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

ORDER MO-1524-I

Appeal MA-010095-1

Hamilton Police Services Board

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NATURE OF THE APPEAL:

Counsel for the appellant submitted a request to the Hamilton Police Services Board (the Police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for copies of investigative reports, medical reports and other documentation relating to an incident on September 13, 1998 at the appellant's place of employment (the Centre). Along with this request, the appellant's counsel attached a copy of a signed "Hamilton-Wentworth Regional Police - Consent to Release of Personal Information" form authorizing disclosure of the appellant's personal information to his counsel. In this interim order, all references to the acts of counsel will be attributed to the appellant.

The Police located records responsive to the request. Before responding to the appellant, the Police notified a number of individuals whose interests might be affected by disclosure of the records at issue (the affected persons). Of the 20 affected persons notified, one could not be located, seven did not respond and eight consented to the disclosure of their personal information to the appellant. Of the four affected persons who did not consent to disclosure, two indicated in their comments that they were not aware of who the requester was and that they could not consent to the disclosure of the "patient's" personal medical information in the absence of that person's written consent. It was also apparent from their comments, however, that if such consent were obtained, they would consent to the disclosure of the patient's information.

The Police issued a decision to the appellant granting partial access to the requested records, including information about the eight affected persons who consented to disclosure. The Police denied access to the remaining information in the records on the basis of sections 8(2)(a) and (c) (law enforcement) and section 14 (invasion of privacy), with reliance on the factors in sections 14(2)(e), (f), (g), (h) and (i) and the presumptions in sections 14(3)(a), (b) and (g). The Police also indicated that "any medical records that formed part of the police investigation are not records of this Police Service and therefore would have to be obtained from the relevant Doctors or Hospitals".

The appellant appealed this decision, in part, because it was his belief that the *Act* provides a general right of an individual to access his or her own personal information. The appellant also believed that an individual has a right to know of any evidence compiled with respect to his or her safety and that any allegations made in this regard are adequately investigated. The appellant indicated further that it was his understanding that consents had been provided by certain individuals, but that the information relating to them had not been disclosed.

During mediation, the appellant clarified that he was not pursuing the issues relating to the consents that he believed had been provided by certain individuals. Also during mediation, the appellant noted that the Police had disclosed the transcript of an interview between an investigating police officer and the appellant. He indicated, however, that he was also seeking a copy of the tape recording of this interview. The Police appeared to take the position that this record was not requested by the appellant and was, therefore, not responsive to the request. Accordingly, I added the scope of the request/responsiveness of records as an issue in this appeal.

The Police did not claim the possible application of either section 38(a) (discretion to refuse requester's own information) or 38(b) (invasion of privacy) to the records at issue. Because the

records appear to contain the appellant's personal information, I also included both sections as issues in this appeal.

Finally, although not addressed during mediation, the statement made by the Police in their decision letter that, "any medical records that formed part of the police investigation are not records of this Police Service and therefore would have to be obtained from the relevant Doctors or Hospitals", raise questions relating to the custody and/or control of records. At my request, an Adjudication Review Officer contacted the Police to clarify this statement. The Police indicated that although they have "possession" of certain medical records, they do not consider these records to be in their "custody" or under their control. The Adjudication Review Officer then contacted the appellant to determine whether he was seeking this type of medical information from the Police. The appellant indicated that he is only seeking records created by/for the Police as part of their investigation, that is, he is only seeking medical records over and above those he has already received from doctors and hospitals. Based on these discussions, I am satisfied that the question of whether the Police have custody and/or control over medical records created by the doctors and hospitals in question is not an issue in this appeal.

I decided to seek representations from the Police and the affected persons who either did not respond to the Police or who did not consent to the disclosure of information pertaining to them, initially. I sent them a Notice of Inquiry setting out the facts and issues remaining to be adjudicated. The Police submitted representations in response, as did four affected persons. Of these four, two consented to the disclosure of their personal information, one provided a qualified consent to disclosure of the information provided by him in the records, subject to the written consent of his patient and one affected person indicated that he had had no contact with the appellant. This affected person did not comment one way or the other on the issues in this appeal, including whether he would consent to disclosure of any information in the records about him. Absent an express intention to consent, I consider this party's comments to be a refusal to consent. One other affected person contacted the Adjudication Review Officer and appeared to indicate that she was prepared to consent to the disclosure of her personal information that is contained in the records. Although asked to provide her consent in writing to this office, this affected person did not do so. In the absence of a clear written consent from this individual, I do not consider her conversation with the Adjudication Review Officer to constitute a proper consent and will, accordingly, deal with information about her in the records as if she did not provide her consent.

In their representations, the Police indicate that five affected persons contacted them directly and consented to the disclosure of the information about them in the records. Accordingly, the Police issued a supplementary decision on October 19, 2001 in which they granted additional access in whole or in part to 39 pages of records. The Police reiterated that the remaining records or parts of records continued to be withheld pursuant to the exemptions originally claimed. It should be noted that two of these affected persons also provided consents to this office.

In addition, the Police indicate in their representations that they do indeed have a copy of an audiotape of the interview between the appellant and the investigating officer. The Police indicate further that they have a copy of an audiotape of an interview with an affected person (the appellant's wife, who consented initially to the disclosure of her personal information to the

appellant). The Police note that the appellant was provided with partial access to the transcripts of these two interviews, but that they are denying access to the tapes pursuant to sections 38(a) and (b), 8(2)(a) and 14. Based on this development, it appeared that the scope of the request issue had been resolved.

I subsequently sought representations from the appellant and provided him with a Notice of Inquiry to which I attached the complete representations of the Police. The appellant was asked to review the representations and to refer to them where appropriate in responding to the issues set out therein. In addition, I indicated that unless he states otherwise, I will no longer consider the scope of the request to be at issue in this appeal.

The appellant submitted representations in response. With respect to the scope of request/responsiveness of records issue, he commented on the submissions of the Police regarding their reasons for providing him with a transcript only, but essentially agreed that the taped statement of the appellant was the only record relevant to this issue. Accordingly, I will not deal with the scope of the request further.

Neither the Police nor the appellant addressed the responsiveness of records aspect of this issue in their representations. I will discuss this issue further below under "Preliminary Matters".

RECORDS:

The records as identified by the Police consist of occurrence reports, supplementary occurrence reports, transcripts, memoranda and other correspondence, police officers' notes, witness statements, documents originating from the Centre of Forensic Sciences and documentation created by the Centre as well as two audio tapes.

In providing the records to this office, the Police did not number the pages or provide an index of records. In order to facilitate the discussion of my analysis in this order, I have numbered the pages in accordance with the sequence as set out on the copy originally provided to this office.

As a result of the disclosures made in response to the request and during the inquiry stage of the appeal, the following pages have been disclosed in full and are not at issue: 3, 4, 5, 7, 8, 9, 12, 50, 51, 59, 60, 64, 65, 66 – 73, 75 – 78, 79, 80 – 81, 98, 99, 148 and 149.

PRELIMINARY MATTERS:

RESPONSIVE INFORMATION

When this appeal was originally opened, the Police provided this office with copies of the records, which included a copy of the records in the form in which they were disclosed to the appellant and a complete copy of the records on which the Police highlighted (for the most part) those portions which had been withheld. Portions of the records consisting of police officers' notes, however, had been blacked out or were otherwise illegible. In the Notice of Inquiry that I sent to the Police, I asked them to return legible copies of these records. The copies of these pages provided by the Police in response to my request were minimally of better quality.

In some cases, certain pages of the original group of records appeared to be withheld in their entirety (or in large portion) on the basis that the information contained therein was not responsive to the request. However, the severing that was done on some of these pages in the second package that was sent is clearly different from the original, usually indicating that less information on a given page was non-responsive or differentiating between non-responsive information and information to which an exemption, presumably, has been applied. On other pages, these amendments are not apparent. In addition, on some pages, I am not able to ascertain which portions have been withheld as being non-responsive and which portions are subject to an exemption. Accordingly, where it is unclear, I will assume, initially, that the information has been withheld as being non-responsive, and will review the severances on this basis.

In Order P-880, former Adjudicator Anita Fineberg considered the issue of relevancy of records and responsiveness:

> In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to the request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request.

I have reviewed all of the information that the Police identify (or appear to identify) as non-responsive, and for the most part, agree with this characterization. This information clearly relates to other matters recorded in the officers' notebooks during their tour of duty that have nothing to do with the investigation conducted into the matter involving the appellant. Accordingly, I find that the information on pages 89, 91, 93, 94, 95, 97, 102, 103, 105, 106, 107, 108, 109, 111 – 113, 115, 116, 119 – 122, 124, 126, 128, 129, 131, 134 as amended during inquiry, 136 – 138, 140 as amended during inquiry, 143, 144, 146 and 147, which the Police have identified as non-responsive, is not reasonably related to the appellant's request.

In addition, pages 11, 52 and 53 contain information of a personal nature relating to a police officer, recorded as an explanation of why this individual was no longer working on the investigation. As this information does not pertain to the investigation *per se*, I find that it is not responsive to the request.

However, I do not completely agree with the manner in which the Police have severed the non-responsive information on certain other records. Specifically, although pages 88, 92, 96, 100, 101, 104, 110, 114, 117, 118, 123, 127, 130, 132, 135, 139, 141, 142 and 145 all contain some information that is not responsive to the appellant's request for the same reason as the above records, other parts of these pages are responsive as they clearly pertain to the matter involving the appellant. In some portions, the appellant is referred to in relation to the issues being investigated. In other portions, specific individuals connected to the matter are referred to and

the severed portion of the record refers to the unique circumstances of the matter in such a way that it is incontrovertible that the information is relevant to the request.

It is apparent, from the manner in which the records were highlighted, that the discrepancies between the responsive and non-responsive portions on these records were more likely a result of carelessness than of design.

As I noted above, the Police did not number the pages. Nor did they provide an index of records, mark the exemptions claimed on the pages of the records provided to this office or make reference to specific records in their representations. Since they have claimed the exemptions in sections 8 and 14 for all of the records, I will consider whether these exemptions (as well as sections 38(a) and/or (b)) apply to the information that is responsive to the request.

On the following pages, only the information which I have found to be not responsive to the request has been withheld: 11, 93, 94, 97, 102, 103, 105, 106, 108, 109, 113, 115, 116, 119, 120, 121, 122, 128, 129, 136, 137, 138, 144 and 147. Because the remaining information on these pages has been disclosed to the appellant, these pages are no longer at issue. I have highlighted in blue on the copies of the records that I am sending to the Police with the copy of this interim order, those portions which are not responsive to the appellant's request.

RECORDS ORIGINATING FROM THE CENTRE

Pages 82 and 83 are memoranda to file. Pages 84 – 86 are "Employee/other Information Reports". Page 87 is a Ministry of the Solicitor General (the Ministry) Occurrence Reports. Pages 150 – 158 and 160 – 172 are staff shift sign-in sheets and page 159 is a Shift Co-ordinator's form. All of these records originated from the Centre, which falls under the jurisdiction of the Ministry. Although these records are in the custody of the Police, the mandatory provision in section 9 of the *Act* must be considered prior to any other decision being made with respect to their disclosure. This section states:

> (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,
>
> (a) the Government of Canada;
>
> (b) the Government of Ontario or the government of a province or territory in Canada;
>
> (c) the government of a foreign country or state;
>
> (d) an agency of a government referred to in clause (a), (b) or (c); or
>
> (e) an international organization of states or a body of such an organization.

> (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.

In order to avoid further delay in dealing with the majority of the records at issue in this appeal, I have decided to defer my decision regarding these 19 pages. In due course, I will send a further Notice of Inquiry to the parties to address this outstanding issue.

This Interim Order will, therefore, address all remaining records and issues.

DISCUSSION:

PERSONAL INFORMATION

Personal information is defined as "recorded information about an identifiable individual". All of the records at issue either refer directly to the appellant, or they pertain to the Police investigation into the matter. In the circumstances, I find that they all contain the personal information of the appellant. 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 exceptions to this general right of access. Because the records at issue all contain the appellant's personal information, my analysis of the basis for withholding this information will be conducted under section 38 of the *Act*.

With respect to the other individuals identified in the records, the Police state:

> The information which forms part of this investigative report is clearly personal information as defined in s. 2(1) of [the *Act*], in that it is information about identifiable individuals, including, but not limited to, the appellant and the affected individuals. The information includes names, addresses, phone numbers and date of birth. The personal information also includes personal opinions and views of individuals interviewed about other individuals named. There is information relating to possible criminal allegations and statements relating to these allegations. The names of individuals appear in conjunction with other personal information relating to both that person and to others. Parts of this investigation are highly sensitive and inherently personal information.

The appellant essentially agrees that some of the information in the records is personal information. He contends, however, that:

> There are further records which were obtained in an individual's professional capacity. The appellant has no way of knowing what information may be classified in which category. Therefore, the appellant will rely on the determination made by the adjudicator.

Previous decisions of this office have drawn a distinction between an individual's personal, and professional or official government capacity, and found that in some circumstances, information

associated with a person in his or her professional or official government capacity will not be considered to be "about the individual" within the meaning of section 2(1) definition of "personal information" (Orders P-257, P-427, P-1412, P-1621).

The Commissioner's orders dealing with non-government employees, professional or corporate officers treat the issue of "personal information" in much the same way as those dealing with government employees. The seminal order in this respect is Order 80. In that case, the institution had invoked section 21 to exempt from disclosure the names of officers of the Council on Mind Abuse (COMA) appearing on correspondence with the Ministry concerning COMA funding procedures. Former Commissioner Linden rejected the institution's submission:

> The institution submits that "...the name of the individual, where it is linked with another identifier, in this case the title of the individual and the organization of which that individual is either executive director, or president, is personal information defined in section of the *FIO/PPA*...." All pieces of correspondence concern corporate, as opposed to personal, matters (i.e. funding procedures for COMA), as evidenced by the following: the letters from COMA to the institution are on official corporate letterhead and are signed by an individual in his capacity as corporate representative of COMA; and the letter of response from the institution is sent to an individual in his corporate capacity. In my view, the names of these officers should properly be categorized as "corporate information" rather than "personal information" under the circumstances.

In Reconsideration Order R-980015, Adjudicator Donald Hale reviewed the history of the Commissioner's approach to this issue and the rationale for taking such an approach. He also extensively examined the approaches taken by other jurisdictions and considered the effect of the decision of the Supreme Court of Canada in *Dagg v. Canada (Minister of Finance)* (1997), 148 D.L.R. (4th) 385 on the approach which this office has taken to the definition of personal information. In applying the principles which he described in that order, Adjudicator Hale came to the following conclusions:

> I find that the information associated with the names of the affected persons which is contained in the records at issue relates to them only in their capacities as officials with the organizations which employ them. Their involvement in the issues addressed in the correspondence with the Ministry is not personal to them but, rather, relates to their employment or association with the organizations whose interests they are representing. This information is not personal in nature but may be more appropriately described as being related to the employment or professional responsibilities of each of the individuals who are identified therein. Essentially, the information is not about these individuals and, therefore, does not qualify as their "personal information" within the meaning of the opening words of the definition.
>
> In order for an organization, public or private, to give voice to its views on a subject of interest to it, individuals must be given responsibility for speaking on its behalf. I find that the views which these individuals express take place in the

> context of their employment responsibilities and are not, accordingly, their personal opinions within the definition of personal information contained in section 2(1)(e) of the *Act*. Nor is the information "about" the individual, for the reasons described above. In my view, the individuals expressing the position of an organization, in the context of a public or private organization, act simply as a conduit between the intended recipient of the communication and the organization which they represent. The voice is that of the organization, expressed through its spokesperson, rather than that of the individual delivering the message [emphasis in original].
>
> In the present situation, I find that the records do not contain the personal opinions of the affected persons. Rather, as evidenced by the contents of the records themselves, each of these individuals is giving voice to the views of the organization which he/she represents. In my view, it cannot be said that the affected persons are communicating their personal opinions on the subjects addressed in the records. Accordingly, I find that this information cannot properly be characterized as falling within the ambit of the term "personal opinions or views" within the meaning of section 2(1)(e).

A number of the individuals identified by the Police and notified during the course of the processing of the request and appeal are doctors or other hospital staff who attended the appellant. As well, a number of staff members from the Centre were interviewed and/or referred to in the records. The Police state:

> Information contained within these records also includes the professional opinions of several affected individuals in their official capacity. Although information was provided in their official capacity, the fact that they were speaking to police during the course of a police investigation should be considered. The views and opinions provided were done relating to the investigation. Some of the affected individuals who were professionals provided consent while others advised they either wanted their information and opinions protected or did not respond thus this police service protected the information pursuant to the mandatory exemption provided by s. 14 of the *Act*.

One affected person states:

> … I wish to advise again that I did not have any contact with the police regarding this matter.
>
> My involvement was only in the interpretation of an echocardiogram … I have never seen this patient.

A second affected person writes:

> [The Freedom of Information and Privacy Co-ordinator] informed me that the appellant in this case was in fact the patient for whom I had prepared medical

> reports and that these were being requested by the law firm representing the patient.
>
> Certainly I wish to co-operate fully in this matter and at the same time having regards to the patient's best interest. However I must also be assured that I am not breaching patient confidentiality.

It is apparent from the representations submitted by these two affected persons, as well as from the records themselves, that the information in the records "about" the medical staff who treated, or were in some way involved in the evaluation of the appellant's medical condition, was provided in their professional capacity. It is also apparent that the second affected person quoted above is concerned about his patient's confidentiality as opposed to his own interest in the records.

It is possible, based on the individual circumstances of a particular case, that information provided by a professional to the police during an investigation might cross the threshold and be more properly characterized as "personal" as opposed to "professional". In this case, however, the medical staff referred to in the records were clearly doing nothing more than providing their usual professional services, both in dealing with the appellant and in responding to questions by the Police investigators. In the circumstances of this appeal, there is nothing on the face of the records or in the representations themselves that would suggest taking a different approach to the information about or provided by these individuals in their professional capacity. Accordingly, I find that none of the records contain the personal information of the doctors or other medical staff associated with the hospital. This information is found on pages 2, 6, 10, 35, 43, 44, 57, 58, 63, 101, 103, 104, 110, 111, 114, 117, 118, 130, 131, 132, 133, 134, 135, 137, 143, 144, 145, 146 and the audiotapes.

Pages 13 and 38 contain the name of the individual who transcribed the interviews conducted with the appellant and his wife. This is clearly information pertaining to this person in her employment capacity. Further, pages 52, 53, 95, 110, 111, 112 and 114 contain the telephone or facsimile number of an analyst at the Centre of Forensic Sciences. Pages 104 and 117 also contain the telephone numbers of individuals contacted by the Police in their professional capacity. Assuming that the numbers on these nine pages are these individuals' work numbers, they are not information "about" the individual personally.

In addition, some of the staff of the Centre are referred to in the records, and have provided information to the Police in their capacity as representatives of the Centre, primarily in a management, supervisory or administrative capacity. In my view, there is nothing "personal" in the responses they provide to the Police queries. Rather, with one exception, the information about these individuals in the records relates to them in their professional capacity. This information is found on pages 1, 24, 25, 32, 33, 55, 61, 62, 74, 89, 90, 91, 92, 96, 100, 101, 104, 110 and 139.

One staff member of the Centre was more involved in the overall matter than other representatives of the Centre. Although in some cases, he is clearly responding to the Police in his supervisory capacity, such as when providing the Police with certain information or

documentation relating to the staffing of the Centre, in other cases, he provides the Police with his own personal perspective with respect to the events at the time and the appellant. In these cases, his interaction with the Police is similar to the other staff of the Centre who gave statements to the Police as witnesses. In this capacity, the information about or provided by him is personal in nature. Similarly, the information about staff who were interviewed by the Police as witnesses or were referred to by the witnesses is information about these individuals in their personal capacity since such activity would clearly fall outside the scope of their normal employment responsibilities. This information is found on pages 13 – 37, 54 – 56, 61 - 63, 107, 123, 124, 125, 126, 127,139,140,141, 142 and the audiotape of the interview with the appellant.

Only information that falls within the definition of "personal information" qualifies for exemption under section 38(b) of the *Act*. I will, therefore, consider whether the discretionary exemption in section 38(b) applies to the portions of the records that contain the personal information of the staff of the Centre who gave witness statements to the Police or were referred to by other individuals in their personal capacity (ie. portions of pages 13 – 37, 54 – 56, 61 - 63, 107, 123, 124, 125, 126, 127,139,140,141, 142 and the audiotape of the interview with the appellant).

INVASION OF PRIVACY

Under section 38(b) of the *Act*, where a record contains the personal information of both the requester and other individuals and the Police determine that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the Police have the discretion to deny the requester access to that information.

Section 38(b) of the *Act* introduces a balancing principle. The Police must look at the information and weigh the requester's right of access to his or her own personal information against another individual's right to the protection of their privacy. If the Police determine that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 38(b) gives the Police the discretion to deny access to the personal information of the requester.

In determining whether the exemption in section 38(b) applies, sections 14(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(2) provides some criteria for the Police to consider in making this determination. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

A section 14(3) presumption can be overcome if the personal information at issue falls under section 14(4) of the *Act* or if a finding is made under section 16 of the *Act* that a compelling

public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the section 14 exemption (See: Order PO-1764).

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

The Police have relied on the "presumed unjustified invasion of personal privacy" in sections 14(3)(a), (b) and (g) of the *Act* and the factors listed under sections 14(2)(e), (f), (g), (h) and (i) of the *Act*.

The appellant takes the position that because no charges were laid, section 14(3)(b) is not applicable in the circumstances. He also believes that individuals have a right to know how allegations relating to their safety have been investigated by the Police. In doing so, the appellant has raised an unlisted consideration which, if found to apply, would favour disclosure.

Section 14(3)(b)

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.

In his representations, the appellant states that an incident occurred at his place of employment which nearly resulted in his death. He indicates that he has sought to pursue all investigative means to try to explain what happened. He states further that following the incident, he provided a statement to the Police and an investigation into the incident was commenced. Although he acknowledges that there was an investigation into a possible violation of law, he stresses that there have been no charges laid against any individual and a considerable period of time has passed since the commencement of the investigation. On this basis, he takes the position that section 14(3)(b) should not apply.

The Police state that:

> An initial police contact commenced with a Possible Poisoning Report relating to [the] appellant. As a result of that complaint, an investigation was conducted by this police service. The conclusion of the investigation indicated that there was no evidence that there was a poison in the system of the complainant/patient.
>
> …

> The records at issue were compiled and are identifiable as part of an investigation into a possible violation of law. In this case the violation could range from assault to attempt murder. The investigation was conducted and the reports submitted. There were no charges laid as stated above because there was no evidence of a poison in the system of the complainant/patient.

The records show the clear progression of an investigation conducted by the Police beginning with the first contact by the appellant following the incident at the Centre. The records consist of interviews with the appellant, his wife, doctors at the hospital and staff at the Centre, as well as independent research and investigation conducted by the individual police officers. The information at issue is found primarily on occurrence reports, supplementary occurrence reports and in the notes made by the investigating officers. I am satisfied that all of the personal information in the records was compiled and is identifiable as part of an investigation conducted by the Police into the circumstances surrounding the incident at the appellant's place of employment which resulted in his hospitalization. It is apparent from the records that this investigation was conducted with a view to determining whether charges under either the *Criminal Code* or other criminal legislation were warranted. Contrary to the appellant's position, the fact that charges were not brought against any individual does not negate the applicability of section 14(3)(b). The presumption in this section only requires that there be an investigation into a possible violation of law (Order P-242).

Absurd Result

Pages 13 – 37 and 54 of the records and the audiotape of the appellant's interview contain a number of references to named individuals or to information that was provided by the appellant to a police officer. Page 107 contains the name of the appellant's child.

In Order M-444, former Adjudicator John Higgins stated:

> Turning to the presumption in section 14(3)(b), the evidence shows that the undisclosed information was compiled and is identifiable as part of an investigation into a possible violation of law (namely, a murder investigation) and for that reason, it might be expected that the presumption in section 14(3)(b) would apply.
>
> However, it is an established principle of statutory interpretation that an absurd result, or one which contradicts the purposes of the statute in which it is found, is not a proper implementation of the legislature's intention. In this case, applying the presumption to deny access to information which the appellant provided to the Police in the first place is, in my view, a manifestly absurd result. Moreover, one of the primary purposes of the *Act* is to allow individuals to have access to records containing their own personal information, unless there is a compelling reason for non-disclosure. In my view, in the circumstances of this appeal, non-disclosure of this information would contradict this primary purpose.

> It is possible that, in some cases, the circumstances would dictate that this presumption should apply to information which was supplied by the requester to a government organization. However, in my view, this is not such a case. Accordingly, for the reasons enumerated above, I find that the presumption in section 14(3)(b) does not apply. In the absence of any factors favouring non-disclosure, I find that the exemption in section 38(b) does not apply to the information at issue in the records.

Several subsequent orders have supported this position and include similar findings (M-613, M-847, M-1077 and P-1263, for example). All of these orders have found that non-disclosure of personal information which was originally provided to the institution by an appellant, or personal information of other individuals which would clearly have been known to an appellant, would contradict one of the primary purposes of the *Act*, which is to allow individuals to have access to records containing their own personal information unless there is a compelling reason for non-disclosure. They determined that applying the presumption to deny access to the information which the appellant provided to the institution would, according to the rules of statutory interpretation, lead to an "absurd" result.

In responding to this issue, the Police indicate that they are aware of the previous rulings of this office on this issue. The Police state, however, that:

> Those decisions are not applicable to this particular case, given that where the information was provided in the course of a criminal investigation, there are legitimate and logical reasons for not re-circulating or returning information to individuals who have provided same.
>
> Specifically, as a criminal investigation proceeds, and in the event that a criminal prosecution is initiated – whether in regard to the charges originally being investigated or others arising as a result of the investigation, it is essential that the integrity of witness information and evidence be protected. For example, if a statement is provided by one witness, a copy of same will not likely be provided to him or her so officers can ensure that the content is not shown to, or discussed with, another witness prior to the police interviewing the latter to obtain his or her version of events. The tainting of witnesses, and information to be obtained from witnesses, must be protected against.
>
> This principle is vital in a continuing investigation where evidence may remain to be collected and witnesses may remain to be interviewed.
>
> Furthermore, it is the position of the Police Service that a witness is aware of the information he or she provided to the police. To subsequently provide that witness with a copy of his or her statement on a police form or "letterhead", particularly a statement which contains sensitive and potentially damaging allegations, is not, on balance, in the public interest. While it is certainly not our intent to suggest any impropriety will occur in this case, it is foreseeable that inappropriate use may be made of any witness statement should it be released.

In essence, the Police do not believe that this principle is applicable in the law enforcement context, for a variety of reasons including interference with an investigation and the impact this might have on any subsequent trial. However, the Police have not claimed the application of sections 8(1)(a), (b) or (f) of the *Act* and in their representations appear to indicate that the matter has concluded. In addition, it should be noted at the outset that the absurd result principle has largely been applied in previous orders in the law enforcement context.

The privacy rights of individuals other than the appellant are without question of fundamental importance. One of the primary purposes of the *Act* (as set out in section 1(b)) is to protect the privacy of individuals. Indeed, there are circumstances where, because of the sensitivity of the information, a decision is made not to apply the absurd result principle (see, for example, Order PO-1759). In other cases, after careful consideration of all of the circumstances, a decision is made that there is an insufficient basis for the application of the principle (see, for example, Orders MO-1323 and MO-1449). In these situations, the privacy rights of individuals other than the requester weighed against the application of the absurd result principle.

However, the withholding of personal information of others in certain circumstances, particularly where it is intertwined with that of the requesting party, would also be contrary to another of the fundamental principles of the *Act*: the right of access to information about oneself. Each case must be considered on its own facts and all of the circumstances carefully weighed in order to arrive at a conclusion that, in these circumstances, withholding the personal information would result in an absurdity.

In my view, the circumstances of this appeal provide a clear case for the application of the absurd result principle since it is readily apparent that the information was either provided by the appellant during his contacts with the Police or is clearly known by him. Moreover, none of the information that I have referred to above relates to medical, psychiatric or psychological history, diagnosis, condition treatment or evaluation within the meaning of section 14(3)(a), or to the type of information contemplated by section 14(3)(g). Nor, in my view, do any of the factors weighing against disclosure in section 14(2) apply to this information. Based on my review of the context in which this information was provided or recorded, I conclude that withholding it in the circumstances of this appeal would result in an absurdity. Therefore, I find that its disclosure would not constitute an unjustified invasion of privacy.

Consent

Section 14(1)(a) of the *Act* 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;

It is apparent that the Police have considered the consents provided by the affected persons and have disclosed information pertaining to those who consented. There are a number of places in

the records, however, where the names of and/or information about some of these individuals continue to be withheld (pages 15, 16, 54, 55, 141 and 142). Consistent with their severing throughout, it is reasonable to assume that the failure to disclose this information was an oversight. In any event, because the individuals referred to in these pages have consented in writing to the disclosure of their personal information, I find that section 38(b) is not applicable to the information about them on pages 15, 16, 54, 55, 141 and 142. However, because the Police have also claimed section 8 for all of the records, I will consider whether these portions of the records are exempt under the law enforcement provisions.

Summary of personal information subject to exemption

In summary, I find that, with the exception of certain personal information on pages 13 – 37, 54, 107, and the audiotape of the appellant's interview (the disclosure of which would result in an absurdity), and information pertaining to certain individuals who have consented to disclosure on pages 15, 16, 54, 55, 141 and 142, the disclosure of the remaining personal information on pages 55, 56, 59, 62, 63, 123, 124, 125, 126, 127, 139, 140, 141 and 142 would constitute a presumed unjustified invasion of personal privacy pursuant to section 14(3)(b) of the *Act*. After reviewing the records and all of the circumstances of this appeal, I am satisfied that neither section 14(4) nor section 16 is applicable to this information. Moreover, based on the overall submissions made by the Police, I am satisfied that their decision to withhold this information was based on a proper exercise of discretion. Accordingly, I find that these portions of the records are exempt under section 38(b) of the *Act*. For greater certainty, I have highlighted in green the portions of the records that are exempt pursuant to section 38(b).

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/LAW ENFORCEMENT

Under section 38(a) of the *Act*, the Police have the discretion to deny an individual access to his own personal information in instances where the exemptions in sections 6, 7, **8**, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that information.

The Police claim that sections 8(2)(a) and (c) apply to the information at issue in this appeal. As I have found that the personal information of other individuals is exempt under section 38(b), I will consider the application of these two sections only to the remaining information.

Sections 8(2)(a) and (c) state:

> A head may refuse to disclose a record,
>
> (a) 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;
>
> (c) that is a law enforcement record if the disclosure could reasonably be expected to expose the author of the record

> or any person who has been quoted or paraphrased in the record to civil liability;

Section 8(2)(a)

Only a report is eligible for exemption under this section. The word "report" is not defined in the *Act*. For a record to be a report, it must consist of a formal statement or account of the results of the collation and consideration of information (Order P-200). Generally speaking, results would not include mere observations or recordings of fact (Order M-1048).

The Police state:

> In accordance with the provisions of section 42 of the *Police Services Act*, the [Police] is a law enforcement agency, which has the function of enforcing and regulating compliance with the law. In the performance of these duties, and in accordance with internal Police Service Policies, procedures and Regulations, police officers are required to complete reports when conducting law enforcement investigations. These reports, which generally take the form of occurrence reports, are for the purpose of documenting information obtained during the course of an investigation and, where required, to provide for effective follow-up. In addition, these reports may be used to assist the Crown Attorney in trial preparation.
>
> …The records in this case include a compilation of officers' interviews, interspersed with officers' comments, notation, interpretations and opinions, as well as summaries, recommendations and potential follow-up information.

The records at issue in this discussion fall into two groups. The first group consists, in part, of transcripts and audiotapes of interviews, a telephone memo and police officers' notes. The second group is comprised of occurrence reports or supplementary occurrence reports. The Police characterize the records as a "compilation", suggesting that, taken as a whole, the entire file represents a report. I addressed similar arguments made by the Police several years ago in Order M-544 and find that the approach I took in that order is equally applicable to the argument made today:

> The Police state that the Sudden Death Report (Record 1) is a report within the meaning of section 8(2)(a), and that it includes investigative records, witness interviews and statements. Record 3, a letter from the Regional Coroner, is clearly not, in and of itself a report within the meaning of section 8(2)(a), nor do the Police claim that it is. Rather, they indicate that as an attachment to the Sudden Death Report, the record is incorporated into the report, thereby falling within the exemption in section 8(2)(a).
>
> In my view, the first step in the analysis is to determine whether Record 3 can be characterized as an attachment to the Sudden Death Report. If it can be so

> characterized, the second step would be to determine whether the Sudden Death Report is a law enforcement report within the meaning of section 8(2)(a).
>
> While it is possible that a "report" can include appendices or attachments as an integral part of the document, I am not satisfied that Record 3 was obtained by the Police or used in any way as part of their investigation or in the course of law enforcement generally. Although indirectly related to information recorded in the Sudden Death Report, I find that the record is not integral to the formal accounting of the results of the collation and consideration of information. I find, therefore, that it is not a part of the Sudden Death Report as a unique and distinctive record, and section 8(2)(a) does not apply to it.

In viewing the records at issue in the current appeal, I cannot conclude that any of the records contained in the first group are connected to any of the occurrence reports in such a way as to become a part of a unique and distinctive record. Accordingly, I will consider whether each distinct document is, in and of itself, a report within the meaning of the *Act*.

In Order M-1109, Assistant Commissioner Tom Mitchinson noted:

> An occurrence report is a form document routinely completed by police officers as part of the criminal investigation process. This particular Occurrence Report consists primarily of descriptive information provided by the appellant to a police officer about the alleged assault, and does not constitute a "report".

In my view, the occurrence reports and supplementary occurrence reports at issue in this appeal can all be similarly characterized. In this case, these reports consist of recordings of fact and the observations of the police officers who prepared them. These reports detail the steps taken by each officer and document the individuals they contacted, the questions asked and responses received. In the circumstances, I find that none of these records constitute a "report" as defined above. Therefore, sections 8(2)(a) and 38(a) do not apply to them.

The remaining records can only be described as a collection of "mere observations and recordings of fact". Therefore, these records do not qualify as a "law enforcement report" and sections 8(2)(a) and 38(a) do not apply to them.

Section 8(2)(c)

In general, section 8 of the *Act* requires that the expectation of one of the enumerated harms coming to pass, should a record be disclosed, not be fanciful, imaginary or contrived, but rather one that is based on reason. An institution relying on the section 8 exemption, bears the onus of providing sufficient evidence to substantiate the reasonableness of the expected harm(s) by virtue of section 42 of the *Act* (Order P-188). The requirement in Order 188 that the expectation of harm must be "based on reason" means that there must be some logical connection between disclosure and the potential harm which the institution seeks to avoid by applying the exemption (Order P-948).

In Order PO-1747, Senior Adjudicator David Goodis stated the following with respect to the words "could reasonably be expected to" in the law enforcement exemption:

> The words "could reasonably be expected to" appear in the preamble of section 14(1), as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373, two court decisions on judicial review of that order in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour) v. Big Canoe,* [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

With respect to this exemption claim, the Police state only that:

> Section 8(2)(c) may be very applicable to this appeal. This disclosure of the record could definitely [expose] the employer of the appellant, possibly doctors and/or the police service to civil liability.
>
> The existence of the civil disclosure process has been held by the Commissioner to reduce the weight accorded to this section in these circumstances [Order PO-1715].

Bearing in mind that I have already found that the statements taken from witnesses are exempt under section 38(b), I find that the representations of the Police fall short of establishing that anyone quoted or paraphrased in any of the records at issue in this appeal could reasonably be expected to be exposed to civil liability as a result of their involvement in the investigations referred to in the records. Accordingly, I find that sections 8(2)(c) and 38(a) do not apply to the records at issue in this discussion.

ORDER:

1. I uphold the decision of the Police to withhold certain personal information and information that is non-responsive to the request. For greater clarity, I have highlighted the personal information in green and the non-responsive information in blue on the copies of these pages that I am attaching to the copy of this order. The highlighted information should **not** be disclosed to the appellant.

2. I do not uphold the decision of the Police with respect to the remaining information.

3. I order the Police to provide the appellant with copies of the records (except for the portions that are highlighted) by providing him with a copy of these records by **April 29, 2002** but not before **April 24, 2002**.

4. In order to verify compliance with this interim order, I reserve the right to require the Police to provide me with a copy of the material disclosed to the appellant in accordance with Provision 3.

5. I remain seized of this appeal pending final resolution of the outstanding issues regarding records 82, 83, 84 – 86, 87, 150 – 158, 159 and 160 - 172.

March 25, 2002

Laurel Cropley
Adjudicator