

Information and Privacy Commissioner,  
Ontario, Canada



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

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## INTERIM ORDER MO-3837-I

Appeal MA17-630-2

Ottawa Police Services Board

September 23, 2019

**Summary:** The police received a request, under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for records relating to the requester for a specified time period. The police granted access, in part, and relied on section 38(a) (discretion to refuse requester's own information) in conjunction with sections 8(1)(a) (law enforcement matter), 8(1)(b) (law enforcement investigation) and 9(1)(c) (foreign government), as well as the mandatory and discretionary personal privacy exemptions at sections 14(1) and 38(b).

In this order, the adjudicator upholds the police's application of sections 14(1) and 38(b) to the personal information in the records. She finds that section 38(a) in conjunction with section 9(1)(c) is applicable, but not the law enforcement exemptions in section 8(1). The adjudicator also finds that the police properly exercised their discretion with respect to the records withheld under section 38(b). She orders the police to re-exercise their discretion with respect to the one record withheld under section 38(a) in conjunction with section 9(1)(c).

**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"), 8(1)(a), 8(1)(b), 9(1)(c), 14(1), 38(a), and 38(b).

**Orders Considered:** Orders PO-3506, MO-3547, MO-3614-I and MO-3758.

### BACKGROUND:

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

I would like all data collected and housed on the City of Ottawa/Ottawa Police Service databases. This request being made is from April of 2009 to October 12, 2017. This request is on the name of [named requester] of Ottawa, Ontario.

[2] The police issued a decision granting partial access to the records responsive to the request. Access to the withheld information was denied pursuant to section 38(a) (discretion to refuse requester's own information) in conjunction with sections 8(1)(c) (reveal investigative techniques and procedures), 8(1)(i) (security), 8(1)(l) (facilitate commission of an unlawful act) and 9(1)(c) (foreign government), as well as the mandatory and discretionary personal privacy exemptions in sections 14(1) and 38(b) of the *Act*. The police also relied on the exclusion at section 52 (2.1) (ongoing prosecution) of the *Act* for a certain record.

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

[4] During mediation, the police issued a revised decision with respect to a specified general occurrence report (as seen below, Record 5). The police advised the appellant that the information with respect to this occurrence would remain exempt as this investigation was still open. The police also relied on section 38(a) in conjunction with sections 8(1)(a) (law enforcement matter), 8(1)(b) (law enforcement investigation), 8(1)(e) (endanger life or safety), 8(1)(f) (right to fair trial), 8(1)(i), 8(1)(l), 8(2)(a) (law enforcement report), as well as section 38(b) of the *Act* to withhold information.

[5] As further mediation was not possible, this appeal was moved to the adjudication stage, where an adjudicator conducts a written inquiry under the *Act*.

[6] During the inquiry, I sought and received representations from the appellant and the police. Pursuant to section 7 of this office's *Code of Procedure and Practice Direction Number 7*, copies of the parties' representations were shared.

[7] I then sent out a Supplemental Notice of Inquiry (NOI) to the police, inviting them to provide representations on sections 9(1)(c) and 52(2.1). After receiving the police's representations, I sent the Supplemental NOI to the appellant, along with a copy of the police's representations. The appellant provided representations in response.

[8] In the police's representations, they confirmed that section 52(2.1) is no longer at issue as the criminal prosecution regarding a specified occurrence (as seen below, Record 4) had concluded and the time to appeal had expired. Accordingly, I have removed this issue from the appeal. As the police have not issued a revised access decision with respect to this record to the appellant, I order them to do so. I make no finding on access to this record in this appeal.

[9] In this order, I uphold the police's application of sections 14(1) and 38(b). I find that section 38(a) in conjunction with section 9(1)(c) is applicable, but not the law

enforcement exemptions in section 8(1). I also find that the police properly exercised their discretion with respect to the records withheld under section 38(b). I order the police to re-exercise their discretion with respect to the record withheld under section 38(a) in conjunction with section 9(1)(c).

## **RECORDS:**

[10] The records at issue consist of the following five general occurrence reports. I have numbered them as follows:

- Record 1 (occurrence report ending in 078)
- Record 2 (occurrence report ending in 582)
- Record 3 (occurrence report ending in 135)
- Record 4 (occurrence report ending in 828)
- Record 5 (occurrence report ending in 980)

[11] The information at issue is the withheld information in each of these occurrence reports.

[12] Two audio recordings, withheld in full, are also at issue in this appeal.

## **ISSUES:**

- A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the mandatory exemption at section 14(1) or the discretionary exemption at section 38(b) apply to the personal information that has been withheld?
- C. Does the discretionary exemption at section 38(a) in conjunction with the law enforcement exemptions at sections 8(1)(a) or 8(1)(b) apply to the remaining information in Record 5?
- D. Does the discretionary exemption at section 38(a) in conjunction with the section 9(1)(c) exemption apply to pages 18-57 of Record 3?
- E. Did the police exercise their discretion under sections 38(a) and/or 38(b)? If so, should this office uphold the exercise of discretion?

## **DISCUSSION:**

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

[13] In order to determine whether the personal privacy exemptions at section 14(1) or section 38(b) of the *Act* applies, it is necessary to decide whether the records contain “personal information” and, if so, to whom it relates. Also, if the records contain the appellant’s personal information then section 38(a) must be considered.

[14] Relevant paragraphs of the definition of “personal information” are the following:

“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 of another individual except if they relate to another 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;

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

personal information.<sup>1</sup>

[16] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.<sup>2</sup>

[17] In their representations, the police submit that the records contain personal information, such as addresses, telephone numbers, dates of birth, gender and statements/personal views of identifiable individuals.

[18] Although the appellant provided representations, his representations did not address this issue.

[19] Based on my review of the records, I find that they contain "personal information" as defined by the *Act*. The five general occurrence reports contain the personal information of the appellant and other identifiable individuals while the two audio recordings contain only the personal information of other identifiable individuals. Specifically, the records at issue contain information that would fall within paragraphs (a), (b), (c), (d), (e), (g) and (h) of the definition of "personal information" in section 2(1) of the *Act*.

[20] In addition, I note that the police have withheld the appellant's own personal information in Record 3 under the personal privacy exemption. The personal privacy exemptions cannot apply to exempt the appellant's own personal information from him to which he has a general right under section 37. As such, I will order the police to disclose his personal information to him in accordance with the highlighted record enclosed with this order.

[21] As the two audio recordings only contain the personal information of other individuals and not the appellant, Part I of the *Act* applies to those records and I must consider whether the withheld information is exempt pursuant to the mandatory personal privacy exemption at section 14(1) of the *Act*.

[22] As the five general occurrence reports contain the personal information of both the appellant and other individuals, Part II of the *Act* applies to this information and I must consider whether the withheld information is exempt pursuant to the discretionary exemptions at sections 38(a) and/or (b) of the *Act*.

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<sup>1</sup> Order 11.

<sup>2</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

**B: Does the mandatory exemption at section 14(1) or the discretionary exemption at section 38(b) apply to the personal information that has been withheld?**

[23] 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.

[24] Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an “unjustified invasion” of the other individual’s personal privacy, the institution may refuse to disclose that information to the requester. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.<sup>3</sup>

[25] In contrast, under section 14(1), where a record contains personal information of another individual but *not* the requester, the institution is prohibited from disclosing that information unless one of the exceptions in sections 14(1)(a) to (e) applies, or unless disclosure would not be an unjustified invasion of personal privacy [section 14(1)(f)].

[26] Under section 38(b), if any of the exceptions in sections 14(1)(a) to (e) applies, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). None of the exceptions in section 14(1)(a) to (e) is relevant here.

[27] In determining whether disclosure of the personal information in the records *would not* be an unjustified invasion of personal privacy under section 14(1)(f) or *would* be an unjustified invasion of personal privacy under section 38(b), sections 14(2) to (4) also provide guidance.

[28] The factors and presumptions at sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Additionally, if any of paragraphs (a) to (c) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under either section 14(1) or section 38(b). None of the circumstances listed in section 14(4) is present here.

***Sections 14(2) and (3)***

[29] Sections 14(2) and (3) read, in part:

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<sup>3</sup> See below in the “Exercise of Discretion” section for a more detailed discussion of the institution’s discretion under section 38(b).

2. A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
  - a. the personal information is highly sensitive;
  - h. the personal information has been supplied by the individual to whom the information relates in confidence; and
  - i. the disclosure may unfairly damage the reputation of any person referred to in the record.
3. A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
  - b. was compiled and is identified 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;

[30] 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.

[31] For records claimed to be exempt under section 14(1) (i.e., records that do not contain the requester's personal information), a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if a section 14(4) exception or the "public interest override" at section 16 of the *Act* applies.<sup>4</sup> None of the section 14(4) exceptions is relevant here and the public interest has not been raised.

[32] If the records are not covered by a presumption in section 14(3), section 14(2) lists various factors that may be relevant in determining whether disclosure of the personal information would be an unjustified invasion of personal privacy and the information will be exempt unless the circumstances favour disclosure.<sup>5</sup>

[33] For records claimed to be exempt under section 38(b) (i.e., records that contain the requester's own personal information), this office will consider, and weigh, the factors and presumptions in both sections 14(2) and (3) and balance the interest of the parties in determining whether disclosure of the personal information in the records would be an unjustified invasion of personal privacy.<sup>6</sup>

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<sup>4</sup> *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13. O.R. (3d) 767 (*John Doe*).

<sup>5</sup> Order P-239.

<sup>6</sup> Order MO-2954.

## ***Analysis and findings re sections 14(1) and 38(b)***

### *Audio recordings*

[34] I will first consider the application of the mandatory personal privacy exemption in section 14(1) to the audio recordings as they only contain the personal information of other individuals. The police withheld these records in full. As stated earlier, the police are prohibited from disclosing these audio recordings unless one of the circumstances listed in sections 14(1)(a) to (e) applies, or unless disclosure would not be an unjustified invasion of personal privacy [section 14(1)(f)]. In this case, the exceptions in sections 14(1)(a) to (e) do not apply to these recordings.

[35] To determine whether disclosure of these recordings are an unjustified invasion of personal privacy, I need to consider whether any of the presumptions in section 14(3) applies. If so, the disclosure of the recordings are presumed to be an unjustified invasion of personal privacy.

[36] The police submit that the presumption under section 14(3)(b) applies as the recordings were created as part of an investigation into a possible violation of the law. The police submit that, therefore, the release of the recordings would constitute an unjustified invasion of personal privacy. The police also submit that section 14(3)(b) applies even when criminal proceedings are not commenced, as there only has to be an investigation into a 'possible' violation of law.

[37] I agree with the police that the presumption in section 14(3)(b) applies to the personal information at issue as the recordings were created and are identifiable as part of an investigation into a possible violation of the *Criminal Code of Canada*. As such, I find that disclosure of these recordings is presumed to be an unjustified invasion of the individuals' privacy and the records are exempt from disclosure under the mandatory privacy exemption at section 14(1) of the *Act*.<sup>7</sup>

### *General occurrence reports*

[38] As stated earlier, these records contain the personal information of the appellant and other individuals. As such, I must weigh the presumptions and factors in sections 14(3) and 14(2) and balance the interests of the parties in determining whether the disclosure of the personal information in these records would be an unjustified invasion of personal privacy.

[39] In this case, I agree with the police that the presumption at section 14(3)(b) also applies to the personal information withheld in the general occurrence reports. The personal information contained in these reports was compiled and is identifiable as part

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<sup>7</sup> *John Doe*, cited above.



of investigations into possible violations of the *Criminal Code of Canada*, all of which (but two) resulted in charges being laid. Although no charges were laid for two of these investigations, there need only have been an investigation into a possible violation of law for the presumption at section 14(3)(b) to apply.<sup>8</sup> Section 14(3)(b) therefore weighs in favour of non-disclosure of the withheld information in these general occurrence reports.

[40] With respect to the factors in section 14(2), the police rely on sections 14(2)(f) (the personal information is highly sensitive) and 14(2)(i) (the disclosure may unfairly damage the reputation of any person referred to in the record). They state:

Section 14(2) does apply to these records, as the personal information contained within the records are highly sensitive and its disclosure may unfairly damage the reputation of the individuals to whom they relate and were supplied by.

[41] I find the factor in sections 14(2)(f) is relevant with respect to the personal information contained in these general occurrence reports because the personal information of the parties in these reports is highly sensitive. To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.<sup>9</sup> Given the personal information withheld in these records, I accept that disclosure of this information to the appellant would cause these individuals significant personal distress. However, I am not convinced by the police's submissions that disclosure may unfairly damage the reputation of the parties referred to in the records. The police's submissions do not substantiate the application of this factor.

[42] In addition, I have reviewed the remainder of the factors in section 14(2), including listed and unlisted factors in favour of disclosure, and find that section 14(2)(h) (the personal information has been supplied by the individual to whom the information relates in confidence) applies to the personal information in these records. I note that the appellant provided representations, but his representations do not address this issue. Consequently, having considered and found that the presumption in section 14(3)(b) and the factors in sections 14(2)(f) and 14(2)(h) apply to the general occurrence reports, I find the personal information qualifies for exemption under section 38(b) of the *Act*, subject to my findings on the police's exercise of discretion below.

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<sup>8</sup> Orders P-242 and MO-2235.

<sup>9</sup> Orders PO-2518, PO-2617, MO-2262 and MO-2344.

**C: Does the discretionary exemption at section 38(a) in conjunction with the law enforcement exemptions at sections 8(1)(a) or 8(1)(b) apply to the remaining information in Record 5?**

[43] The remaining information in Record 5 consists of the narrative of the incident (excluding the personal information of identifiable individuals) and administrative police matters.

[44] Section 38(a) is another exemption from a individual's general right of access to their own personal information. It 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.

[45] 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.<sup>10</sup>

[46] 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.

[47] In this case, the police rely on section 38(a) in conjunction with sections 8(1)(a), 8(1)(b), 8(1)(c), 8(1)(e), 8(1)(f), 8(1)(i), 8(1)(l), 8(2)(a), and 9(1)(c). However, the police only provided brief submissions on sections 8(1)(a) and (b). As the section 8(1) exemptions are discretionary and the police have not provided any submissions on the other exemptions, I will not be considering them any further.

[48] Sections 8(1)(a) and (b) read:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,

- a. interfere with a law enforcement matter;
- b. interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

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<sup>10</sup> Order M-352.

[49] 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).

[50] The term “law enforcement” has covered the following situation:

- a police investigation into a possible violation of the *Criminal Code*.<sup>11</sup>

[51] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.<sup>12</sup>

[52] It is not enough for an institution to take the position that the harms under section 8 are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter.<sup>13</sup> The institution must provide detailed evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.<sup>14</sup>

### ***Section 8(1)(a) – Law enforcement matter***

[53] In order for section 8(1)(a) to apply, the law enforcement matter must be ongoing or in existence.<sup>15</sup> The exemption does not apply where the matter is completed, or where the alleged interference is with “potential” law enforcement matters.<sup>16</sup> However, the “matter” may extend beyond a specific investigation or

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<sup>11</sup> Orders M-202 and PO-2085.

<sup>12</sup> *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

<sup>13</sup> Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

<sup>14</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

<sup>15</sup> Order PO-2657.

<sup>16</sup> Orders PO-2085 and MO-1578.

proceeding.<sup>17</sup> The institution holding the records need not be the institution conducting the law enforcement matter for the exemption to apply.<sup>18</sup>

***Section 8(1)(b) – Law enforcement investigation***

[54] The law enforcement investigation in question must be a specific, ongoing investigation. The exemption does not apply where the investigation is completed, or where the alleged interference is with “potential” law enforcement investigations.<sup>19</sup> The investigation in question must be ongoing or in existence.<sup>20</sup>

[55] The police submit that the general occurrence reports were created in the course of law enforcement investigations. They initially submitted that one of the records, specifically Record 5, was created due to an ongoing law enforcement investigation that could lead to potential criminal charges of breach release conditions stemming from prior criminal charges. The police submit that if this record was released prematurely before the investigation was completed, it could hamper the investigative process and court processes should the investigation result in criminal charges.

[56] During the inquiry, the police confirmed that the investigation with respect to Record 5 has concluded.

***Analysis and findings***

[57] As mentioned above, the police provided only brief representations on the application of sections 8(1)(a) and 8(1)(b) of the *Act*.

[58] Although the appellant provided representations, his representations did not address the application of these exemptions.

[59] The police submitted that the law enforcement matter and investigation that are the subject matter of Record 5 is now complete. The police did not provide representations on how disclosure of the withheld information in this record could reasonably be expected to result in any harms now that the investigation is concluded.

[60] As stated above, I have found the personal information in Record 5 exempt under section 38(b). For the remaining information, I find it is not exempt under section 38(a) as I have found that sections 8(1)(a) and (b) do not apply.

[61] In sum, I find that the police have failed to provide sufficient evidence to support

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<sup>17</sup> *Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 4233 (Div. Ct.).

<sup>18</sup> Order PO-2085.

<sup>19</sup> Order PO-2085.

<sup>20</sup> Order PO-2657.

the application of section 38(a) in conjunction with sections 8(1)(a) and (b). Subject to my findings under Issue E, I will order the police to disclose the withheld information in Record 5 except for the information that I have found to be exempt under the personal privacy exemptions.

**D: Does the discretionary exemption at section 38(a) in conjunction with section 9(1)(c) exemption apply to pages 18 to 57 of Record 3?**

[62] The police claim that pages 18 to 57 of record 3 are subject to the exemption under section 38(a) in conjunction with section 9(1)(c) of the *Act*. The police did not rely on any personal privacy exemptions for this portion of the record.

[63] Sections 9(1)(c) and 9(2) state:

1. A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,

c. the government of a foreign country or state;

2. A head shall disclose a record to which subsection (1) applies if the government, agency or organization from which the information was received consents to the disclosure.

[64] The purpose of this exemption is to ensure that governments under the jurisdiction of the *Act* continue to obtain records which other governments might otherwise be unwilling to supply without having this protection from disclosure.<sup>21</sup>

[65] If disclosure of a record would permit the drawing of accurate inferences with respect to information received from another government, it may be said to "reveal" the information received.<sup>22</sup>

[66] For a record to qualify for this exemption, the institution must establish that:

1. disclosure of the record could reasonably be expected to reveal information it received from one of the governments, agencies or organizations listed in the section; and

2. the information was received by the institution in confidence.<sup>23</sup>

[67] The focus of this exemption is to protect the interests of the supplier of

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<sup>21</sup> Order M-912.

<sup>22</sup> Order P-1552.

<sup>23</sup> Orders MO-1581, MO-1896 and MO-2314.

information, and not the recipient. Generally, if the supplier indicates that it has no concerns about disclosure or vice versa, this can be a significant consideration in determining whether the information was received in confidence.<sup>24</sup>

[68] The police submit that they received pages 18 to 57 of Record 3 in confidence from the Bermuda Police Services. They submit that these pages contain court documents from the Supreme Court of Bermuda, and statements and emails from the victim. The police submit that the Bermuda Police Services collected these pages as a part of their investigation into the possibility of a criminal offence and their disclosure could identify other parties to the matter, and would reveal information collected and shared by that agency.

[69] The police did not contact the Bermuda Police Services for consent to disclose the pages of Record 3 supplied by them. Based on my review of the record and the circumstances of this appeal, I accept that the police received these pages in confidence. As such, I am satisfied that disclosure of these pages could reasonably be expected to reveal information that the police received from the Bermuda Police Services in confidence. Accordingly, I find that section 9(1)(c) applies and these pages are exempt under section 38(a).

**E: Did the police exercise their discretion under sections 38(a) and/or 38(b)? If so, should this office uphold the exercise of discretion?**

[70] The sections 38(a) and (b) exemptions are 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.

[71] 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.

[72] In either case, this office may send the matter back to the police for an exercise of discretion based on proper considerations.<sup>25</sup> This office may not, however, substitute

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<sup>24</sup> Orders M-844 and MO-2032-F.

<sup>25</sup> Order MO-1573.

its own discretion for that of the institution.<sup>26</sup>

***Police's representations***

[73] The police submit that they properly exercised their discretion in applying section 38(b). They submit that they considered the following factors:

- privacy rights of involved individuals
- interference with a law enforcement matter
- individuals should have a right of access to their own personal information
- whether the requester was seeking his own information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the investigation undertaken with a view to a law enforcement proceeding is likely to result

[74] The police also submit that they properly exercised their discretion in applying section 38(a). They submit that they considered the following factors when reaching their decision:

- individuals should have a right of access to their own personal information
- the privacy of individuals should be protected (third parties)
- the nature and source of the information

[75] The police also submit that they considered the following factors in denying the information under section 38(a):

- the information was provided in confidence from a foreign country or state
- the information is highly sensitive and contains personal information of multiple third parties

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<sup>26</sup> Section 43(2).

- the information provided from the foreign agency was collected as part of their investigation into the possibility of a criminal act, and its disclosure could interfere with their processes and could easily identify the other parties involved

[76] In addition, the police submit that they withheld information under section 38(a) in conjunction with section 9(1)(c) to protect the process of sharing confidential information with other levels of government. They submit:

... Communication between agencies is a valuable resource that aids in the criminal investigation process and without the protection of confidentiality there might exist an unwillingness of other governments and foreign agencies to supply information that would be of assistance to the police.

### ***Appellant's representations***

[77] In his representations, the appellant submits that the police did not exercise their discretion with respect to section 38(a). Specifically, the appellant submits that section 9(1)(c) does not apply to pages 18 to 57 of Record 3 because the pages requested do not meet the Canadian court standard for evidence that can be used. He submits that it is all hearsay. The appellant further submits:

... Once any piece of information that is housed in any Canadian database, that the government runs is open to their [citizens]. As a Canadian citizen I need to know what is there. I need to know what is not accurate, so I can update and prove what is fact and what is fiction. There was never any Canadian government representative that witness the events in Bermuda's courtroom when [I] was being illegally prosecuted.

[78] The appellant did not provide any representations with respect to the police's exercise of discretion under section 38(b).

### ***Analysis and findings***

[79] An institution's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law.<sup>27</sup> It is my responsibility to ensure that this exercise of discretion is in accordance with the *Act*. If I conclude that discretion has not been exercised properly, I can order the institution to reconsider the exercise of discretion.<sup>28</sup>

[80] Based on my review of the parties' representations and the records at issue, I

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<sup>27</sup> Order MO-1287-I.

<sup>28</sup> Order P-58.



find that the police properly exercised their discretion to withhold the personal information pursuant to the discretionary personal privacy exemption at section 38(b) of the *Act*. I note that the police took into account the above-noted relevant considerations. I am satisfied that they did not act in bad faith or for an improper purpose. Accordingly, I uphold the police's exercise of discretion in deciding to withhold the personal information pursuant to the section 38(b) exemption.

[81] However, I do not find that the police properly exercised their discretion to withhold information I have found exempt under section 38(a) in conjunction with section 9(1)(c). While the police properly considered the appellant's right to his own personal information under section 38(b), I find they did not also consider this factor when applying section 38(a). Moreover, I find this factor relevant as the withheld information relates to the appellant and contains information and references that the appellant would already know. Furthermore, the withheld information consists of a number of court documents which I presume would have been available to the appellant. Finally, considering that the legal matter and investigation are no longer ongoing, and given the passage of time, I find that the police did not consider all of the relevant factors when they withheld the information on pages 18 to 57 of Record 3 under section 38(a). Accordingly, I will order the police to re-exercise their discretion, taking into consideration the factors I have listed above.

## **ORDER:**

1. I order the police to issue an access decision with respect to Record 4. The police are to treat the date of this order as the date of the request, in accordance with sections 19, 22 and 23 of the *Act*.
2. I uphold the police's application of the personal privacy exemptions at sections 14(1) and 38(b).
3. I order the police to disclose to the appellant his personal information contained in Record 3, the withheld information on page 32 of Record 1 and the withheld information in Record 5 by **October 29, 2019** but not before **October 24, 2019** in accordance with the highlighted records I have enclosed with the police's copy of this order. To be clear, the highlighted information should be disclosed to the appellant.
4. I uphold the police's application of section 38(a) in conjunction with section 9(1)(c). However, I order the police to exercise their discretion with respect to the information withheld under section 38(a). The police are to provide a decision on this exercise of discretion to the appellant and this office within 30 days of the date of this order.
5. I remain seized of this matter in order to determine whether the police exercised their discretion properly.

6. I uphold the police's exercise of discretion with respect to the information withheld under section 38(b).
7. In order to verify compliance with this order, I reserve the right to require the police to provide me with a copy of the records as disclosed to the appellant as well as a copy of their access decision issued in accordance with order provision 1.

Original signed by \_\_\_\_\_

Lan An  
Adjudicator

September 23, 2019 \_\_\_\_\_