Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2970

Appeal MA12-501

Windsor Police Services Board

October 31, 2013

Summary: The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* to the Windsor Police Services Board for access to information related to a complaint made against him. The police granted partial access to the responsive record, severing portions pursuant to section 38(a), read with sections 7(1), 8(1)(c), and 12, and section 38(b), read with sections 14(2)(d), and 14(3)(b), (d), and (h) of the *Act*. The appellant appealed the police's decision. In this order, the adjudicator upholds the police's decision in part. She finds that section 38(a), read with section 12, and section 38(b), apply to some portions of the record. She also upholds the police's discretion to deny access to that information. However, she finds that none of the exemptions apply to some of the information at issue and she orders that information disclosed.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of "personal information"); 7(1); 8(1)(c); 12; 14(1)(f); 14(2)(d), (f), (h); 14(3)(b), (d), (h); 38(a), (b).

Cases Considered: *R v. Campbell* [1999] S.C.R. 565.

OVERVIEW:

[1] The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Windsor Police Services Board (the police) for access to information related to a complaint made against him.

[2] The police located the record responsive to the request and granted the appellant partial access to it. Access to portions of the record was denied in accordance with section 38(b) (personal privacy), read in conjunction with the presumption in section 14(3)(b) (investigation into a possible violation of law) of the *Act*.

[3] The appellant appealed the police's decision to deny access to portions of the responsive record.

[4] During mediation, the police advised the mediator that in addition to section 38(b) they were also relying on section 38(a) (discretion to withhold a requester's own information), read in conjunction with section 7(1) (advice and recommendations), section 8(1)(c) (law enforcement) and section 12 (solicitor-client privilege). The police issued a supplemental decision to the appellant notifying him of the additional exemption claims.

[5] As the appeal was not resolved during mediation, the file was transferred to the adjudication stage of the appeal process for an inquiry. I began my inquiry into this appeal by sending a notice of inquiry, setting out the facts and issues, to the police. The police provided representations in response.

[6] The appellant was then provided with a copy of the notice of inquiry, together with the representations of the police. The appellant provided representations in response.

[7] For the reasons that follow, in this order I make the following findings:

- the record contains the "personal information" of the appellant and other identifiable individuals;
- the discretionary exemption at section 38(a), read in conjunction with the solicitor-client privilege exemption at section 12, applies to some of the information at issue;
- the discretionary exemption at section 38(a), read in conjunction with the law enforcement exemption at section 8(1)(c) and the advice and recommendations exemption at section 7(1), does not apply to any of the information at issue;
- the discretionary personal privacy exemption at section 38(b) applies to the information for which it has been claimed;

- the police's exercise of discretion to deny access to the severed portions of the record pursuant to sections 38(a) and (b) was appropriate and should be upheld.

RECORDS:

[8] The record at issue in this appeal consists of a 19-page document entitled *General Occurrence Hardcopy.*

ISSUES:

A. Does the record 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(a), read in conjunction with the solicitor-client privilege exemption at section 12 apply to the information at issue?

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

D. Does the discretionary exemption at section 38(a), read in conjunction with the exemption for advice or recommendations at section 7(1) apply to the information at issue?

E. Does the discretionary personal privacy exemption at section 38(b) apply to the information at issue?

F. Did the police exercise their discretion under sections 38(a) and (b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A. Does the record contain "personal information" as defined by section 2(1) and, if so, to whom does it relate?

[9] Under the *Act*, different exemptions may apply depending on whether or not a record contains the personal information of the requester. Where records contain the requester's own information, access to the records is addressed under Part II of the *Act* and the discretionary exemptions at section 38 may apply. Where the records at issue contain the personal information of individuals other than the appellant but not that of the appellant, access to the records is addressed under Part I of the *Act* and the mandatory exemption at section 14(1) may apply.

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

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name 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;

[11] 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.[1]

[12] 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.[2]

[13] 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.[3]

[14] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[4]

[15] The police submit that the information severed on pages 3, 4, 5, 6, 8, 12, 15 and 16 of the general occurrence report consist of the "personal information" of individuals other than the appellant, as that term is defined in section 2(1) of the *Act*. They submit that this information falls within paragraphs (a), (c), (d), (g), and (h) of the definition of section 2(1) of the *Act* as it includes individuals' names, dates of birth, addresses, telephone numbers, and, in certain cases, ethnicities, driver's licence numbers and information that the individuals provided to the police in order to assist in an investigation.

[16] Having reviewed the responsive record, I find that it contains the personal information of the appellant, including recorded information about him such as his race, age, and sex (paragraph (a)), criminal or employment history (paragraph (b)), address and telephone number (paragraph (d)), and his name, along with other personal information about him (paragraph (h)).

[17] The record also contains the personal information of other identifiable individuals, including a number of witnesses. This information qualifies as their personal information because it contains information pertaining to their race, age and sex (paragraph (a)), address and telephone number (paragraph (d)), and their name, along with other personal information about them (paragraph (h)).

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[1] Order 11.
[2] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[3] Orders P-1409, R-980015, PO-2225 and MO-2344.
[4] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[18] As described above, given that the record contains both the appellant's personal information, as well as that of other identifiable individuals, Part II of the *Act* applies to the record in its entirety. Therefore, I must consider whether the severed information is exempt from disclosure under the discretionary exemptions at section 38(a) and (b).

B: Does the discretionary exemption at section 38(a), read in conjunction with the section 12 exemption apply to the information at issue?

[19] 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.

[20] 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.
> > [emphasis added]

[21] Section 38(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.[5]

[22] Where access is denied under section 38(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information. The institution is asked to address this under "Exercise of Discretion", below.

[23] In this case, the police rely on section 38(a), read in conjunction with solicitor client privilege exemption at section 12, to exempt the information at issue on pages 14 and 17 of the record.

[24] Section 12 states as follows:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

[5] Order M-352.

[25] Section 12 contains two branches as described below. Branch 1 arises from the common law and branch 2 is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privilege

[26] Branch 1 of the section 12 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 12 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue.[6]

[27] In the circumstances of this appeal, it appears that solicitor-client communication privilege may apply.

Solicitor-client communication privilege

[28] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.[7]

[29] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[8]

[30] The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach.[9]

[31] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[10]

[32] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.[11]

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[6] Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).
[7] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[8] Orders PO-2441, MO-2166 and MO-1925.
[9] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[10] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[11] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

Branch 2: statutory privileges

[33] Branch 2 is a statutory exemption that is available in the context of counsel employed or retained by an institution giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

Statutory solicitor-client communication privilege

[34] Branch 2 applies to a record that was "prepared by or for counsel employed or retained by an institution for use in giving legal advice."

Representations

[35] The police submit that the severances made to pages 14 and 17 of the record qualify as solicitor-client privileged information. They submit that these portions of the record consist of legal advice provided by Crown counsel to the police at the conclusion of the investigation. They further submit:

> In a Superior Court Decision, *R v. Welsh,* 2007,[12] J. O'Connor states:
>
> > [I]n my view, the solicitor-client privilege must be scrupulously guarded and respect by the courts, whether it involves an accused person and his or her counsel or the police seeking legal advice from their counsel, usually a Crown Attorney….Accused person and police officers, knowing their communications may be scrutinized by a judge, who may then be required to assess their credibility, would be less inclined to be frank in their discussions. The possibility that their discussions could be released into the public domain would have a chilling effect on open discussions between solicitor and client. Lawyers would be hesitant to give advice lest they be summoned to then give evidence, thus disqualifying them from performing their proper function as counsel.

[36] In his representations, the appellant neither responded to the police's representations on this issue nor did he make any specific representations on the possible application of section 38(a), read in conjunction with section 12, to the severed information on pages 14 and/or 17 of the record.

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[12] ONCJ 651 (CanLII).

Analysis and finding

[37] For a record to be subject to the common law solicitor-client privilege exemption under branch 1, it must be established that the record is a written or oral communication of a confidential nature between a client and a legal advisor that is directly related to seeking, formulating or giving legal advice.[13]

[38] Previous orders have established that a solicitor-client relationship exists between a local police force and a Crown Attorney.[14] However, while communications between police and Crown counsel may be privileged, this is only the case if they amount to information that is directly related to seeking, formulating or giving legal advice.

[39] In *R. v. Campbell*[15] the Supreme Court of Canada found that privilege applied to communications between a Royal Canadian Mounted Police (RCMP) officer and a federal Department of Justice lawyer over the legality of a proposed "reverse sting" operation by the RCMP. The court emphasized that not everything done by a government (or other) lawyer attracts solicitor-client privilege. The Court stated that:

> [w]hether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered.

[40] This office has applied *Campbell* in several cases.[16] In each of these cases, privilege was found to exist on the basis that the police sought legal advice from Crown counsel.

[41] In the circumstances of the current appeal, having reviewed the severances for which section 38(a), read in conjunction with section 12, has been claimed, I do not accept that the last severance on page 17 qualifies as solicitor-client privileged communications. The information in this severance does not contain legal advice that was provided by Crown counsel to police, but is rather an internal police communication. However, I accept that both severances on page 14 and the first two severances made on page 17 contain information that qualifies as solicitor-client privileged communications that fall under branch 1 of the exemption at section 12 of the *Act.* In my view, were this information disclosed, it would clearly reveal legal advice provided by Crown counsel to the police regarding the incident in which the appellant was involved.

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[13] *Descôteaux, supra,* note 7.
[14] Orders PO-1779, PO-1931 and MO-1241.
[15] [1999] 1 S.C.R. 565.
[16] Orders PO-1779, PO-1931 and MO-1241.

[42] Accordingly, subject to my review of the ministry's exercise of discretion, I find section 38(a), read in conjunction with the solicitor-client privilege exemption at section 12 applies to both severances on page 14 and the first two severances made on page 17 of the record.

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

[43] The police also rely on section 38(a), read in conjunction with the law enforcement exemption dealing with investigative techniques and procedures at section 8(1)(c) of the *Act*. That section reads:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

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

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

[45] The term "law enforcement" has been found to apply with respect to a police investigation into a possible violation of the *Criminal Code.*[17]

[46] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[18]

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[17] Orders M-202 and PO-2085.
[18] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

[47] Where section 8(1)(c) uses the words "could reasonably be expected to", the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[19]

[48] It is not sufficient for an institution to take the position that the harms under section 8 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfilment of the requirements of the exemption.[20]

[49] In order to meet the "investigative technique or procedure" test, the institution must show that disclosure of the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. The exemption normally will not apply where the technique or procedure is generally known to the public.[21]

[50] The techniques or procedures must be "investigative". The exemption will not apply to "enforcement" techniques or procedures.[22]

Representations

[51] The police submit that the final paragraph on page 17 is exempt from disclosure pursuant to section 38(a), read in conjunction with section 8(1)(c). It submits that the information on that page "reveals procedures currently in use during a criminal investigation and subsequent procedures followed when an investigation concludes with no charges." They further submit that the information "outlines communications with various units related to procedures followed during and at the conclusion of an investigation" and that "[t]hese techniques and procedures are not known to the public."

[52] The appellant does not make any specific representations on this issue.

Analysis and findings

[53] I have considered the information on page 17 of the record, the last severance made to that page, and I do not accept the police's submission that it qualifies for exemption pursuant to section 38(a), read in conjunction with the law enforcement exemption at section 8(1)(c).

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[19] 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.).
[20] Order PO-2040; *Ontario (Attorney General) v. Fineberg*.
[21] Orders P-170, P-1487, MO-2347-I and PO-2751.
[22] Orders PO-2034, and P-1340.

[54] As noted above, previous orders have established that for this exemption to apply, the techniques or procedures must be "investigative" in nature.[23] As submitted by the police, the severed information reveals communications with other law enforcement units regarding the incident involving the appellant. In my view, the severance does not reveal a technique that is "investigative," but rather an administrative step that is routinely taken by the police in certain circumstances, specifically following the conclusion of an investigation.

[55] Moreover, as noted above, for section 8(1)(c) to apply, evidence amounting to speculation of possible harm is not sufficient.[24] In the circumstances of this appeal even if the information could be said to reveal an "investigative technique or procedure", I do not accept that I have been provided with the requisite "detailed and convincing evidence" to establish that the disclosure of the specific information that has been severed could reasonably be expected to hinder or compromise its effective utilization.

[56] Accordingly, I find that section 38(a) read in conjunction with section 8(1)(c), does not apply to the last severance on page 17 of the record.

D. Does the discretionary exemption at section 38(a), read in conjunction with the exemption for advice or recommendations at section 7(1) apply to the information at issue?

[57] The police also claim that the discretionary exemption at section 38(a), read in conjunction with section 7(1) applies to the information at issue on pages 14 and 17 of the record because that information qualifies as advice or recommendations. As I have found that the majority of the severed information on pages 14 and 17 qualifies as solicitor-client privileged information that is subject to the exemption pursuant to section 38(a), read in conjunction with section 12, it is only necessary for me to determine whether section 38(a), read in conjunction with section 7(1), applies to the remaining information, the last severance on page 17 of the record.

[58] Section 7(1) states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

[59] The purpose of section 7 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks

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[23] Orders PO-2034, and P-1340.

[24] 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.).

to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure.[25]

[60] Previous orders have established that advice or recommendations for the purpose of section 7(1) must contain more than mere information.[26]

[61] "Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised.[27]

[62] Examples of the types of information that have been found *not* to qualify as advice or recommendations include:

- factual or background information
- analytical information
- evaluative information
- notifications or cautions
- views
- draft documents
- a supervisor's direction to staff on how to conduct an investigation[28]

Representations

[63] The police submit that all the information that has been severed from pages 14 and 17 qualifies for exemption pursuant to section 38(a), read in conjunction with section 7(1) for the following reason:

> These pages contain recommendations and advice provided by the Crown Attorney to the Windsor Police Service, regarding matters related to the investigation.

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[25] Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.).

[26] Order PO-2681.

[27] Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

[28] Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (*supra,* note 27); Order PO-2115; Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (*supra,* note 27).

[64] The appellant makes no specific recommendations on this issue.

Analysis and findings

[65] As previously stated, the only information that remains at issue on pages 14 and 17 of the record is the last severance on page 17. On my review, this information clearly does not reveal advice or recommendations. Rather, it is factual information about administrative steps that were taken by the police, following the conclusion of the investigation into the incident and the determination that no charges would be laid.

[66] Therefore, I find that section 38(a), read in conjunction with section 7(1), does not apply to the last severance on page 17 of the record. Accordingly, I will order it disclosed.

E. Does the discretionary personal privacy exemption at section 38(b) apply to the information at issue?

[67] As noted above, 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.

[68] Under 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.

[69] 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.

[70] For section 38(b) to apply, on appeal I must be satisfied that disclosure of the information *would* constitute an unjustified invasion of another individual's personal privacy.

[71] In determining whether the exemption at section 38(b) applies, sections 14(1), (2), (3), and (4) of the *Act* provide guidance in determining whether the disclosure of personal information would result in an unjustified invasion of the affected person'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).

[72] In the circumstances, none of the exceptions to the exemption at sections 14(1) or (4) appear to be relevant

Representations

[73] The police submit that the presumptions at sections 14(3)(b), (d), and (h) apply, and also that the factor weighing against disclosure at section 14(2)(h) applies in the circumstances of this appeal. Although they have raised the possible application of these provisions, the police have made no substantive representations on how they specifically apply to the information at issue.

[74] The appellant has also not specifically addressed the application of specific exemptions, but with respect to the disclosure of the affected parties' personal information he makes representations that can be summarized as follows:

- He would like to know the substance of the information that was provided by three specific witnesses, specifically, the information that those witnesses provided about him.

- He is going through an arbitration hearing and one of the affected parties has made his statements. The appellant would like to match those statements with what was said to police.

- He does not want any personal information about the witnesses.

[75] The appellant submits:

> As the person who was arrested and charged, I feel I have the right to know exactly what were the threats that I was alleged to have made and to whom. In order to defend myself against these allegations, I must know what was said. The Crown Attorney…will not be proceeding with any charges as there is no evidence to do so.

[76] He concludes his representations by stating that no one can understand the turmoil that he has been through as a result of allegations about him that have not been proven and that no one will hire him if they discover that he was fired for making a threat. He states that he intends to file a civil suit once his arbitration hearing is done and he requires this information for that process.

Section 14(3)

[77] 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*,[29] the Divisional Court said the Commissioner could:

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

[78] The police have raised the application of the presumptions at section 14(3)(b), (d) and (h) to the information that it has withheld pursuant to section 38(b). Those sections read:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> (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;
>
> (d) relates to employment or educational history;
>
> (h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

Section 14(3)(b)

[79] For section 14(3)(b) to apply, the information must have been compiled and is identifiable as part of an investigation into a possible violation of law.

[80] Having considered the record and the circumstances of the current appeal, I accept that the presumption at section 14(3)(b) applies to all of the personal information at issue in the record. This information consists of the personal information contained in a police occurrence report and has clearly been compiled and is identifiable as part of an investigation into a possible violation of law under the *Criminal Code of Canada.* Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.[30] The presumption can also apply to

[29] [2001] O.J. 749.
[30] Orders P-242 and MO-2235.

records created as part of a law enforcement investigation where charges are subsequently withdrawn.[31]

[81] Therefore, I conclude that section 14(3)(b) applies to the personal information at issue and its disclosure is presumed to be an unjustified invasion of the affected parties' personal information.

Section 14(3)(d)

[82] For the presumption at section 14(3)(d) to apply, the information must relate to an identifiable individual's employment or educational history.

[83] A person's name and professional title, without more, does not constitute "employment history",[32] however, information contained in resumés[33] such as the number of years of service[34] and work histories[35] fall within the scope of section 14(3)(d).

[84] Having reviewed the record, some of the information belonging to one of the affected parties qualifies as their employment or educational history as it describes that individual's number of years of service and other information about their work history.

[85] Accordingly, I accept the police's position that the presumption at section 14(3)(d) applies to some of the personal information for which section 38(b) has been applied.

Section 14(3)(h)

[86] For the presumption at section 14(3)(h) to apply, the information must indicate an identifiable individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

[87] The police do not make any submissions identifying the information at issue for which they claim this presumption applies. However, at the beginning of the record where the affected parties are listed, as is standard in police occurrence reports, the affected parties are identified by name and personal information including their sex, birthdate, *ethnicity*, address and telephone numbers is provided. In my view, only the portion of information at issue in the record that can be said to qualify for the presumption at section 14(3)(h) is the affected parties' ethnicity. Accordingly, I find that section 14(3)(h) applies to this information.

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[31] Orders MO-2213, PO-1849 and PO-2608.
[32] Order P-216.
[33] Orders M-7, M-319 and M-1084.
[34] Orders M-173 and MO-2103-I.
[35] Orders M-1084 and MO-1258.

Section 14(2)

[88] As noted above, section 14(2) provides some factors for the police to consider in making a determination on whether the disclosure of personal information would result in an unjustified invasion of the affected parties' personal privacy. The list of factors under section 14(2) is not exhaustive. The police must also consider any circumstances that are relevant, even if they are not listed under section 14(2).[36] Some of these criteria weigh in favour of disclosure, while others weigh in favour of privacy protection.

[89] In the circumstances, the police claim that the consideration at section 14(2)(h) applies. From my review, the only other criteria that might apply are those listed at sections 14(2)(d) and (f). Those sections read:

> 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,
>
> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
>
> (f) the personal information is highly sensitive;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence;

Section 14(2)(d)

[90] For section 14(2)(d) to apply, the appellant must establish that:

> (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and
>
> (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
>
> (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and

[36] Order P-99.

(4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.[37]

[91] Previous orders have established that an appellant must provide sufficient evidence to establish that there is a proceeding that exists or is contemplated in some definite fashion and that is relevant to a fair determination of a right.[38]

[92] Additionally, it has previously been held that for the purpose of civil litigation, it may be that the discovery mechanisms available to the requester in that litigation will be sufficient to ensure a fair hearing with the result that section 14(3)(d) does not apply.[39]

[93] Although the appellant submits that it is his intention to file a civil suit once his arbitration hearing is done and that he requires this information for that purpose, he has not provided me with sufficient evidence to establish that this proceeding exists or is contemplated in some definite fashion. Additionally, I have not been provided with sufficient evidence to establish that any of the other three elements of the test outlined above have been met. Accordingly, I do not find that the criteria at section 14(3)(d) is a relevant consideration in the circumstances of this appeal.

Section 14(2)(f)

[94] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.[40] Given the nature of the information that is at issue, I accept that the personal information that has been withheld can be considered to be highly sensitive and that its disclosure could result in significant personal distress for the affected parties. Accordingly, I find that the factor weighing against disclosure is relevant.

Section 14(2)(h)

[95] The factor at section 14(2)(h) weighs in favour of privacy protection. For it to apply, both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Thus, section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.[41]

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[37] Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).
[38] Order P-443.
[39] Order PO-1833.
[40] Orders PO-2518, PO-2617, MO-2262 and MO-2344.
[41] Order PO-1670.

[96] In my view, the context and surrounding circumstances of this matter are such that a reasonable person would expect that the information supplied by them to the police would be subject to a degree of confidentiality. Accordingly, in this appeal, I find that the factor in section 14(2)(h) is a relevant consideration that weighs in favour of protecting the privacy of the affected parties and withholding their personal information.

Summary

[97] In conclusion, I have found that the presumption at section 14(3)(b) applies to the personal information at issue because it was compiled as part of an investigation into a possible violation of law. I also find that the presumptions at sections 14(3)(d) and (h) apply to some of the information that has been severed as it relates to some of the affected parties' employment or education history or indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

[98] Even if some of the information is not covered by a presumption, there is no evidence that any of the criteria in section 14(2) which favour disclosure apply in the circumstances. However, I have found that there is some evidence that the factors weighing in favour of privacy protection and against disclosure at sections 14(2)(f) and (h) are relevant considerations as the information is highly sensitive and was supplied to the police by the individual to whom it relates in confidence.

[99] As a result, I find that the disclosure of the affected parties' personal information would constitute an unjustified invasion of personal privacy and the discretionary exemption at section 38(b) applies to the personal information for which it was claimed. Accordingly, subject to my discussion below on the exercise of discretion, I will uphold the ministry's decision not to disclose it.

F. Did the police exercise their discretion under sections 38(a) and (b)? If so, should this office uphold the exercise of discretion?

[100] The exemptions at sections 38(a) and (b) are discretionary and permit an institution to disclose information despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, this office may determine whether the institution failed to do so.

[101] In this order, I have found that some parts of the record qualify for exemption under the discretionary exemption at section 38(a) while others qualify for exemption pursuant to the discretionary exemption at section 38(b). Consequently, I will assess whether the police exercised their discretion properly in applying the exemption to the portions of the record that have been withheld.

[102] This office 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.

[103] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[42] This office may not, however, substitute its own discretion for that of the institution.[43]

[104] 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
    - 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
- 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

[42] Order MO-1573.
[43] Section 43(2) of the *Act*.

- 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
- the historic practice of the institution with respect to similar information.

Representations

[105] The police submit that they "balanced the need for access to the appellant's personal information with the need to protect the privacy right of the other individuals involved in the incident."

[106] The police explain that in deciding not to disclose the information regarding the affected parties they considered the criteria weighing against disclosure listed at section 14(2)(h) (that the information had been supplied by the individual to whom the information relates in confidence), the presumption against disclosure at section 14(3)(b) (that the information was compiled as part of an investigation into a possible violation of law), the presumption against disclosure at section 14(3)(d) (that the information relates to employment or educational history), and the presumption at section 14(3)(h) (that the personal information indicates the individual's racial or ethnic origin, sexual orientation or religious or political believes or associations).

[107] They also submit that because the appellant did not wish them to notify the other parties identified in the record of the request they were unable to contact the affected parties to seek their views regarding the disclosure of their personal information.

Analysis and finding

[108] As stated above, this office cannot substitute its exercise of discretion for that of the institution. Based on my review of the representations and the record at issue in this appeal I am satisfied that the police properly exercised their discretion to withhold the information at issue in the record under sections 38(a) and (b). The police have considered the nature of the information that they have withheld, its sensitivity and importance, the appellant's interest in this information, as well as the purposes of the *Act*.

[109] I find the police exercised their discretion to apply the exemption at section 38(b) to withhold the personal information relating to the affected parties was proper and made in good faith. The police considered the fact that the disclosure of the personal information relating to identifiable individuals would give rise to a presumed unjustified invasion of their privacy as set out in section 14(3) of the *Act.* The police

also considered the fact that in the context of the investigation into the incident, the personal information had been supplied in confidence which is a criteria weighing against disclosure listed in section 14(2)(h). Having reviewed the record closely, I note that the police disclosed the majority of the information in the occurrence report that does not contain the personal information of other identifiable individuals. In my view, considering the nature of the information that has been severed, as well as the privacy right of the identifiable individuals to whom the personal information relates, I accept that the police took proper considerations into account and exercised their discretion appropriately.

[110] Although the police's representations focus on their exercise of discretion with respect to the information that they severed pursuant to section 38(b), having considered the information that was severed pursuant to section 38(a), I also accept that they exercised their discretion in withholding this information properly.

[111] With respect to the information that was severed pursuant to section 38(a), read in conjunction with the solicitor-client privilege exemption in section 12, I accept that the police weighed the appellant's right of access to information against the importance of keeping privileged communications between the police and their legal counsel confidential. The Supreme Court of Canada has repeatedly affirmed the importance of maintaining the integrity of this privilege and stated that it must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interest on a case-by-case basis.[44] In light of this, I accept that in making the severances pursuant to section 38(a), read in conjunction with section 12, the police determined that the public interest in maintaining the integrity of the privilege should be protected.

[112] In light of the information that was severed by the police, and the nature of the information itself, I accept that they took into account relevant considerations, did not take into account irrelevant ones, and severed the information in good faith. Therefore, I find that, in the circumstances of this appeal, the police's exercise of discretion was appropriate. Accordingly, I will uphold it.

ORDER:

1. I order the police to disclose the last severance on page 17 of the record to the appellant by **December 2, 2013**. The portion to be disclosed is highlighted in green on the copy of page 17 sent to the police with this order.

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[44] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* [2010[] 1 S.C.R. 815, para 75; *Canada (Privacy Commissioner) v. Blood Tribe Department of Health,* [2008] 2 S.C.R. 574, paras. 9 and 10; *Goodis v Ontario (Ministry of Correctional Services),* [2006] 2 S.C.R. 32, paras. 16 and 17.

2. I uphold the police's decision to deny access to the information remaining at issue pursuant to sections 38(a) and (b) of the *Act*.

3. In order to verify compliance with this order, I reserve the right to require the police to provide me with a copy of the record disclosed to the appellant pursuant to provision 1.

Original signed by: October 31, 2013
Catherine Corban
Adjudicator