Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-2157

Appeal MA-060071-1

Ottawa Police Service

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NATURE OF THE APPEAL:

The Ottawa Police Services Board (the Police) received a request pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to an incident that occurred on a specified date involving the requester's former husband, her son and her father.

The requester requested the following:

1) a copy of a specific police investigation concerning a closed case completed by a named Sergeant;

2) a copy of the police report completed by this Sergeant, including a detailed account of the activity by her former husband that led to the police involvement and the resulting action taken by the police; and,

3) a copy of all witness statements related to this case.

The requester stated in her request that in addition to her own witness statement, it was her understanding that the Police had also received witness statements from four other individuals: the appellant's father, two of her neighbours and an identified school principal (the affected persons). The requester also stated that she did not authorize the Police to contact her former husband with respect to her request for access to the records.

The Police located responsive records. After notifying the four affected persons, the Police issued a decision letter in response to the request, in which they indicated they were granting partial access to the information requested. The Police advised that two affected persons had consented to the release of their information. Of the other two affected individuals, one had objected to the release of their information and one had not responded to the notification letter. The Police indicated they were relying on the personal privacy exemptions in sections 38(b) and 14(1) (invasion of privacy), in conjunction with the presumption in 14(3)(b) of the *Act*, to deny access to the undisclosed portions of the records.

The requester, now the appellant, appealed the Police's decision to deny access.

In her appeal letter, the appellant indicated that she has sole custody of her son and power of attorney for him, and that she is entitled to exercise his rights of access under the *Act*. Accordingly, the possible application of section 54(c) of the *Act* was raised in this appeal.

In her appeal letter, the appellant referred to sections 32(e), 32(f)(ii) and section 53 of the *Act* as authority for disclosure of the information. She also stated that section 5 (obligation to disclose) of the *Act* applies to her case. In addition, the appellant referred to the following statutes which she believes support her position that the information should be released:

- *Child and Family Services Act* (section 72)
- *Police Services Act* (section 41)
- *Children's Law Reform Act*

As a result, the appellant has raised the possible application of section 14(1)(d) of the *Act* which addresses the situation where disclosure is expressly authorized by statute. Based on the appellant's comments, sections 5 and 14(1)(d) were added as issues.

In her appeal letter, the appellant referred to section 14(3)(b). She stated that there is an ongoing investigation and breach of a Family Court order and therefore, the concluding words of section 14(3)(b) (which pertain to the disclosure of information where this is "necessary … to continue the investigation") should apply. In her appeal letter, the appellant also contended that the Police did not attempt to sever the information, as contemplated by section 4(2) of the *Act*.

During mediation, the appellant further asserted that it was in the public interest that this information be released, thereby raising the application of section 16 of the *Act* (public interest override section). Section 16 has therefore been added as an issue.

Also during mediation, the following further developments occurred:

- the Police provided an Index of Records to the appellant.

- the appellant confirmed that she does not require the affected persons' contact information or identifying information such as their home address, telephone number, date of birth, driver's license or social insurance number and that she is not interested in obtaining access to pages 1-3.

- the appellant confirmed that she would not be pursuing certain procedural matters raised in her appeal letter where she had contended that the Police did not abide by the requirements relating to time frames and notification outlined under the *Act*.

- both the affected person who had objected to disclosure and the affected person who had not responded were contacted by the mediator and subsequently provided written consent to the release of the requested personal information. Therefore, all four witnesses who provided statements have provided their consent to the release of their statements.

- the Police agreed to release pages 29, 30, 31 and 33.

- the Police had previously denied access to pages 1-3, 29-31 and 33 on the basis of the personal privacy exemption in section 14(1) (as opposed to section 38(b)) only for these pages, and the section 14(1) exemption is, therefore, no longer at issue in this appeal.

- the appellant discovered that the witness statement of one of the affected persons is not part of the records. The Police maintain that they do not have a statement from this individual, only the notes recorded by the officer as to what the witness

said. The appellant is of the view that the witness did provide a witness statement to the Police. Therefore, the reasonableness of the Police's search for responsive records is at issue.

As further mediation was not possible, the file was moved to the adjudication stage of the appeal process. I began the adjudication by sending a Notice of Inquiry to the Police, outlining the facts and issues in the appeal and inviting the Police to provide written representations. I did not invite the Police to provide representations on section 5, as this office has no jurisdiction to review an institution's decision not to apply this section [Orders P-1175, P-1336]. The Police responded with representations, a complete copy of which was then sent to the appellant with the Notice of Inquiry. The appellant provided representations in response.

I then wrote to the Police asking for reply representations on the issue of additional disclosure on the basis of a Family Court order issued as a result of a consent signed by her ex-husband's lawyer, in which the ex-husband consented to an order that the Police provide all reports regarding the police file pertaining to this appeal to the appellant's lawyer upon request. The Police responded with representations and also replied that the Family Court order should not have any bearing on the appeal as that is a separate process from an access request under the *Act*. The appellant was provided with a copy of the Police's reply representations. She provided sur-reply representations in response.

RECORDS:

The records remaining at issue and their disclosure status are as follows:

Record	Page Number(s)	Description	Released?
1	4	Will State of appellant's father	Partial
2	5	Will State of principle	No
3	7	Will State of neighbour 1	No
4	8	Will State of neighbour 2	No
5	9-11	Pages 1,2 & 3 of concluding report by [named] Sgt.	Partial
6	14	Witness statement of neighbour 1	No
7	26-27	Fax pages from principal	No
8	28	Letter faxed from principal	Partial
9	32	Statement from appellant's father of 2005-12-05	No
10	34-35	Statement from appellant's father of 2005-11-30	No
11	38, 40-43	Pages 1, 3, 4, 5 and 6 of [named] Sgt.'s handwritten notes	Partial

I note that the appellant already has complete copies of Records 9 and 10. She provided these to this office with her notice of appeal. Therefore, I will remove them from the scope of the appeal.

The remaining records at issue (Records 1 to 8 and 11) are claimed to be exempt by the Police by reason of section 38(b) in conjunction with section 14(3)(b). The appellant, in seeking disclosure of these records, contends that the Police did not attempt to sever the information as contemplated by section 4(2) and that disclosure of the personal information in the records is expressly authorized by an Act of Ontario or Canada (section 14(1)(d)) or by the application of the public interest override at section 16 of the *Act*.

DISCUSSION:

Preliminary Issue - Right of Custodial Parent to Access Records of Minor Child

As a preliminary issue, I must determine whether the appellant can exercise a right of access on behalf of her son, who is less than sixteen years of age.

Section 54(c) states:

> Any right or power conferred on an individual by this Act may be exercised,
>
> > if the individual is less than sixteen years of age, by a person who has lawful custody of the individual;

Under this section, the appellant can exercise her son's right of access under the *Act* if she can demonstrate that

- the individual is less than sixteen years of age; and
- the requester has lawful custody of the individual.

The appellant provided the Police with a copy of a Court Order granting her custody of her son, who is less than sixteen years of age. The Police provided this office with a copy of this Order and have not disputed the appellant's custodial claim in their representations. Therefore, I find that the appellant meets the requirements of section 54(c) and that she is entitled to have the same access to the personal information of her son as he would have. Accordingly, the request for access to the personal information of the appellant's son will be treated as though the request came from the appellant's son himself [Order MO-1535].

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates. That term is defined in

section 2(1) of the *Act* as "recorded information about an identifiable individual", followed by a non-exhaustive list of examples.

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

The Police submit that the record contains personal information of the appellant and other identifiable individuals, in accordance with the following paragraphs of the definition of "personal information" in section 2(1) of the *Act*:

> "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,
>
> (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;

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

The appellant agrees that the records contain personal information.

Analysis/Findings

I find that all of the records contain the personal information of the appellant, the appellant's son and other identifiable individuals. The personal information of the appellant and the other identifiable individuals in the records consists of recorded information about them, and includes their sex and ages (paragraph (a)), their employment history (paragraph (b)), their addresses and telephone numbers (paragraph (d)), the views or opinions of another individual about the individual (paragraph (g)) and their names along with other personal information about them (paragraph (h)).

Because all of the records remaining at issue contain the personal information of the appellant and/or her son (which she is entitled to request in the same way that her son could do, as discussed above), I will consider whether the personal privacy exemption at section 38(b) applies. This is the personal privacy exemption that potentially applies to records that contain the requester's own personal information.

INVASION OF PRIVACY

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.

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.

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.

Sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold under section 38(b) is met.

If the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is it is not exempt from disclosure under section 38(b).

Section 14(1)(a)

The appellant has raised the application of section 14(1)(a) to a number of records as all four witnesses in the records have provided their consent to the disclosure of his or her personal information in the context of this access request [see Order PO-1723]. Section 14(1)(a) states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access.

Consent by the appellant's ex-husband's lawyer

As noted previously, there is a Family Court consent signed by the appellant's lawyer and her ex-husband's lawyer. This document contains the appellant's and her ex-husband's lawyers' written consent to the issuance of an order that the Police provide the reports on the specified incident number which is the subject matter of the records to either the appellant's or her ex-husband's lawyers upon their request. In the circumstances of this appeal, I do not accept this as a valid consent under section 14(1)(a) for the reasons that follow.

Although this consent refers to the incident which is the subject matter of the records, it appears to be narrow in scope compared to the records at issue as it only covers "reports", a term whose meaning in this context is also not particularly clear. As well, even if it did encompass all of the records that contain the appellant's ex-husband's personal information, there is no indication whether the reports authorized to be disclosed to the appellant's lawyer were to be disclosed to the appellant, and if so under what conditions the appellant would be authorized to view, maintain or use these reports.

It is also possible that the appellant's ex-husband could provide further information about this consent and its scope, but the appellant has stated that she does not wish her ex-husband to be notified of this appeal. In Order PO-1723, Adjudicator Laurel Cropley found that section 21(1)(a) of the provincial *Freedom of Information and Protection of Privacy Act* (the provincial *Act*), the equivalent of section 14(1)(a) of the *Act*, requires that consent be provided under the *Act*, that is, the consenting party must provide a written consent to the disclosure of his or her personal information in the context of an access request. In this case, the consent of the appellant's ex-husband's lawyer was not given in the context of this access request. In my view, although it may be appropriate to apply section 14(1)(a) to a consent provided in another context outside the *Act*, this would depend on the circumstances and the evidence must be clear that the consent actually relates to the records, has not been revoked, etc., which would generally require notification of the individual whose consent is to be relied upon. As noted, the appellant is opposed to such notification taking place in this case.

For all these reasons, I find that this consent is not sufficient under section 14(1)(a) to authorize the release of the ex-husband's personal information to the appellant .

Records 1 to 4 and 6

These records all contain statements made by witnesses to the police concerning the investigation that is the subject of the records. All of these witnesses have provided their written

consent to the disclosure of their personal information in the context of this access request. These statements contain the personal information of both the witnesses and other identifiable individuals, including the appellant's ex-husband. As stated above, as the appellant's ex-husband has not provided his written consent to disclosure in the context of this access request, I find that section 14(1)(a) does not apply to authorize the release of these records to the appellant.

Record 5

The appellant provided, as an attachment to her representations, a copy of Record 5, except for the severance of the school principal's name on page 1 and the appellant's father's name and a note regarding the investigating officer's conversation with the school principal on page 2. Both the appellant's father and the school principal have provided this office with written consent to release their personal information. Therefore I find that section 14(1)(a) applies to the information in this record pertaining to them. I conclude that disclosure of the undisclosed personal information in Record 5 would not result in an unjustified invasion of the personal privacy of identifiable individuals. This record is not exempt under section 38(b) and I will order it disclosed.

Record 7

Record 7 is comprised of two pages faxed from the school principal to the Police. As the school principal has provided this office with written consent to release her personal information, I am ordering page 1 of Record 7 to be released in this order. This page is a fax cover page containing only this witness' personal information, to which section 14(1)(a) applies, with the result that it is not exempt under section 38(b). Page 2 of this record is the page that was faxed with the cover page. The originator of this page of Record 7, the appellant's ex-husband, has not provided his written consent to disclosure in the context of this access request. For the reasons cited above, I find that section 14(1)(a) does not apply to page 2 of this record.

Record 8

The information severed from Record 8 is a handwritten note from the school principal to the appellant. Although the school principal has provided this office with written consent to release her personal information, I have not been provided with sufficient evidence to establish conclusively that the appellant has already received a copy of this handwritten note. This note contains the personal information of both the principal and the appellant's ex-husband who has not provided his consent in the context of an access request. For the reasons cited above, I find that section 14(1)(a) does not apply to this record.

Record 11

Record 11 is comprised of pages 1, 3, 4, 5 and 6 of [the named] Sergeant's handwritten notes. The undisclosed portions on part of page 3 and on pages 4 to 6 of these notes contain the statements made to the Sergeant by all four witnesses who have provided consent. However,

because this record also contains the personal information the appellant's ex-husband who has not provided his consent in the context of an access request. For the reasons cited above, I find that section 14(1)(a) does not apply to this record.

Summary: Section 14(1)(a)

Based on the provision of written consents to disclose in the context of this access request under section 14(1)(a), I will order the Police to provide the appellant with copies of Records 5 and page 1 of record 7. Disclosure of these records would not result in an unjustified invasion of the personal privacy of any identifiable individuals under section 38(b).

Therefore the records remaining at issue are:

- Records 1 to 4 and 6
- Page 2 of Record 7
- Record 8
- Record 11

Section 14(1)(d)

The appellant has also raised the possible application of section 14(1)(d) in this appeal. This section states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > under an Act of Ontario or Canada that expressly authorizes the disclosure.

The phrase "under an Act of Ontario or Canada that expressly authorizes the disclosure" in section 14(1)(d) closely mirrors the phrase "expressly authorized by statute" in section 28(2) of the *Act*, which is the equivalent of section 38(2) of the provincial *Act* [Order PO-1933]. This office has stated the following with respect to the latter phrase in section 38(2) of the provincial *Act*:

> The phrase "expressly authorized by statute" in subsection 38(2) of the *Act* requires either that specific types of personal information be expressly described in the statute, or a general reference to the activity be set out in the statute, together with a specific reference to the personal information to be collected in a regulation made under the statute i.e., in a form or in the text of the regulation [Compliance Investigation Report I90-29P].

The appellant has not made representations in response to the Notice of Inquiry identifying provisions in an Act of Ontario or Canada that expressly authorizes the disclosure of the personal information in the remaining records. Nevertheless, I have reviewed the statutes referred to by the appellant in her letter of appeal, namely, the *Child and Family Services Act* (section 72), *Police Services Act* (section 41) and the *Children's Law Reform Act*. I cannot find therein a provision expressly authorizing the disclosure of the undisclosed personal information in the records to the appellant. Therefore, based on the submissions of the parties, and my review of the remaining records, I find that the exception in section 14(1)(d) does not apply in this case.

It is therefore necessary to turn to section 14(3) in order to determine whether disclosure of the remaining information would be presumed to be an unjustified invasion of personal privacy under section 38(b).

Section 14(3)(b)

The Police have claimed that the presumption in paragraph (b) of section 14(3) 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.

The Police state in their representations that:

> Police investigation reports into the conduct of citizens are both confidential and privileged to the investigative body to maintain fairness and presumption of innocence. The information was compiled and is identifiable as part of an investigation into a possible violation of law.
>
> The personal information of the other individuals was compiled by members of the Ottawa Police Service during an investigation into a child custody complaint and was used to determine whether an offence under the Criminal Code of Canada may have been committed. The information contained in these records was used to investigate this incident and prosecute any offender(s) should charges be laid. The appellant indicated in her appeal letter that there is an ongoing investigation and breach of a Family Court order therefore the concluding words of Section 14(3)(b) should apply. The investigation into this incident has been completed and no further action will be taken on this complaint. We are therefore not aware of there being any ongoing investigation.

The appellant does not dispute the fact that the information in the records were compiled and is identifiable as part of an investigation into a possible violation of law, thereby falling within the ambit of the presumption in section 14(3)(b). However, the appellant submits that she requires the records for a trial at the Superior Court of Justice Family Court Branch related to the incident which is the subject matter of the records, and thereby appears to be arguing that disclosure is necessary to "continue the investigation" into a possible violation of law. I find, however, that the personal information is not required to continue the police investigation for which the personal information was compiled. I agree with the following statement of Adjudicator Bernard Morrow in Order PO 2167:

> [I]n my view, the drafters of the *Act* did not intend to justify the rebutting of the presumption against disclosure under section 21(3)(b) [section 14(3)(b) in the municipal *Act*] in circumstances where a private individual or organization wished to pursue their own investigation. The phrase "continue the investigation" refers to the investigation in which the information at issue was compiled. This view has been followed in previous orders of this office (Orders MO-1356, M-718 and M-249).

I find that the personal information of individuals other than the appellant and her son in the remaining records was compiled and is identifiable as part of an investigation into a possible violation of law pursuant to the *Criminal Code*. I therefore find that the presumption in section 14(3)(b) applies.

Although no criminal proceedings were commenced against any individuals, this presumption still applies. This presumption only requires that there be an investigation into a possible violation of law [Order P-242]. Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the "public interest override" at section 16 applies. [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. Section 14(4) is inapplicable to the records at issue and I will deal later in this order with section 16 (public interest override).

The appellant appears to have raised the application of the factor in section 14(2)(d), namely, that the information is relevant to a fair determination of her rights at Family Court and the factor in section 14(2)(a), namely, that disclosure is desirable for the purpose of subjecting the activities of the Police to public scrutiny. However, having found that section 14(3)(b) applies I am precluded from considering any of the factors weighing for or against disclosure under section 14(2), because of the *John Doe* decision.

Because I have found that section 14(3)(b) applies to the personal information remaining at issue, subject to my discussion below of Absurd Result, Exercise of Discretion and Public Interest Override, I conclude that its disclosure is an unjustified invasion of personal privacy. The personal information remaining at issue in Records 1 to 4 , 6, page 2 of Record 7, Record 8 and Record 11 qualifies for exemption under section 38(b).

Absurd Result

Where the requester originally supplied the information or the requester is otherwise aware of it, the information may be found not exempt under section 38(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Orders M-444, MO-1323].

The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement [Orders M-444, M-451]
- the requester was present when the information was provided to the institution [Orders M-444, P-1414]
- the information is clearly within the requester's knowledge [Orders MO-1196, PO-1679, MO-1755]

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 [Orders M-757, MO-1323, MO-1378].

I must determine whether the absurd result principle applies to the remaining records. The only records that this principle could apply to in this case are the witness statements (Records 1 to 4 and 6) and the undisclosed portions on part of page 3 and on pages 4 to 6 of the notes that comprise Record 11. Record 11 contains the statements made to the Sergeant by all four witnesses. The witnesses have provided their consent to the disclosure of their personal information. I note that in Order MO-1868-R, former Assistant Commissioner Tom Mitchinson applied the absurd result principle to witness statements made by individuals who consented to the disclosure of their statements. The relevant portion of that Order reads as follows:

> To date, this office has not applied the absurd result principle to a situation where an individual has consented to disclose his or her witness statement which may contain personal information of individuals other than the witness and the requester. Having carefully considered the various interests at play in this type of situation, I have concluded that the principle should be extended to this type of situation.
>
> Order M-444 and other subsequent similar orders have made it clear that if an individual makes a formal request for access under the *Act* to his or her statement made as a witness to a police investigation, that statement will be provided to the requester, regardless of the fact that it contains personal information of other individuals. These orders are saying, in effect, that denying a requester access to information that originated with that same person cannot be justified on the basis

> that some parts of the statement may relate to other individuals as well. This office has applied the absurd result principle to that set of circumstances, and institutions routinely disclose statements of this nature in response to requests under both the provincial and municipal statutes. This practice reflects a clear balancing of interests in favour of disclosing information that might otherwise be caught by a presumption in section 14(3)(b), on the basis of what Adjudicator Cropley described as a "higher" right of access to one's own personal information.
>
> What I am talking about in the current appeal is extending the principle one step further. In my view, if a witness consents to disclose his or her statement to a requester, barring exceptional circumstances, that alone should be sufficient to trigger the absurd result principle. While I acknowledge that this situation differs from the case where the information in the statement originates with a requester, in my view, it is a difference without a meaningful distinction. From a practical perspective, in many cases a consenting witness would have a copy of his or her statement and could simply pass it on to a requester. If no copy is in the possession of a witness, that individual could make a request under the *Act* for the record, which would be granted, and then simply provide it to the requester, without somehow raising any concerns regarding the privacy protection provisions in Part II of the *Act*. I can see no useful purpose in creating hurdles to a right of access that are not rooted in a legitimate concern for privacy protection. In my view, barring exceptional circumstances that are clearly not present here, I do not accept that the Legislature could have intended to cloak all witness statements with the highest degree of privacy protection inherent in a section 14(3) non-rebuttable presumption in circumstances where the author of the statement has expressed a clear intention to share the content of the statement with a requester.
>
> Accordingly, I find that applying the section 14(3)(b) presumption as the sole basis for denying access to witness statements where the witness has consented to disclosure would produce a manifestly absurd result.

In Order MO-2035, Adjudicator Frank DeVries adopted this approach to the provision of the statements of witness who consented to the disclosure of their statements to the appellant. In that order, he stated:

> With respect to the statement of the affected party who consented to the disclosure of his statement to the appellant, I follow the approach taken by former Assistant Commissioner Mitchinson in Order MO-1868-R. I find that this statement should also be provided to the appellant. To deny access to it on the basis that its disclosure would constitute an unjustified invasion of other individuals' privacy, where the affected party who made the statement has consented to its disclosure to the appellant, would lead to an absurd result.

> Again, I am mindful of the sensitivity of the subject matter of the records. On my review of the statement of the affected party who provided the consent, I find that it includes much information about the affected party himself, as well as information about the appellant, but that it contains little direct information about the other affected parties in this appeal. In the circumstances, I am satisfied that the "exceptional circumstances" referred to by former Assistant Commissioner Mitchinson in MO-1868-R do not exist in this appeal, and I find that the absurd result principle extends to the signed statement of the affected party…

Following the line of reasoning in Orders MO-1868-R and MO-2035, I find that the absurd result is applicable to Records 1 to 4 and 6 and the undisclosed portions on part of page 3 and on pages 4 to 6 of the notes that comprise Record 11. These records consist of the witnesses' direct recollection of the event that is the subject matter of the records. I find that the "exceptional circumstances" referred to by former Assistant Commissioner Mitchinson in MO-1868-R do not exist in this appeal.

Accordingly, I will order that Records 1 to 4 and 6, the undisclosed portions on page 3 concerning the Police Sergeant's discussion with the appellant's father, and the undisclosed portions on pages 4 to 6 of the notes that comprise Record 11 (except for the witnesses' dates of birth, home address and telephone numbers, which the appellant has indicated is not at issue) be disclosed to the appellant on the basis of the absurd result principle.

Subject to my discussion of the Police's exercise of discretion below, I therefore, find that the following records are exempt under section 38(b): page 2 of Record 7, Record 8 and page 1 and the undisclosed part of page 3 of Record 11, concerning the Police Sergeant's discussion with the appellant's ex-husband.

EXERCISE OF DISCRETION

The section 38(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

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

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2) of the *Act*].

Representations of the Parties

The Police state that they considered the following factors in the exercise of their discretion:

1. The privacy rights of the other individuals referred to in the records.

2. The exemptions in sections 14 that serve to protect the other individuals.

3. The right of access of the appellant to this information.

4. The information was collected for a law enforcement purpose in order for the Police to conduct investigations under the *Criminal Code* of Canada.

5. The information is considered to be not only the personal information of the appellant, but other individuals and should be protected.

6. Police investigations into the conduct of citizens are confidential and privileged to the investigative body in order to maintain fairness and a presumption of innocence.

The appellant responds that:

> Such exemption no longer applies… [A]ll affected parties have given written consent to disclose and a court order exists that orders full disclose of such documentation and personal information.

Analysis/Findings

The records that are not subject to disclosure by reason of my findings set out above are page 2 of Record 7, the handwritten portion on Record 8 and page 1 and part of page 3 of Record 11. In denying access to these records, I find that the Police exercised their discretion under section 38(b) in a proper manner taking into account relevant factors and not taking into account irrelevant factors. The undisclosed portions in the remaining records contain the personal information of the appellant's ex-husband. He has not provided his consent to disclosure in the context of an access request. In exercising their discretion I also find that the Police applied section 4(2) of the *Act* in a proper manner and disclosed as much of the responsive portions of the remaining records without disclosing material which is exempt.

PUBLIC INTEREST OVERRIDE

Section 16 states:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and **14** does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

For section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act's* central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Order P-984].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

A public interest is not automatically established where the requester is a member of the media [Orders M-773, M-1074].

The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984].

Any public interest in non-disclosure that may exist also must be considered [*Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.)].

A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)]

- the integrity of the criminal justice system has been called into question [Order P-1779]

- public safety issues relating to the operation of nuclear facilities have been raised [Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario*

(Information and Privacy Commissioner), [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805]

- disclosure would shed light on the safe operation of petrochemical facilities [Order P-1175] or the province's ability to prepare for a nuclear emergency [Order P-901]

- the records contain information about contributions to municipal election campaigns [*Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773]

A compelling public interest has been found not to exist where, for example:

- another public process or forum has been established to address public interest considerations [Orders P-123/124, P-391, M-539]

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568]

- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding [Orders M-249, M-317]

- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter [Order P-613]

Representations of the Parties

The Police state that:

> In order for a compelling public interest to outweigh the exemption there must be an interest to the public at large and not just one individual or small group of individuals. There is no indication that the public at large has an interest in the information contained in the records. The information contained in the records is essentially private in nature as they deal with a sensitive custody issue involving a mere few individuals. If required for a family court/civil purpose the appellant has the option of subpoenaing the records or obtaining a court order compelling us to release the documents to her or any legal counsel representing her.

In response the appellant relies on the Family Court order issued as a result of the consent signed by her ex-husband's lawyer.

Analysis/Findings

I agree with the reply submission made by the Police in which they state that:

> the fact that a court order was issued does in no way mean that there is a compelling public interest in this information, only that the appellant and/or her lawyer have an interest in the release of this information.

In my view, the interests being advanced by the appellant are essentially private in nature. I therefore find that the privacy interest protected by section 14(3)(b) concerning the records that I have not ordered disclosed above cannot be overcome in this case by the "public interest override" in section 16 [*John Doe v. Ontario (Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767]. There is no compelling public interest in the disclosure of the personal information in this case as the appellant is requesting the information for a predominantly personal reason [Order M-319].

SEARCH FOR RESPONSIVE RECORDS

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

A reasonable search is one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request (see Order M-909).

The Police were asked to provide a written summary of all steps taken in response to the request.

Analysis/Findings

As stated above, the appellant takes the position that a witness statement of one of the affected persons should be part of the records identified for this request. The Police maintain that such a statement is not part of their records. The Police state that:

> The main file, where documents are kept, was double-checked by the Freedom of Information Analyst to ensure that there was no statement from this individual. The investigating officer, who spoke to the individual on the phone, was also [contacted]. He checked his file personally and could not locate a statement. The investigator advised that he had spoken to the individual over the phone and took notes as to their account of the incident. He also indicated that the individual was to forward a statement, but that none was ever received by him. The only statement from this individual is the verbal one taken over the phone by the investigator. We conten[d] that although the individual was supposed to prepare a statement and forward to the police that this was never done. Had this been done it would have been forwarded to the main file by the investigator once he received it and would have been retained in accordance with our Policy for the Retention and Destruction of Records.

The appellant speculates that the witness statement may have been removed by certain individuals from the fax machine and destroyed. In their reply representations, the Police describe the security requirements surrounding access to the fax machine, as follows:

> [T]he fax machine … is located in a secure office. When there are no investigators in the office the door locked and only those who work in the office have a key to the door. If an individual who does not work in the [named] Office were wandering around or at the fax machine he/she would be questioned. There is no evidence to prove that the statement was received by the Detective investigating this complaint.

On this basis, I do not accept the appellant's contention that the statement was received and surreptitiously destroyed.

I find that the Police have provided a comprehensive description of the steps they undertook to locate the statement that the appellant maintains should exist. Based on the submissions of the Police and the appellant, I am satisfied that the Police conducted a reasonable search for the statement that the appellant claims to exist and I dismiss that part of the appeal.

ORDER:

1. I uphold the Police's search for responsive records.

2. I uphold the Police's decision not to disclose:

   - page 2 of Record 7;

   - the handwritten portion on Record 8; and,

- the highlighted portions of Record 11 accompanying the Police's copy of this Order.

3. I order the Police to disclose the remaining Records to the appellant by **March 15, 2007** but not before **March 9, 2007**.

4. In order to verify compliance with provisions 2 and 3 of this Order, I reserve the right to require the Police to provide me with a copy of the records disclosed to the appellant.

Original signed by: February 8, 2007
Diane Smith
Adjudicator