Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3095

Appeal MA13-485

Cornwall Community Police Services Board

September 15, 2014

Summary: The police received a request for access to a specified report. The police located one responsive record. After notifying two third parties, the police issued a decision letter to the appellant, denying her access to the record, in full. The police claimed the discretionary exemption in section 38(b) (unjustified invasion of personal privacy) to withhold the record. The appellant appealed the police's decision. During mediation, the police issued a revised decision letter, advising the appellant that it was also claiming the application of section 13 (danger to health and safety) to the record. During the inquiry process, the police advised that they were also relying on section 38(a), read with sections 8(1)(e) (health and safety) and 8(2)(a) (law enforcement report), to deny access to the record. In this order, the adjudicator upholds the police's decision, in part. The adjudicator does not allow the police to raise the discretionary exemption in section 38(a), in conjunction with sections 8(1)(e) and 8(2)(a), late. However, the adjudicator finds that portions of the record are exempt under section 38(b) and concludes that the police properly exercised their discretion to withhold that information. The adjudicator finds that the remaining portions of the record are not exempt under the *Act* and orders the police to disclose them to the appellant.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 2(1) (definition of "personal information"), 13, 38(a) and 38(b).

Orders and Investigation Reports Considered: M-444

OVERVIEW:

[1] The Cornwall Community Police Service (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a specified police report.

[2] The police located the responsive record and notified two individuals whose interests may be affected by its disclosure (the affected parties) pursuant to section 21 of the *Act*. Upon receipt of the affected parties' submissions, the police issued a decision letter to the appellant, advising her that they denied access to the record, in full. The police claimed the application of the discretionary exemption in section 38(b) (personal privacy) to withhold the record.

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

[4] During mediation, the police issued a revised decision letter to the appellant. The police advised the appellant that they continued to claim the exemption in section 38(b) and that they were also claiming the discretionary exemption in section 13 (danger to health and safety) of the *Act* to withhold the record, in its entirety.

[5] As mediation did not resolve all the issues, the appeal was transferred to the adjudication stage of the appeals process where a written inquiry is conducted by an adjudicator.

[6] Although the police claimed section 13 alone to exempt the record, upon my review of its contents, I find that because it appears to include the personal information of the appellant access to it should be considered under Part II of the *Act*. Accordingly, I have included section 38(a), in conjunction with section 13, as an issue in this appeal.

[7] I began my inquiry by seeking representations from the police and the two affected parties in response to a Notice of Inquiry. The police submitted representations. In its representations, the police raised the possible application of the discretionary exemption in section 38(a), in conjunction with sections 8(1)(e) (endanger the life or physical safety of a law enforcement officer or any other person) and 8(2)(a) (law enforcement report). I then invited the appellant to make representations in response to the Notice of Inquiry and the ministry's arguments, which were shared in accordance with section 7 of this office's *Code of Procedure* and *Practice Direction 7*. The appellant also submitted representations.

[8] In the discussion that follows, I uphold the police's decision, in part. I do not allow the police to raise the late raising of the application of section 38(a), in conjunction with sections 8(1)(e) and 8(2)(a). I find that the record contains the "personal information" of the appellant and two affected parties, as that term is defined in section 2(1) of the *Act*. I also find that the witness statements of the two affected

parties qualify for exemption under section 38(b) and uphold the police's exercise of discretion to withhold those portions of the record. However, I find that the remaining portions of the record do not qualify for exemption under section 38(b) or section 13 and order the police to disclose those portions of the record.

RECORD:

[9] The record at issue is a two page general occurrence report.

ISSUES:

A. Should I allow the police to raise the discretionary exemption in section 38(a), in conjunction with sections 8(1)(e) and 8(2)(a), late?

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

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

D. Does the discretionary exemption at section 38(a) in conjunction with the section 13 exemption apply to the information at issue?

E. Did the institution exercise its discretion under section 38(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A. Should I allow the police to raise the discretionary exemption in section 38(a), in conjunction with sections 8(1)(e) and 8(2)(a), late?

[10] In its representations, the police raised the possible application of the discretionary exemption in section 38(a), in conjunction with sections 8(1)(e) and 8(2)(a), for the first time. Section 11 of the IPC's *Code of Procedure* (the *Code*) addresses circumstances where institutions seek to raise new discretionary exemption claims during an appeal. Section 11.01 states:

> In an appeal from an access decision, excluding an appeal arising from a deemed refusal, an institution may make a new discretionary exemption claim only within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not

to consider a new discretionary exemption claim made after the 35-day period.

[11] The purpose of this policy is to provide institutions with a window of opportunity to raise new discretionary exemptions, but only at a stage in the appeal where the integrity of the process would not be compromised and the interests of the requester would not be prejudiced. The 35-day policy is not inflexible, and the specific circumstances of each appeal must be considered in deciding whether to allow discretionary exemption claims made after the 35-day period.[1] The 35-day policy was upheld by the Divisional Court in *Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg*.[2]

[12] In the circumstances of this appeal, I am not prepared to allow the police to rely on section 38(a), in conjunction with sections 8(2)(a) and 8(1)(e) of the *Act*, to deny access to the information in the record.

[13] The police did not provide me with any explanation as to their reasons for the late raising of this discretionary exemption and did not provide any submissions to demonstrate why the late raising of this exemption would not result in prejudice to the appellant.

[14] In its representations, the police claim that section 38(a), read with section 8(2)(a), of the *Act* applies to the record, which consists of a general occurrence report. Section 8(2)(a) provides that a head may refuse to disclose a record that is "a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law." Occurrence reports, supplementary reports and similar records of various police agencies have been found in previous orders of this office not to meet the definition of "report" under the *Act*, because they have been found to be more in the nature of recordings of fact than formal, evaluative accounts of investigations.[3] I see nothing in the record at issue that merits any different treatment.

[15] The police also claim that section 38(a), read with section 8(1)(e), applies to the record. Section 8(1)(e) provides that a head may refuse to disclose a record if the disclosure could reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person. While the police make this claim with respect to the record, they failed to provide me with any evidence of what the nature of the harms might be, nor did they provide any explanation as to how the harm contemplated by section 8(1)(e) could reasonably be expected to occur if the record is disclosed. In my view, the representations of the police fall short establishing the application of section 38(a), in conjunction with section 8(1)(e), to the record.

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[1] Orders P-658 and PO-2113.

[2] (21 December 1995), Toronto Doc. 110/95, leave to appeal refused [1996] O.J. No. 1838 (C.A.).

[3] See Orders M-1109, MO-1238, MO-2065, PO-1845 and PO-1959.

[16] In the circumstances, I find that any prejudice to the police in disallowing its claim that section 38(a), in conjunction with sections 8(2)(a) and 8(1)(e), applies to the record would not outweigh any possible prejudice to the appellant in allowing it. As a result, I will not consider the application of section 38(a), in conjunction with sections 8(2)(a) and 8(1)(e), to the information that remains at issue in this appeal.

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

[17] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contain "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,
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> (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,
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> (c) any identifying number, symbol or other particular assigned to the individual,
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> (d) the address, telephone number, fingerprints or blood type of the individual,
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> (e) the personal opinions or views of the individual except if they relate to another individual,
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> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and

(h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[18] 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]

[19] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[5]

[20] Neither the police nor the appellant made submissions on whether the record contains "personal information" as that term is defined in the *Act*. Since the police have claimed that the personal privacy exemption in section 38(b) applies to the entire record, it is reasonable to assume that the police take the position that the entire record contains "personal information".

[21] Based on my review of the record, I find that it contains the "personal information" of the appellant and two individuals (the affected parties), as that term is defined in section 2(1) of the *Act*. As the occurrence relates to an incident involving the appellant, I find that it can be considered to contain her personal information. In particular, I find that the record contains the appellant's personal views or opinions (paragraph (e)), the opinions or views of other individuals as they relate to her (paragraph (g)) and her name, along with other personal information about her (paragraph (h)).

[22] With regard to the two affected parties, I find that the record also contains their personal information. For both of these individuals, I find that some of the personal information consists of their personal views or opinions (paragraph (e)), the opinions or views of individuals as they relation to them, particularly that of the individual that was involved in the incident (paragraph (g)), and their names, along with other personal information about them (paragraph (h)).

[23] I also find that the header of the record that includes the incident report, the print date, the author of the report, the name of the officer that entered the report, the report time and the first sentence of the report do not constitute "personal information", as that term is defined in section 2(1) of the *Act*. As such, I will not consider whether this information is exempt from disclosure under section 38(b).

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[4] Order 11.
[5] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[24] As I have found that the record contains the personal information of the appellant and two affected parties, I will consider whether it qualifies for the personal privacy exemption at section 38(b) in Part II of the *Act*.

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

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

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

[26] 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 record, which also contain the requester's personal information.[6]

[27] In other words, where a record contains the 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.

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

[29] In considering 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 record would result in an unjustified invasion of another individual's personal privacy. Section 14(2) provides some criteria for the police to consider in making this determination; section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. In addition, if the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy under section 38(b).

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[6] Order M-352.

Section 14(3)

[30] The police submit that the discretionary personal privacy exemption in section 38(b) applies to the information at issue. The police submit that the presumption listed in section 14(3)(b) of the *Act* applies to the record. 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.

[31] The police state that the information contained in the record was collected for the sole purpose of interviewing all parties and determining whether charges were warranted. As such, the police submit that the information was compiled and is identifiable as part of an investigation into a possible violation of law. The police also submit that, even though charges were not laid as a result of the investigation, the absence of charges does not negate the application of section 14(3)(b) of the *Act*.

[32] In response, the appellant states that she does not seek access to third party names and any other third party identifiers. The appellant submits that she should have complete access to the record requested.

[33] Based on my review of the record and the representations of the parties, I find that the presumption in section 14(3)(b) applies to the personal information in the record. As the police note, this office has found that the presumption in section 14(3)(b) may apply even if no criminal proceedings were commenced against any individuals. The presumption only requires that there be an investigation into a possible violation of law.[7] The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.[8]

[34] I have reviewed the record and it is clear from the circumstances that the personal information contained 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. Although no criminal proceedings were commenced against any of the individuals involved in the incident, I find that the presumption in section 14(3)(b) still applies to all of the personal information in the record.

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[7] Orders P-242 and MO-2235.

[8] Orders MO-2213 and PO-1849.

[35] As the presumption in section 14(3)(b) applies to the record and no factors favouring disclosure in section 14(2) apply, I am satisfied that the disclosure of this information would constitute an unjustified invasion of the personal privacy of the affected parties. Therefore, I find that the record is exempt from disclosure under section 38(b) of the *Act*, subject to my review of the absurd result principle and the police's exercise of discretion, below.

Absurd Result

[36] This office has applied the "absurd result" principle in situations where the basis for a finding that information qualifies for exemption would be absurd and inconsistent with the purpose of the exemption.

[37] Senior Adjudicator John Higgins first applied the absurd result principle in Order M-444 where, after finding that the disclosure of identified information would, according to the legislation, be a presumed unjustified invasion of privacy, he went on to state:

> However, it is an established principle of statutory interpretation that an absurd result, or one which contradicts the purposes of the statute in which it is found, is not a proper implementation of the legislature's intention. In this case, applying the presumption to deny access to information which the appellant provided to the Police in the first place is, in my view, a manifestly absurd result. Moreover, one of the primary purposes of the Act is to allow individuals to have access to records containing their own personal information, unless there is a compelling reason for non-disclosure. In my view, in the circumstances of this appeal, non-disclosure of this information would contradict this primary purpose.

[38] Numerous subsequent orders have supported this position and include similar findings. The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement;[9]
- the requester was present when the information was provided to the institution;[10]
- the information is clearly within the requester's knowledge.[11]

[39] However, previous orders have also established that if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.[12]

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[9] Orders M-444, M-451 and M-613.
[10] Order P-1414.
[11] Orders MO-1196, PO-1679 and MO-1755.
[12] Orders M-757, MO-1323 and MO-1378.

[40] All the parties to this appeal were asked to make representations on whether the absurd result applies to the record. However, none made representations on this issue.

[41] The record at issue in this appeal contains the personal information of the appellant and two affected parties. I have found that it qualifies for exemption under section 38(b) of the *Act*. On my review of the record, I note that some portions of the withheld information contain the summary of the conversations between the police and the affected parties about the incident. Without specific information confirming that the appellant was present and heard these conversations, I find that withholding this information would not result in an absurdity and I find that the absurd result does not apply to this information.

[42] However, I find that the record contains information that the appellant is clearly aware of, as she was present and participated in certain conversations or exchanges. For example, the record contains a summary of the appellant's own statement to the police and the police's conversation with the appellant. In these circumstances, I am satisfied that withholding the first two paragraphs and the last sentence of the record from the appellant, which contain information that is clearly within her knowledge as they involved her, would lead to an absurd result.

[43] In addition, in the circumstances of this appeal, I find that disclosure of this information would not be inconsistent with the purpose of the section 38(b) exemption.

[44] Accordingly, I find that the first two paragraphs and the last sentence of the record which contain information that the appellant is clearly aware of do not qualify for exemption under section 38(b) of the *Act*, because to deny the appellant access to this information would result in an absurdity.

[45] With respect to the other information contained in the record, in the circumstances of this appeal, I find that the "absurd result" principle is not applicable, as I am not satisfied that these portions of the record contain information which the appellant is clearly aware of. Consequently, I find that the absurd result principle does not apply to the remaining portions of the record and these portions are exempt under the section 38(b) exemption, subject to my review of the police's exercise of discretion below.

[46] As I have found that the absurd result principle applies to some of the information in the record, I will now consider whether that information is exempt under section 38(a), in conjunction with section 13, of the *Act*. I will not consider whether section 38(a), read with section 13, applies to exempt the information already found exempt under section 38(b) of the *Act*.

D. Does the discretionary exemption at section 38(a) in conjunction with the section 13 exemption apply to the information at issue?

[47] Section 38(a) of the *Act* reads as follows:

> 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.

[48] In its decision, the police advised the appellant that they withheld the record under the exemption in section 13. Section 13 of the *Act* states:

> A head may refuse to disclose a record whose disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

[49] For this exemption to apply, the police must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the police must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the police must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated.[13]

[50] An individual's subjective fear, while relevant, may not be sufficient to establish the application of the exemption.[14]

[51] In its representations, the police refer to the affected parties' consent forms in which the individuals refused to consent to the release of their information, stating that the disclosure would "cause trouble". The police state that the Declaration of Principles under the *Police Services Act*[15] states that police services shall be provided in accordance with the need to ensure the safety and security of all persons in Ontario and in recognition of the importance of respect for victims of crime and understanding their needs. The police also state that they have taken into account their responsibility of "confidentiality" under section 95 of the *Police Services Act of Ontario*. The police reiterate that the affected parties indicated that they do not consent to the release of their information.

[52] The appellant does not address whether the disclosure of the record would reasonably expect to seriously threaten the safety or health of an individual.

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[13] *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.).
[14] Order PO-2003.
[15] R.S.O. 1990, c.P.15.

[53] The only information that remains at issue consists of the header, the first two paragraphs and the last sentence of the record. As discussed above, the information that remains at issue consists of information that was within the knowledge of or was provided by the appellant. Based on my review of the police and the appellant's representations and the information that remains at issue in the record, I am not satisfied that this information qualifies for exemption under section 13 of the *Act*. I find that the police have not provided me with sufficient evidence to establish a reasonable basis for the belief that the health or safety of the affected parties may be endangered as a result of the disclosure. The only evidence that the police have provided me is the affected parties' concern that the appellant may "cause trouble" if the record is disclosed. I find that a concern that there may be "trouble" is not sufficient for me to find that there is a reasonable basis for the belief that the health or safety of the affected parties may be endangered as a result of the disclosure of portions of the record that contain the appellant's own statement or information from the police that was relayed to her.

[54] Therefore, I find that the police have not provided me with sufficient evidence to demonstrate that the harms contemplated by section 13 could reasonably be expected to arise should the information that remains at issue be disclosed. Accordingly, I find that the header information, first two paragraphs and last sentence of the record do not qualify for exemption under section 13 of the *Act* and should be disclosed to the requester.

E. Did the institution exercise its discretion under section 38(b)? If so, should this office uphold the exercise of discretion?

[55] The section 38(b) exemption is discretionary and permits the police to disclose information, despite the fact that it could be withheld. On appeal, this office may review the police's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so.[16]

[56] In addition, I may find that the institution erred in exercising its discretion where, for example;

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

[16] Orders PO-2129-F and MO-1629.

[57] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[17] This office may not, however, substitute its own discretion for that of the institution.[18]

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

- the purposes of the *Act*, including the principles that information should be available to the public, individuals should have a right of access to their own personal information, exemptions from the right of access should be limited and specific and the privacy of individuals should be protected;

- the wording of the exemption and the interests it seeks to protect;

- whether the requester is seeking his or her own personal information;

- whether the requester has a sympathetic or compelling need to receive the information;

- whether the requester is an individual or an organization;

- the relationship between the requester and any affected persons;

- whether disclosure will increase public confidence in the operation of the institution;

- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person;

- the age of the information; and

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

[59] In their representations, the police state that they are cognizant of the fact that the *Act* exists to promote access to information and transparency. However, the police submit that they properly exercised their discretion to refuse the appellant access to the information in question. The police state that their refusal to grant access to the record does not reflect a desire to hide information from the public. Rather, the police submit

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[17] Order MO-1573.
[18] Section 43(2).

that their refusal to grant the appellant access to the record is an attempt to ensure the safety of members of the public. In light of these safety concerns, and given that they are not aware of any compelling reasons for disclosure, the police submit that they properly exercised their disclosure to disclose the record to the appellant.

[60] The appellant did not make submissions on whether the police properly exercised their discretion.

[61] I have reviewed the circumstances of this appeal, the representations of the parties and the record. I note that I have found that some of the information that relates to the appellant, was provided by her or is within her knowledge is not exempt under the *Act*. The information that I have found exempt under section 38(b) consists of the affected parties' witness statements to the police regarding the incident involving the appellant. Based on my review of the police's representations and the personal information that remains at issue, I am satisfied that the police weighed the appellant's interest in obtaining access to the information against the protection of the affected parties' personal privacy. Accordingly, I am satisfied that the police did not err in the exercise of their discretion to refuse to disclose the information that remains at issue.

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

ORDER:

1. I uphold the police's decision to withhold the third and the majority of the fourth paragraphs of the record under section 38(b) of the *Act*.

2. I order the police to disclose the remainder of the record to the appellant by **October 21, 2014**, but not before **October 16, 2014**. I have enclosed a highlighted copy of the record with the police's copy of this order, with the information to be withheld in pink.

3. In order to verify compliance with provision 2, I reserve the right to require the police to provide me with a copy of the information disclosed to the appellant.

Original signed by: September 15, 2014
Justine Wai
Adjudicator