



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

ORDER M-757

Appeal M_9500347

Durham Regional Police Services Board



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BACKGROUND:

In November of 1992, an incident occurred which resulted in the laying of charges of assault against the appellant by the Durham Regional Police Force (the force). Assault charges were also laid against three other individuals. The appellant was tried and acquitted of the charges.

The appellant subsequently filed three formal complaints against several officers concerning his treatment by members of the force in connection with the assault charges that were laid against him. The complaints were filed with the Office of the Police Complaints Commissioner (the PCC). As is the usual practice, the complaints were initially investigated by the Public Complaints Investigation Bureau of the force. The Chief of Police decided that no further action was required in respect of that matter. The appellant requested a review of that decision by the PCC. The PCC investigated the complaints. However, in September 1994, the ongoing investigation by the PCC was terminated when all the complaints were withdrawn by the appellant. As a result, the complaints were never formally resolved.

NATURE OF THE APPEAL:

Counsel for the appellant submitted a request to the Durham Regional Police Services Board (the Police) for access to all information concerning his client relating directly or indirectly to the incident which gave rise to the laying of the assault charges, the subsequent processing of the charge and the handling of the matter by the Police. The request goes on to seek access to the notebook entries and the record of shift for 20 named police officers for specified dates. With respect to the notebook entries, the request states that these should be "... supplied as they appear chronologically in the memo notebooks ...". The request was made pursuant to the Municipal Freedom of Information and Protection of Privacy Act (the Act).

In a subsequent clarification of the request, counsel indicated that he is seeking access to the following:

- (1) The officers' memo notebooks of the officers indicated and for the dates indicated [in the request];
- (2) A record of shift for each of the officers identified on the dates identified [in the request]; and
- (3) All information relating to [the appellant] in the possession of [the Police] or available to [the Police] relating directly or indirectly to [the appellant] and the charge against him and the handling of such charge, including without limitation, records of communication with other police officers, reporters, citizens, representatives of [the appellant], etc. Such material and information may or may not be contained in the officers' memo notebooks. Such information may be recorded in other ways. Accordingly, we are requesting this information, no matter how such information is recorded or preserved. It may be on computers, in files, in notebooks, in copies of correspondence or in other forms. To put the matter at its most simplistic, we are asking for all information relating to [the appellant] and [the appellant's] matter in its most general form.

The Police responded to the request, as clarified, with an interim access decision and fee estimate. Counsel filed an appeal of this decision. This appeal was resolved by Order M-514 in which, among other matters, Inquiry Officer John Higgins ordered the Police to make a final access decision regarding records responsive to each of the three parts of the request.

Pursuant to section 21 of the Act, the Police notified 19 individuals whose interests could be affected by the disclosure of the requested records. Six of these individuals consented to the disclosure of all their personal information and one consented to partial disclosure. Eight did not respond to the notification. The notices to the four remaining individuals were returned to the Police and marked "not at this address".

The Police also notified 27 police officers regarding the disclosure of information which might affect their interests.

The Police subsequently issued two decision letters dated May 29, 1995 and June 5, 1995 respectively. At that time, the Police identified approximately 1,900 pages of responsive records and denied access to them in part, based on the following exemptions in the Act:

- facilitate commission of an unlawful act - section 8(1)(l)
- law enforcement report - section 8(2)(a)
- invasion of privacy - sections 14(1) and 38(b)
- information published or available - section 15(a)
- discretion to refuse requester's own information - section 38(a)

An agent for the appellant (the agent) filed an appeal of this decision to deny access to some of the records. The appellant advised this office that counsel was not to be involved in the appeal.

In addition to disputing the application of the claimed exemptions, the agent maintains that there is a public interest in disclosure of the records, thus raising the application of section 16 of the Act. The agent also believes that additional records should exist.

The agent agreed that the documents that are publicly available would not be at issue in the appeal. Therefore, I need not consider the application of the exemption in section 15(a). Furthermore, the agent agreed not to seek access to those records which were duplicates.

A Notice of Inquiry was sent to the agent, the Police and to 13 of the individuals previously notified by the Police. The same notice was also sent to the 27 police officers. The Police subsequently advised this office that there were six other officers who should receive notification. The Police had not initially notified these individuals as they were no longer employed by the Police and their names were inadvertently omitted from the Police notification list. Notices of Inquiry were sent to these officers as well. In summary, a total of 46 individuals received notification of this appeal - 13 individuals (the civilian affected parties) and 33 officers or former officers (the Police affected parties).

Representations were received from the Police, the agent and 23 of the Police affected parties. No submissions were received from any of the civilian affected parties. Three of the notices sent to these individuals were returned to this office marked "moved" or "no longer at this address".

All of the Police affected parties objected to the disclosure of any of their personal information on the basis that to do so would constitute an unjustified invasion of their personal privacy. The submissions of the agent included two videotapes.

Attached to the Notice of Inquiry sent to the parties was an index of records prepared by the Appeals Officer. This index set out the page numbers of the records at issue, a description of these documents and the exemptions claimed by the Police to deny access to them, either in whole or in part. The index also set out those records which were duplicate copies of others and, accordingly, not at issue as per the agreement of the agent.

In this order, where necessary, I will refer to the records according to the page numbering system used by the Police and set out in the record index. In my view, no useful purpose would be served by attaching the index to this order. The parties are all aware of the specifics of all the records. The records may be generally described as follows:

- (1) Police officers' notebooks (pages 1-142)
- (2) General investigative files into the assault allegations against the appellant and three other individuals (pages 143-491)
- (3) Professional Standards Branch Investigative files (pages 502-1901). This group of records includes the following types of documents:
 - the final report
 - 99 questions posed by the appellant and the responses thereto
 - citizen statements
 - subject officers statements
 - witness officers statements
 - public complaint forms and notices of the withdrawal of the complaints
 - correspondence between the PCC and other individuals
 - arrest, incident and supplementary reports
 - crown briefs
 - bail hearings
 - criminal records
 - mug shots
 - news releases
 - police prisoner lodging forms
 - police duty schedules

This group of records includes a large portion of the general investigative file documents.

- (4) Miscellaneous records (pages 1902-1914)

These four general groups of records consist of 1,914 pages of documentation. The records also include two audio tapes and two computer diskettes.

The Police advised this office that one of the audiotapes was blank and that the other contained a dictation of portions of the final report. I confirmed this information by listening to the tapes.

During the inquiry I so advised the agent who agreed that these two tapes need not be considered further.

I have also reviewed the information on the two computer diskettes which, according to the Police, were located in their Professional Standards Branch files. One diskette contains two files - a copy of page 946 and a copy of page 963. These two files also appear on the second diskette which contains a third file of portions of the Final Report, amendments to the Final Report as well as copies of pages 1900-1901 and the Public Complaints Investigation Bureau 1993 Complaints Form. As all of the information contained on the computer diskettes is a duplicate of that recorded in paper format and the agent has confirmed that she is not seeking access to duplicate records, I will not consider the computer diskettes as separate records for the purposes of this appeal.

PRELIMINARY ISSUES

RECORDS PREVIOUSLY RECEIVED

During the inquiry, I provided the agent with a list of several records. The list indicated that the agent, the appellant or counsel appeared to have previously received copies of these documents. In addition, the list referred to several records which were duplicates of others at issue. The agent was requested to advise this office in the event that any of the records on the list should still be addressed in this order.

The agent advised this office that she was still seeking access to pages 502, 749-753, 851-852, 966, 990, 1266, 1468-1469 and 1556-1557. The appellant or the agent had received access to these pages in full in the context of other proceedings. In response to the request under the Act, the Police denied access to these pages, either in whole or in part, on the basis of sections 8(2)(a) and 14(1). I will consider these pages in this order.

Pages 1910-1911 comprise a witness statement that was not disclosed to the agent in response to the request in this appeal. The agent subsequently submitted a separate request for access to this statement. The witness consented to the disclosure of the statement with the exception of his personal identifiers found on page 1911. The Police disclosed a copy of page 1910 to the agent and advised that the original of this page could be viewed in their office. The agent appealed this decision wishing to see page 1911, which was the back of the statement. However, once the agent was apprised of the type of information on page 1911, she agreed that the statement was no longer at issue. Accordingly, I need not consider pages 1910-1911 in this order.

The agent also advised this office that the copies of pages 946 and 1341 were not very clear. The Police have provided the most legible copies possible to this office and I will order them to provide this quality of copies to the agent. They appear to be the pages the agent referred to during the inquiry in her discussion of questions 2 and 21 in the Notice of Inquiry under the issue "Reasonable Search for Records". At that time she also requested clearer copies of these documents.

The agent has expressed concern that she has not received access to the personal information of two individuals who consented to the disclosure of their personal information. The statements that these two individuals gave to the Police constitute pages 908-909 and 910-913. The Police

disclosed the personal information of the consenting individuals to the agent, but did not disclose information relating to other individuals who did not consent. I will consider the information which was withheld from these records under the section "Invasion of Privacy".

The only other references to these individuals are found on pages 1099, 1118 and 1416. Page 1099 is found in a letter written by counsel and page 1118 in a letter written by the agent's husband. These two pages were included in the list of records which were provided to the appellant during the inquiry. The agent has indicated that she is not seeking access to these two documents. The Police should disclose the name on the second last line of page 1416. The Police were in receipt of the consents from these two individuals at the time at which they issued their first access decision.

ADDITIONAL RECORDS

In the letter of appeal, the agent had raised the issue of the existence of additional responsive records. Accordingly, in the Notice of Inquiry, the Police were asked to provide this office with information respecting the searches they conducted in order to locate the requested records. I will address the adequacy of the searches later in this order.

In their submissions, the Police state that they conducted a second search of the record holdings in the Police Services Board, the Records Branch - Criminal Records Section and the Forensic Identification Unit. Sixty-two additional pages of records were located during the subsequent searches of the Police Services Board and Forensic Identification Unit files.

During the inquiry, the agent was provided with a descriptive list of these additional records. The list identified which records were duplicates of records at issue, which records the Police were prepared to disclose, either in whole or in part, and which records were being withheld under certain exemptions. The exemptions claimed for these additional records are the same as those previously cited for other documents.

As I have previously indicated, the agent is not seeking access to any duplicates. Fifty of the additional records fall into this category. The Police state that they are prepared to disclose pages 1941, 1943, 1952, and 1973-1977 in full and provide partial access to pages 1917-1919 but have not yet done so. I will order the Police to disclose these records in my order.

The Police have denied access to pages 1920-1921 in total and to portions of pages 1917-1919 on the basis of section 14(3)(b) of the Act. The agent has stated that she is not seeking access to these records. There is no information on page 1919 related to the appellant. In these circumstances, the agent has also indicated that she is not interested in receiving access to page 1919.

The agent does want to pursue access to pages 1938-40, 1942, 1944-51, 1953-66 and 1978. Pages 1938-40 and 1954-56 are duplicates of pages 271-273. They are portions of a letter dated November 23, 1993 that she sent to the Chairman of the Police Services Board. These pages have been disclosed to the agent with certain portions withheld on the basis of sections 8(2)(a) and 14(1) of the Act. I will consider these pages in my discussion which follows.

Page 1942 is a duplicate of page 696. Pages 1944-51 are duplicates of pages 262-269. Page 1953 is a duplicate of page 270. Page 1978 is a duplicate of page 451. Pages 696, 262-270 and 451 have all been previously disclosed in full to the agent by the Police. In my view, the Police are not required to give access to the previously disclosed records for a second time.

DISCUSSION OF EXEMPTIONS

LAW ENFORCEMENT REPORT

The Police have claimed that section 8(2)(a) applies to exempt numerous records from disclosure. However, because of the manner in which I will deal with this appeal, it is only necessary that I consider its application to pages 271-273, 851-852 and 1556-1557.

Section 8(2)(a) states:

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;

In order for a record to qualify for exemption under section 8(2)(a) of the Act, the Police must satisfy each part of the following three-part test:

1. the record must be a report; **and**
2. the report must have been prepared in the course of law enforcement, inspections or investigations; **and**
3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

[See Order 200 and Order P-324]

In Order 221, Commissioner Tom Wright made the following comments about part one of the test:

The word "report" is not defined in the Act. However, it is my view that in order to satisfy the first part of the test, i.e. to be a report, a record must consist of a formal statement or account of the results of the collation and consideration of information. Generally speaking, results would not include mere observations or recordings of fact.

I agree with this approach and will apply it to the record at issue in this appeal.

Pages 851-852 and 1556-1557 are Public Complaint Forms under the Police Services Act. They contain summaries of the incidents which lead to the complaints and the specific allegations made against the named officers. In my view, these records do not constitute "reports" as they do not contain the results of the consideration of any information set out in the documents.

As I have previously indicated, pages 271-273 are pages of a letter written by the agent to the Chairman of the Police Services Board. It is clear that such a record meets none of the criteria required for the section 8(2)(a) exemption to apply.

Accordingly, I find that section 8(2)(a) does not apply to exempt pages 271-273, 851-852 and 1556-1557.

PERSONAL INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

I have reviewed all the records at issue to determine if they contain personal information and, if so, to whom the personal information relates.

All of the records related to the assault charges filed against the appellant contain his personal information. In addition, they contain the personal information of other identifiable individuals. These documents have been severed such that the only information remaining at issue is the personal information of the other individuals who did not consent and information which the Police have withheld on the basis of section 8(1)(l).

There are other records which contain only the personal information of non-consenting individuals other than the appellant. These include the duty schedules of the police officers as well as records which relate solely to other individuals. In the latter case, the documents have been withheld in their entirety.

Some of the records, in particular the notebooks, contain references to named police officers functioning in their employment or professional capacity. The Police have disclosed such information. References to the same officers appear in the Professional Standards Branch Investigative files. I accept the submissions of the Police that an officer who is a subject officer or a witness officer in a public complaint investigation is not functioning in his or her normal capacity as a police officer. I agree with the Police that such references constitute the personal information of the officers.

Section 36(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 38 provides a number of exceptions to this general right of access.

Under section 38(a) of the Act, the Police have the discretion to deny access to an individual's own personal information in instances where certain exemptions, including section 8(1)(l),

would otherwise apply to that information. I will address this issue in the section of this order entitled "Facilitate the Commission of an Unlawful Act/Discretion to Refuse Requester's Own Information".

INVASION OF PRIVACY

Under section 38(b) of the Act, where a record contains the personal information of both the appellant and other individuals and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information. In this situation, the requester is not required to prove that disclosure of the personal information **would not** constitute an unjustified invasion of the personal privacy of another individual. Since the requester has a right of access to his/her own personal information, the only situation under section 38(b) in which he/she can be denied access to the information is if it can be demonstrated that disclosure of the information **would** constitute an unjustified invasion of another individual's privacy.

Where, however, the record only contains the personal information of other individuals, section 14(1) of the Act prohibits the disclosure of this information unless one of the exceptions listed in this section applies. The only exception which might apply in the circumstances of this appeal is section 14(1)(f), which permits disclosure if it "... does not constitute an unjustified invasion of personal privacy".

In both these situations, sections 14(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. Where one of the presumptions found in section 14(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is where the personal information falls under section 14(4) or where a finding is made that section 16 of the Act applies to the personal information.

If none of the presumptions contained in section 14(3) apply, the institution must consider the application of the factors listed in section 14(2) of the Act, as well as all other considerations that are relevant in the circumstances of the case.

A number of previous orders (Order M-384, M-444 and M-451) have held that the disclosure of personal information relating to an individual other than the requester, in circumstances where the person requesting the information had originally provided it to the government organization, would not result in an unjustified invasion of personal privacy. I agree, and I find that disclosure of the information which was provided to the Police by the agent would not constitute an unjustified invasion of personal privacy of any other individual. This applies to pages 271-273 which are pages from the letter written by the appellant to the Chairman of the Police Services Board. This also applies to pages 851-852 and 1556-1557 which are the forms outlining the details of the complaints provided by the agent to the Police over the telephone. Accordingly, the exemption in section 38(b) does not apply and these pages should be disclosed.

The Police maintain that the following provisions of section 14(3) are applicable to some of the personal information at issue:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

- (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
- (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;
- (d) relates to employment or educational history;
- (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

In addition, the Police submit that the personal information is highly sensitive, unlikely to be accurate or reliable and that its disclosure may unfairly damage the reputation of any person referred to in the record. They, therefore, rely on the provisions of sections 14(2)(f), (i) and (g) in support of their position that such personal information should not be disclosed.

Both the police officers' notebooks (pages 1-142) and the general investigative files into the assault allegations against the appellant and three other individuals (pages 143-491) contain the personal information of individuals that was obtained by the Police during their investigation into the various assault charges. I find that such information was compiled and is identifiable as part of an investigation into a possible violation of law, namely the Criminal Code. Therefore, it is subject to the presumption in section 14(3)(b) of the Act.

The Police state that a public complaint investigation is a law enforcement investigation legislated pursuant to Part VI of the Police Services Act. The Police indicate that the results of such an investigation can lead to charges against the subject officers for violation of the Code of Offences as set out in Ontario Regulation 927 of the Police Services Act. Therefore, they submit that the personal information contained in the Professional Standards Branch Investigative files (pages 502-1901) was compiled and is identifiable as part of an investigation into a possible violation of law, that is, an alleged breach of the Police Services Act. I agree and find that this personal information is also subject to the presumption in section 14(3)(b) of the Act.

The balance of the pages at issue, pages 1902-1914, relate to information contained in the Crown's file for the prosecution of the appellant. I find that this information as well was compiled as part of an investigation into a possible violation of law.

Even though the agent or the appellant had previously received copies of pages 502, 749-753, 966, 990, 1266 and 1468-1469 through other processes, I find that the information withheld at this time is still subject to the presumption in section 14(3)(b) of the Act.

In summary, I find that all the personal information at issue falls within the presumption in section 14(3)(b) of the Act.

The agent submits that the disclosure of the personal information is desirable for the purpose of subjecting the activities of the Police to public scrutiny (section 14(2)(a)).

As I have previously indicated, where one of the presumptions in section 14(3) applies, it can only be rebutted if section 14(4) or 16 applies. This result is dictated by the findings of the Divisional Court in John Doe v. Ontario (Information and Privacy Commissioner) (1993) 13 O.R. 767. Therefore, section 14(2)(a) cannot apply to rebut the presumption in section 14(3)(b).

I have considered the application of section 14(4) of the Act and find that none of the personal information that I have found to be subject to the presumption falls within the ambit of this provision. Thus, where the personal information appears in records containing the personal information of the appellant and other individuals, it is exempt under section 38(b) of the Act. Those records containing solely the personal information of individuals other than the appellant are exempt pursuant to section 14(1).

The agent submits that many of the records contain the personal information of the appellant. Accordingly, she states that if the Police denied access to the personal information of any other individuals contained in these records, they should have claimed the application of section 38(b) of the Act, as opposed to section 14(1).

I agree. In fact, in both their decision letters dated May 29 and June 5, 1995, the Police claimed the application of section 38(b), in addition to section 14(1). In their submissions to this office, the Police explained the reasons for their exercise of discretion under section 38(b) of the Act, as well as their reasoning under section 14(1). I see no reason to disturb the exercise of discretion under section 38(b).

I will address the agent's public interest arguments on the application of section 16 of the Act later in this order.

FACILITATE THE COMMISSION OF AN UNLAWFUL ACT/DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

The Police have applied section 8(1)(l) of the Act to exempt from disclosure their operational "ten" codes, patrol zones and patrol car identification numbers, and the rules and regulations governing the frequency that an officer is to check the cells where prisoners are lodged. Section 8(1)(l) states:

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

facilitate the commission of an unlawful act or hamper the control of crime.

The Police have indicated that they use the “ten” codes to shorten radio transmissions, to standardize radio responses and, most importantly, to reduce the ability of those involved in criminal activity from easily tracking the activities of police officers. They submit that they applied section 8(1)(l) on the basis of this last concern.

The Police have explained the meaning of the five codes which have not been disclosed. They have provided, as part of their representations, an example of a case in which those involved in criminal activities acquired a list of the police codes and how it undermined the effectiveness of the Police in their attempt to control these activities.

In addition, they submit that knowledge of the Police patrol zones and car identification numbers could enable those involved in criminal activities to monitor the whereabouts and actions of specific units in a zone. In the example provided, the Police indicate that the criminal had attended the area beforehand and monitored the activities of the Police to gain familiarity with the patterns of the Police. In this way, they were able to ascertain which day would be the most conducive to their criminal pursuits.

As far as the information related to the cell checking is concerned, the Police submit that knowledge of this information would greatly facilitate an individual with the intent of committing the criminal act of aiding and abetting a prisoner in escaping from lawful custody. Such information could undermine the security of the police facility, especially in the area of the cells, and potentially jeopardize the safety of the police officer working in that area.

The agent submits that, in response to previous requests, the Police have provided access to information similar to that now exempted under section 8(1)(l).

The purpose of the exemption in section 8(1)(l) is to provide the Police with the discretion to preclude access to records in circumstances where disclosure could reasonably be expected to result in the harm set out in this section. I am satisfied that, in this case, the Police have provided sufficient evidence to establish that disclosure of the “ten” codes, patrol zones and patrol car identification numbers, and the rules and regulations governing the frequency that an officer is to check the cells where prisoners are lodged could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. Accordingly, I find that the requirements for exemption under section 8(1)(l) have been met with respect to this information.

Where this information appears in records containing the personal information of the appellant, it is exempt under section 38(a) of the Act. Where it appears in records which do not contain the appellant’s personal information, it is exempt under section 8(1)(l).

PUBLIC INTEREST IN DISCLOSURE

Section 16 of the Act 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.

I have found that some of the information at issue is exempt under sections 8(1)(l) and 38(a) of the Act. As section 8 is **not** included in the exemptions listed in section 16, I will not consider this information in my discussion of the “public interest override”.

I have also found that some of the personal information is exempt under section 14, which is referred to in section 16. Those records containing both the personal information of the appellant and other individuals, I have held to be exempt under section 38(b). Section 16 does not refer specifically to this exemption. I have previously considered this issue in Order P-541, where I made the following comments concerning sections 23, 49(b) and 21 of the Provincial Freedom of Information and Protection of Privacy Act, which are the equivalent of sections 16, 38(b) and 14 of the Municipal Act:

In my view, where an institution has properly exercised its discretion under section 49(b) of the Act, relying on the application of sections 21(2) and/or (3), an appellant should be able to raise the application of section 23 in the same manner as an individual who is applying for access to the personal information of another individual in which the personal information is considered under section 21.

Accordingly, I will consider the possible application of section 16 to any portions of the records which are found to qualify for exemption under section 38(b).

In order for section 16 to apply, there must be a **compelling** public interest in disclosure, and this compelling public interest must **clearly** outweigh the **purpose** of the exemption, as distinct from the value of disclosure of the particular record in question.

The agent has made extensive submissions on the application of section 16 of the Act. In this regard, she has referred to three other high profile cases involving the Police in which their conduct has been called into question. The agent has pointed to similarities between these cases and the incident which lead to the creation of the records at issue in this appeal as supporting disclosure of these records on the basis of a compelling public interest.

The agent argues that these similarities reveal systemic problems with the Police. She states that the public is entitled to information which reveals the conduct of the Police in situations where, in her opinion, they have shown a disregard for their own policies and procedures. She states that such conduct, in the other cases, has resulted in substantial costs to the public in the form of multiple trials and other legal proceedings. The agent’s position is that the public should be able to scrutinize the behaviour of the Police and that disclosure of the records at issue would achieve this result.

The position of the Police is that any public interest which may have existed with regard to this matter has already been met. They point to the fact that the initial complaint was investigated by the Police and prosecuted by the Crown. The Police state that the criminal court system is a public system in which the trial was open to the public.

Furthermore, the Police indicate the substantial amount of material that was disclosed to the appellant and the agent as a result of the filing of the complaints with the PCC and the subsequent investigations. Finally the Police submit that:

The appellant has claimed the section 16 compelling public interest override that would support disclosure of information that has been denied through exemptions under this Act. This assertion would certainly appear to be in opposition to the appellant's decision to withdraw the complaints filed with the Office of the Public Complaints Commissioner. The public complaint investigation had not been concluded and the Office of the Public Complaints Commissioner had not concluded its review of the investigation that the appellant had requested. This review could have led to a Board of Enquiry into the matter.

Accordingly, the Police submit that the appellant's interest in disclosure of the records is a personal, as opposed to a public, interest.

I accept the submissions of the agent that, in circumstances in which the actions of the Police have been called into question, the public has a right to scrutinize their activities. However, I also agree with the Police that there are institutions, such as the PCC, which have been established to address these issues at first instance.

In this case, I am not satisfied that there exists a compelling public interest **in disclosure of the records** which clearly outweighs the purpose of the personal privacy exemption. In my view, the agent has not demonstrated how disclosure of the information contained in the records would satisfy the public interest goals of Police scrutiny, etc., as she has described them. Even if, for example, the PCC inquiry had been concluded and found evidence of Police wrongdoing, I would still have to be satisfied that these records would promote the public's understanding of the conduct of the Police. Accordingly, I find that section 16 does not apply in the circumstances of this appeal.

REASONABLENESS OF SEARCH

When a requester provides sufficient details about the records which he or she is seeking and the Police indicate that no additional records exist, it is my responsibility to ensure that the Police have made a reasonable search to identify any records which are responsive to the request. The Act does not require the Police to prove with absolute certainty that the requested records do not exist. However, in my view, in order to properly discharge their obligations under the Act, the Police must provide me with sufficient evidence to show that they have made a reasonable effort to identify and locate responsive records.

As I have previously indicated, one part of the request was for access to the notebooks of several named police officers for specific time periods. The Notice of Inquiry sent to the agent and the Police included 35 questions based on the agent's assertion that additional records should exist. Several of these questions relate to the existence of responsive or additional notebook entries or records for several named police officers.

In their submissions, the Police responded to each of these 35 questions. At my request, the Police provided a copy of the responses to the agent for her response. I will now address the position of the parties with respect to each of these questions.

Questions 1-4, 6-10, 12, 14-18, 21-24, 27- 33 and 35

The agent is satisfied with the responses the Police have provided to questions 3-4, 6-10 and 14_18.

Questions 2 and 21 relate to the provision of clearer copies of the records. Question 33 relates to the witness statement which constitutes pages 1910-1911. I have dealt with these matters in the section of this order "Records Previously Received" and have advised the agent that the confirmation she has requested concerning the witness statement is a matter beyond the jurisdiction of this office. I have also advised the agent there is no further verification which I may undertake with respect to the response of the Police to Question 1.

Question 35 addresses the additional pages to the Final Investigation Report which has already been disclosed.

Given the responses of the Police to Questions 22-24 and 27-32, and the fact that the agent did not address these questions during the inquiry, I am satisfied that these matters have also been resolved.

Question 5

The Police have provided information to the agent on the searches undertaken to locate a response to the letter which constitutes pages 988-989. The Police also advised the agent to contact the PCC to determine if they received a response to the letter which was written by the PCC investigator. Although the agent advised me that the PCC investigator would contact me to indicate if, in fact, he had received a response to his letter, the investigator has not done so. I am satisfied with the response of the Police with respect to their efforts to locate a response in their files. The agent may wish to pursue this matter with the PCC.

Question 11

This question addresses the existence of notebooks for a staff sergeant and three sergeants of the Police.

The agent has submitted extracts from the policies and procedures of the Police dealing with the keeping of notebooks. She has highlighted several sections of the policies including the following:

Constables, while on duty, shall carry an issue memorandum book which shall be made out in the prescribed manner (section 3.14.7).

In addition, I note that, pursuant to section 3.8.8, staff sergeants and detective sergeants, while on duty, are also required to carry an issued notebook and complete it in the prescribed manner.

However, section 4.13.2, which the agent has not highlighted, and which the Police refer to in their submissions, states:

A member **whose duties require his keeping a memorandum book** shall record ... [emphasis added]

The Freedom of Information and Privacy Co-ordinator of the Police has explained that, in effect, it is the Chief of Police who decides which members' duties require the keeping of memorandum books. He has further explained that the Chief has decided that members of the Police who are functioning in an administrative position, are not required to keep a notebook.

The agent suggests that another individual who was functioning in a supervisory capacity did, in fact, keep a notebook. It is on this basis that she suggests that the four officers referred to should also have responsive notebooks.

As part of their representations, the Police have submitted affidavits from 20 officers regarding the searches for their notebooks. Sixteen of the officers indicate that they forwarded the requested notebooks to the Freedom of Information Office of the Police in response to the request. They state that they have no other notebook entries responsive to the request in their custody or control.

Three of the officers, the sergeants, affirm that during the period for which their notebooks were requested, they were functioning in supervisory positions and were thus not required to keep a notebook. The final officer, the staff sergeant, was functioning in an administrative position at the relevant time and states that, as such, he too was not required to keep a notebook.

Based on the information provided in the affidavits of these individuals, I am satisfied that the Police have conducted a reasonable search to locate the notebooks of the four officers named in Question 11.

Question 12

This question relates to the notes of a constable concerning the events on a specific date. The Police state that the notes constitute pages 11-20 of the records and that they were disclosed in part to counsel on June 5, 1995. As part of their representations, the Police have submitted an affidavit from this constable who affirms that he forwarded to the Freedom of Information and Privacy Unit his notebook that was responsive to the request. He also states that he has no additional responsive notebooks in his custody or under his control. Based on the submissions of the Police, and the information included in this affidavit, I find that the Police have conducted a reasonable search to locate records responsive to Question 12.

Question 13

This question addresses the issue of the existence of two statements taken on a specific date by an officer and the incident report prepared by the same officer at the end of his shift. The Police have explained that the statements do not appear as distinct documents but are recorded in the officer's notebook on pages 67-69 of the records. Portions of these pages have been disclosed to the agent. The Police have also explained why there is no incident report of that date.

The Police have included the affidavit of this officer as part of their submissions. The Police have also submitted affidavits from eighteen other individuals concerning the searches they undertook for records in their possession responsive to the request. Eight of these individuals state that they did not locate any responsive records as a result of their searches. The nine

individuals who did find responsive records, indicated that they had sent them to the Freedom of Information and Privacy Office.

Having reviewed these submissions, I am satisfied that the Police have undertaken a reasonable search to locate any records responsive to Question 13.

Questions 19-20

Question 19 relates to a report which the Police have identified as a memorandum dated April 26, 1993. This document comprises pages 876-877. Access has been denied to this memorandum under section 8(2)(a), law enforcement report, in addition to section 14(3)(b).

Question 20 concerns a brief which is referred to on page 71, #1 of the final PCC Report. The Police have identified pages 1267-1398 as this document. The Police have claimed that several of these pages are also exempt under section 8(2)(a), as well as section 14(3)(b).

The appellant did not claim that additional records existed in response to these questions. As I understand it, the issue appears to be one of the identification of these documents as well as the characterization of them as "reports" for the purposes of section 8(2)(a). As I have indicated, the Police advised the agent where these documents appear in the records. Furthermore, I have already upheld the decision of the Police to deny access to these records under section 14(1) or 38(b). Therefore, I am of the view that there are no outstanding matters with respect to these two questions.

Questions 25 and 26

These questions address the issue of the existence of Mobile Digital Terminal (MDT) transactions and radio transmission recordings on what is known as the master logger tape. In their response to the Notice of Inquiry, the Police provided an explanation as to why only some MDT transactions were retrieved and why only some voice transmission tapes could be located.

As part of their submissions, the Police have provided an affidavit from the manager of the Information Services Branch (the manager). The manager states that he was to retrieve all information stored on the computer assisted dispatch system that was responsive to the request. He indicates that such information is retained 90 days on line and archived off line for one year from the date of its initial entry. He has attached a copy of the Police records retention by-law setting out these time periods. The records requested related to incidents which had occurred in 1992. As the request was received in 1994, the online information had been purged in accordance with the records retention by-law of the Police.

On this basis, I am satisfied that the Police have conducted a reasonable search to locate records responsive to Questions 25 and 26.

Question 34

The Police have indicated the officers they contacted in an attempt to locate any information to identify who wrote this report.

In addition to the activities described above, the Police also provided this office with the following list of all the information banks which were searched in order to respond to this request:

Police Services Board: access request records and general correspondence

Personal Information Banks: Freedom of Information and Protection of Privacy Records
Crime Analysis Records
Criminal Intelligence Records
Finger/Palm Print File (Automated Records)
Finger/Palm Print File (Hard Copy Records)
Investigative Case Records
Public complaints

Having reviewed all the information provided by the agent and the Police, I am satisfied that the Police have undertaken reasonable searches in order to locate the records that are responsive to this request. In addition, although they were technically not required to do so in all cases, the Police have provided the agent with very detailed explanations of why certain records do not exist.

ORDER:

1. I uphold the decision of the Police to deny access to the records with the exception of those listed in Provision 2.
2. I order the Police to disclose to the agent:
 - (i) pages 271-273, 851-852, 1556-1557, 1941, 1943, 1952, and 1973-1977 in their entirety,
 - (ii) the portions of pages 1917-1919 which they have indicated may be disclosed on the copies of these records provided to this office with their submissions; and
 - (iii) the second last line of page 1416 in its entirety.
3. I order the Police to provide the agent with a clear copy of pages 946 and 1341.
4. I order the Police to disclose the pages listed in Provisions 2 and 3 by sending a copy of them to the agent not later than May 6, 1996.
5. In order to verify compliance with this order, I reserve the right to require the Police to provide me with a copy of the records which are disclosed to the agent pursuant to Provisions 2 and 3.

6. I find that the Police search for responsive records was reasonable in the circumstances of this appeal and this aspect of the appeal is dismissed.

Original signed by: _____ April 19, 1996
Anita Fineberg
Inquiry Officer