position that the appellant had ample opportunity to raise any concerns regarding any additional records that he felt were related to the incident and subsequent investigation.

[26] The appellant did not make representations in response to the Notice of Inquiry.

[27] Upon review of the police's representations and a review of the entire appeal file, I find that the police interpreted the appellant's request too narrowly at the outset and failed to clarify his request with him.

[28] In Order P-880, Adjudicator Anita Fineberg determined that records must "reasonably relate" to the request in order to be considered "responsive". She went on to state:

> … the purpose and spirit of freedom of information legislation is best served when government institutions adopt a liberal interpretation of a request. If an institution has any doubts about the interpretation to be given to a request, it has an obligation pursuant to section 24(2) of the *Act* to assist the requester in reformulating it. As stated in Order 38, an institution may in no way unilaterally limit the scope of its search for records. It must outline the limits of the search to the appellant.

[29] Similarly, in Order 134, former Commissioner Sidney B. Linden commented on the proper interpretation of section 24(2). In that case, a requester sought access to a number of records relating to dealings between the Ministry of Finance and various Automobile Associations. Commissioner Linden found that the request was both broad and somewhat vague, but went on to find that the Ministry had a statutory obligation to assist in clarifying the scope of the request. In that context, the former commissioner stated:

> Due to the way in which the request was worded, I can appreciate the difficulty experienced by the institution in assisting the appellant to clarify the request, as required under subsection 24(2). Nonetheless, the *Act* imposes an obligation on the institution to offer assistance, and, based on the information supplied to me during the course of this appeal, it is difficult for me to conclude that this obligation has been adequately discharged. … In my view, given the circumstances that existed at the time the request was made, it was at least possible that the appellant intended his request to include access to the legal files. This possibility was not specifically identified or addressed by the institution at that time. In its representations on this point, the institution points out that the legal

> files are not routinely kept in the division of the institution which received the request. Since the appellant was not in a position to know this, I do not think this submission advances the institution's argument.
>
> … the institution felt that the files were outside the scope of the original request and should be the subject of a new one; and the appellant thought that he was seeking information which he expected to receive in response to his initial request. While I can appreciate that there is some ambiguity on this point, in my view, the spirit of the *Act* compels me to resolve this ambiguity in favour of the appellant. The institution has an obligation to seek clarification regarding the scope of the request and, if it fails to discharge this responsibility, in my view, it cannot rely on a narrow interpretation of the scope of the request on appeal.

[30] In Order PO-1730, Commissioner Ann Cavoukian applied Order 134 with regard to a request for access to all records pertaining to Ontario Hydro's exclusion from the *Act*. When Ontario Hydro advised the appellant that it continued to be covered by the *Act* and therefore no responsive records exist, the appellant clarified that his request included records relating to both Ontario Hydro and its successor companies. Ontario Hydro disagreed with the appellant's clarification and maintained its position that the original request was clear and was restricted to Ontario Hydro. In her decision, the commissioner found:

> At the time of making his request, the appellant was not in a position to know any of the details regarding the corporate structure that would be taking over Ontario Hydro's operations, and more specifically that two of the successor companies, rather than Ontario Hydro itself, would be removed from the jurisdiction of the *Act*. These decisions were made over the course of discussions leading up to the restructuring of Ontario Hydro, effective April 1, 1999. Given the circumstances that existed at the time of his request, it is my view that the appellant more than satisfactorily discharged his responsibilities under section 24(1)(b).
>
> Ontario Hydro, on the other hand, clearly had more detailed knowledge of its restructuring activities at the time it received the appellant's request, including intentions regarding ongoing coverage of any successor companies under the *Act*. In my view, it was reasonable for Ontario Hydro to conclude, without further discussions with the appellant, that his request covered both Ontario Hydro and its successor companies. It was not reasonable, however, to narrowly interpret the request to exclude any successor companies without first raising this issue with the appellant. Ontario Hydro had an obligation to seek clarification under section 24(2) if it had any doubts, and I find that it failed to discharge this responsibility in its dealings with the appellant.

> ….
>
> Similarly, Ontario Hydro had an obligation to seek clarification before narrowly interpreting the scope of the appellant's request. Having unilaterally limited the scope of the request without seeking any clarification from the appellant, it cannot rely on this narrow interpretation on appeal.

[31] In this case, the appellant's request did not clearly state the types of records he sought relating to the incident. The request only identified the incident. Applying the commissioner's reasoning in Order PO-1730, I find that the appellant would not have been in a position to know exactly what types of records would be searched by the police and what types of records would reasonably relate to his request. On the other hand, the police clearly have detailed knowledge of the types of records that may be responsive to the appellant's request. In my view, it was reasonable for the police to conclude, without further clarification from the appellant, that his request was for all records relating to the incident. I find that it was not reasonable for the police to narrowly interpret the request and search for only the record of appearance and occurrence report, without first raising this issue with the appellant. Upon review of the original request, I find that the police had an obligation to seek clarification under section 24(2) and they failed to discharge this duty in their dealings with the appellant.

[32] Although the issue of scope might have been raised earlier in the process by either party to the appeal, I find that this fact does not diminish the police's responsibility to seek clarification with the appellant upon receipt of the original request.

[33] Accordingly, I find that the complete police file, including all witness statements, police officer's notes, photos and other records relating to the investigation of the incident to be within the scope of the appellant's original request and should have been addressed by the police in their original decision letter. As a result, I will order the police to conduct an additional search for responsive records.

Responsiveness

[34] In their decision, the police advised the appellant that the report date was severed from the record of appearance. The police advise that this report date was severed under "non-responsive" because the date reflects the date the record was printed from the police's CIPS database and is not related to the actual incident or request.

[35] In Order PO-2254, Adjudicator Sherry Liang found that "administrative information relating to the printing of the reports" requested to be non-responsive to the appellant's request:

> The information in these portions of the record reflect when the record was printed and by whom, and was created after the appellant's request. I am satisfied that this information is not covered by the scope of the appellant's request, and I uphold the Ministry's decision to withhold this information.

[36] I adopt this reasoning for the purposes of this appeal. From my review of the records, the only information marked as non-responsive relates solely to the date the record of appearance was printed. This information does not relate to the incident that is the subject of the appellant's request. Accordingly, I find that the information marked as non-responsive does not "reasonably relate" to the request and is, therefore, not covered within the scope of the appellant's request. I uphold the police's decision to withhold this information as non-responsive to the request.

B. Does the occurrence report contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[37] 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.[3] 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.

[38] 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

[3] Order M-352.

> 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 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;

[39] 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.[4]

[40] Sections 2(2.1) and (2.2) also relate to the definition of personal information. These sections state:

> (2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (2.2) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[4] Order 11.

[41] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[5]

[42] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[6]

[43] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[7]

[44] The police submit that the records were created in connection to a police investigation of the incident that the appellant was involved in. In the confidential portions of their representations, the police describe the types of personal information they withheld from disclosure and identify the individual to whom the personal information relates. The police submit that the information withheld is of a personal nature and does not relate to individuals in a professional, official or business capacity.

[45] The two affected parties submit that the records contain their personal information.

[46] The appellant did not make representations.

[47] Based on my review of the occurrence report, I find that the majority of the withheld portions of it contain "personal information", as that term is defined in section 2(1) of the *Act*.

[48] Specifically, I find that all of the records contain the appellant's personal information, including his date of birth, race, national or ethnic origin, and sex (paragraph (a)), information relating to his criminal history (paragraph (b)), his address and telephone number (paragraph (d)), the opinions or views of individuals as they relate to the appellant (paragraph (g)) and his name along with other personal information about him (paragraph (h)). As the occurrence report relates to an incident that was reported to the police involving the appellant's behaviour, as well as his subsequent arrest, I find that it can be considered to contain his personal information, within the meaning of that term in section 2(1) of the *Act*.

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[5] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[6] Orders P-1409, R-980015, PO-2225 and MO-2344.
[7] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[49] In addition, I find that the majority of the withheld portions of the occurrence report contain the personal information of other identifiable individuals, including the affected parties. The personal information consists of their dates of birth, national or ethnic origins, and sex (paragraph (a)), information relating to their medical history (paragraph (b)), identifying numbers or other particulars assigned to these individuals, such as a licence plate (paragraph (c)), the addresses and telephone numbers of these individuals (paragraph (d)), and their names along with other personal information about them or where the disclosure of the name would reveal other personal information about them (paragraph (h)).

[50] I note that the police severed the event number on pages 1 and 7 of the occurrence report. The police's representations do not address how the event number constitutes "personal information" within the meaning of section 2(1). In Order MO-2378, Adjudicator Daphne Loukidelis considered whether Intergraph Computer Aided Dispatch (ICAD) event numbers constitute "personal information":

> With respect to the ICAD event numbers, I find that these do not fit within the definition of "personal information in section 2(1) of the *Act*. Previous orders of this office have established that information is identifiable if there is a *reasonable expectation* that an individual may be identified by the disclosure of the information [see *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.) and Order P-230]. This suggests that there must be a means of connecting the information with an identifiable individual. I find that I have not been provided with evidence to substantiate that some means of connecting the event number to a specific individual without reference to the Police database, which is not accessible to the public, exists. In my view, therefore, the event number cannot identify any individual and accordingly, it cannot accurately be described as an "identifying number." More generally, the number is not information about an "identifiable individual".

[51] I adopt this analysis for the purposes of this appeal. Based on my review of the occurrence report, I find that the event number is analogous to the ICAD event number considered in Order MO-2378. In the case of the event number in the occurrence report at issue, I find that it is information about the event and not an "identifiable individual" because it is not connected to the appellant, but rather the incident. Therefore, I find that the event number on pages 1 and 7 of the occurrence report is not "personal information" within the meaning of section 2(1) of the *Act* and I will order it disclosed, as no other exemptions have been claimed for it and no mandatory exemptions apply.

[52] As I have found that the rest of the severed portions of the records contain the personal information of the appellant and/or other individuals, I will consider whether they qualify for the personal privacy exemption under the discretionary exemption at

section 38(b) or the discretionary exemption at section 38(a), found in Part II of the *Act*.

C. Does the discretionary exemption at section 38(a), read in conjunction with the section 8(1)(l) exemption apply to the information at issue in the occurrence report?

[53] Section 36(1) 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. The police claim that some of the information on pages 2 and 7 of the occurrence report is exempt from disclosure under the discretionary exemption at section 38(a) of the *Act* read in conjunction with the law enforcement exemption at section 8(1)(l).

[54] Section 38(a) reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if section 6, 7, **8**, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

[55] The police take the position that two of the severances on pages 2 and 7 of the occurrence report are exempt pursuant to section 38(a), read in conjunction with section 8(1)(l). That section provides:

> 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.

[56] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting further events in a law enforcement context.[8]

[57] For the purposes of section 8(1)(l), the police must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[9]

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[8] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

[9] 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.).

[58] It is not sufficient for an institution to take the position that the harms under section 8 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfillment of the requirements of the exemption.[10]

[59] The police made confidential representations on the possible application of section 8(1)(l) to two excerpts on pages 2 and 7 of the occurrence report.

[60] Upon review of the withheld information and the representations of the police, I find that the police did not provide me with sufficiently "detailed and convincing" evidence to demonstrate that the disclosure of this information could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. I find that the police's representations are speculative and do not establish a reasonable expectation of the harm described in section 8(1)(l).

[61] Therefore, I find that section 38(a), read in conjunction with section 8(1)(l), does not apply to the two severances made on pages 2 and 7 of the occurrence report and I will order them disclosed, as no other exemptions have been claimed and no mandatory exemptions apply to this information.

D. Does the discretionary exemption at section 38(b) apply to the information at issue in the occurrence report?

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

> A head may refuse to disclose to the individual to whom the information related personal information,
>
> > if the disclosure would constitute an unjustified invasion of another individual's personal privacy.

[63] 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.[11]

[64] 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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[10] Order PO-2040; *Ontario (Attorney General) v. Fineberg, supra* note 8.
[11] Order M-352.

[65] In the circumstances of this appeal, it must be determined whether disclosing the personal information of the appellant and other individuals would constitute an unjustified invasion of these other individuals' personal privacy under section 38(b).

[66] 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.

[67] Under section 14, where a record contains the personal information of an individual other than the requester, the institution must refuse to disclose that information unless disclosure would not constitute an "unjustified invasion of personal privacy".

[68] 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 does not constitute an unjustified invasion of 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).

[69] The police submit that section 38(b) applies to the withheld responsive information remaining 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. In addition, the police submit that none of the factors listed in section 14(2) apply to the information at issue. However, the police submit that the presumption in section 14(3)(b) of the *Act* applies. Section 14(3)(b) states:

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

[70] The police submit that section 14(3)(b) applies to the information at issue because the police conducted an investigation and gathered personal information about identifiable individuals as part of an investigation into a possible violation of law. Therefore, the disclosure of such information would constitute an unjustified invasion of

personal privacy and is exempt from disclosure. Noting Order P-242, the police submit that section 14(3)(b) applies even when criminal proceedings are not commenced.

[71] In their representations, the two affected parties advised that they do not consent to the disclosure of their personal information to the appellant and submit that the disclosure of the information at issue would constitute an unjustified invasion of their personal privacy.

[72] The appellant did not make submissions.

[73] Based on my review of the information withheld 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 noted, this office has found that the presumption in section 14(3)(b) may still 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.[12] The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.[13]

[74] I have reviewed the occurrence report and it is clear from the circumstances that the personal information in it was compiled and is identifiable as part of the police's investigation into a possible violation of law, namely the *Criminal Code* of Canada.

[75] Accordingly, I find that the personal information in the occurrence report 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).

[76] Given the application of the presumption in section 14(3)(b) and the fact that no factors in favour of disclosure were claimed or otherwise established, I am satisfied that the disclosure of the remaining personal information in the occurrence report would constitute an unjustified invasion of another individual's personal privacy. Accordingly, I find that this information is exempt from disclosure under section 38(b) of the *Act*, subject to my assessment as to whether the police exercised their discretion appropriately.

E. Did the police exercise their discretion under section 39(b)? If so, should I uphold their exercise of discretion?

[77] 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, this office may review the police's decision to

[12] Orders P-242 and MO-2235.
[13] Orders MO-2213 and PO-1849.

determine whether it exercised its discretion and, if so, to determine whether it erred in doing so.[14]

[78] 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; or
- it fails to take into account relevant considerations.

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

[80] In support of its position that it properly exercised its discretion to withhold portions of the records under section 38(b) of the *Act*, the police state that they considered the following:

- Section 29 of the *Act* authorizes the indirect collection of personal information for the purpose of law enforcement. Section 28 introduces safeguards to the collection of personal information. In the case at issue, the balance between right of access and the protection of privacy must be given in favour of protecting the privacy of the other identifiable individuals.
- In assessing the value of protecting the privacy interest of an individual other than the requester, one must consider the nature of the institution. Given the unique status of law enforcement institutions within the *Act* and the unique status to authorize the collection of personal information, the police submit that they generally view the spirit and content of the *Act* as placing a greater responsibility to safeguarding the privacy interests of individuals where personal information is collected.

[81] In the circumstances of this appeal, the police note that no charges were laid as a result of the incident, which suggests that there was no clear indication of culpability. The police submit that this fact and the possibility that the disclosure of the affected parties' personal information could lead to their exposure to further negative attention from the appellant weighed heavily towards the protection of the privacy of the other individuals identified in the records.

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[14] Orders PO-2129-F and MO-1629.
[15] Order MO-1573.

[82] The police submit that they did not exercise their discretion in bad faith or for an improper purpose and they took into account all relevant considerations in exercising its discretion to apply the exemption in section 38(b) to the information at issue.

[83] The appellant did not make representations with regard to the police's exercise of discretion.

[84] Based on my review of the police's representations and the information at issue, I am satisfied that the police weighed the interests in favour of disclosure against those favouring non-disclosure and properly exercised their discretion to withhold the information at issue. I am not persuaded that the police failed to take relevant factors into account or that they considered irrelevant factors in withholding the personal information in the occurrence reports. Therefore, I find that the police exercised their discretion under section 38(b) and did so in a proper manner.

ORDER:

1. I order the police to conduct a search for all records that relate to the incident that is the subject of the appellant's original request, including, but not limited to, all witness statements, police officer's notes, photos and other records relating to the investigation of the incident.

2. I order the police to issue a new decision letter to the appellant by **November 4, 2013**.

3. I order the police to disclose the event number identified on pages 1 and 7 and the information withheld under section 38(a), in conjunction with section 8(1)(l), on pages 1 and 7 of the occurrence report by **November 8, 2013**, but not before **November 4, 2013**.

4. I uphold the police's decision to withhold the remaining information at issue.

5. In order to verify compliance with this order, I reserve the right to require the police to provide me with a copy of the records that are disclosed to the appellant pursuant to order provision 3.

Original signed by: October 4, 2013
Justine Wai
Adjudicator