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

INTERIM ORDER MO-1633-I

Appeal MA-020055-1

Waterloo Regional Police Services Board

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NATURE OF THE APPEAL:

This is an appeal from a decision of the Waterloo Regional Police (the Police), made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) sought access to all records relating to two occurrence reports.

In its decision, the Police granted access to some of the records located, granted partial access to others, and denied access to some records in their entirety. In denying access to the records or parts of records, the Police relied on the discretionary exemption in section 38(a) of the *Act*, with reference to sections 8(1) (law enforcement), 8(2)(a) (law enforcement report), 9(1) (information from governments), 12 (solicitor-client privilege) and 13 (threat to safety or health). The Police also relied on the discretionary exemption in section 38(b), with reference to section 14(1) (unjustified invasion of personal privacy), the factors in sections 14(2)(f) (highly sensitive) and 14(2)(h) (supplied in confidence), and the presumptions in sections 14(3)(a) (medical history), 14(3)(b) (law enforcement investigation), 14(3)(d) (employment or educational history) and 14(3)(g) (personal recommendations or evaluations).

The Police also provided the appellant with an Index of Records in which it listed the records located, indicated whether access was being granted, denied, or denied in part, the exemptions applied, and its reasons. It should be noted that, on the Index, the Police have indicated as "N/A" those portions of the records which have been withheld because they contain information about matters unrelated to the appellant's request. In some instances, the Police have stated that the "N/A" information consists of police codes, and in other instances, information about other investigations.

The appellant appealed from the decision of the Police. Mediation was not successful in resolving the issues, and the matter was referred to me for adjudication. The Mediator's Report lists the issues in dispute in the appeal, consisting of the application of the exemptions relied on by the Police. Responsiveness has not been raised as an issue in this appeal, nor has the reasonableness of the search for records.

I sent a Notice of Inquiry to the Police, initially, and also to two provincial government Ministries identified as having an interest in some of the records at issue. I received representations from the Police and from one of the Ministries, which were shared with the appellant with the exception of certain confidential portions. The appellant has provided representations in response.

RECORDS:

The records in issue have been numbered pages 1 to 130, and consist of occurrence reports (pages 1 to 35 and 116 to 121), memoranda or correspondence from other agencies (pages 38 to 48 and 125 to 130), witness statements or interview reports (pages 49 to 66), a file entry log (page 67), notes (pages 68 to 71), records from a third party (pages 72 to 97), excerpts from a police officer's notebook (pages 98 to 115), and Confidential Instructions for Crown Counsel (122 and 123).

Pages 1 to 35, 49 to 67, 99 to 104, 106, 108, 109, 100A to 111 and 113 to 123 were disclosed in part and withheld in part.

Pages 38 to 48, 68 to 97, 110, 112 and 125 to 130 were withheld in their entirety.

Pages 36 to 37, 98, 105, 107 and 124 were released in full to the appellant.

It should be noted that pages 102 and 103 have been interchanged in the Index.

CONCLUSON:

I uphold the application of section 14(1) in conjunction with section 38(b) of the *Act* to some of the records or parts of records at issue, and section 8(1)(c) or 8(1)(h) in conjunction with section 38(a) to others. Section 9(1), together with section 38(a), also applies to exempt some of the information from disclosure. I have deferred my decision on whether section 12 applies to exempt some of the information, pending notification to the Ministry.

DISCUSSION:

NON-RESPONSIVE INFORMATION

No issue was raised about the information severed from the records on the basis of non-responsiveness. Accordingly, pages 1, 8 to 10, 23, 29, 30, 33, 35, 102, 106, 110A, 113, 114 and 116 to 121 are not at issue in this appeal, as the only information severed from these pages was claimed by the Police as non-responsive. The same applies to portions of pages 2 to 7, 11 to 22, 24 to 28, 31, 32, 34, 100 to 104, 109, 110, 110B to 112 and 115. These portions are also not at issue, although other portions of these pages are.

PERSONAL INFORMATION

I will consider, firstly, whether the records contain personal information, and if so, to whom that personal information relates, for the answer to these questions determines which parts of the *Act* may apply.

The application of the section 14 personal privacy exemption, as well as the application of the section 38(a) and (b) exemptions, depends on a finding that the records contain "personal information", as defined in section 2(1) of the *Act*. "Personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual [paragraph (c)] and 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 [paragraph (h)].

I find that, with the exceptions detailed below, the records at issue contain the personal information of both the appellant and of other individuals. The information about the appellant relates to a police investigation and his subsequent arrest and prosecution for threatening a provincial Cabinet minister. The personal information of other individuals was obtained during the investigation and prosecution, and includes names, gender, position titles (which could reveal the identity of an individual), dates of birth and ages, addresses, telephone numbers, personal

opinions, and other information about them. Pages 22 and 55 contain information about an individual unrelated to this incident.

Although the witnesses became involved in the incident through their employment, I am satisfied that information about them given as witnesses in a police investigation relates to them personally, and not professionally. I note that the Police decided to release most of the contents of the witness statements to the appellant, based on their decision that the information given by the witnesses was in their professional capacities. I find, however, that this is not information about these witnesses in relation to their professional duties. However, I approve of the decision of the Police to release this information, in that the information disclosed consists of either factual information about the appellant and not about a witness, or to the extent that the information contains the views or opinions of a witness, the views or opinions relate to the appellant and are thus not the personal information of the witnesses under section 2(1)(e) of the *Act*.

Alternatively, the Police have severed all personal identifiers from the information disclosed, and I uphold these severances below. In these circumstances, the information released to the appellant is not about "identifiable individuals" and thus does not qualify as personal information.

Consistent with the above, certain information given by a witness on pages 21, 52 and 53 contains the views or opinions of the witness about the appellant. This information is not the personal information of the witness, either by application of section 2(1)(e) of the *Act*, or because all personal identifiers have been severed. The personal privacy exemption thus does not apply to exempt this information from disclosure. Other information on these pages identifying the witnesses qualifies as their personal information.

Based on the representations of the Police, I accept that the information of Ontario Provincial Police (OPP) officers on pages 3, 55 and 100 (a 24-hour pager number) can be viewed as both personal and professional.

I find that pages 38 to 48 of the records contain the personal information of the appellant, but not of other individuals. There is information about other individuals, but I am satisfied that it is information about them in a professional capacity. These individuals were acting in the course of professional duties in the circumstances described in these records. Again, the personal privacy exemption thus does not apply to exempt this information from disclosure.

Pages 63 and 66 contain personal information of individuals other than the appellant, and not of the appellant.

The Police have also claimed the personal privacy exemption for information severed from pages 7, 67 to 97, 109, 110B to 112, 115, 122, 123 and 125 to 130. However, with the exception of the name of an individual on page 67, and some information on page 127, the other pages contain personal information of the appellant only, and not of other individuals. The personal privacy exemption thus does not apply to these pages, with the exception of portions on pages 67 and 127.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/INVASION OF PRIVACY

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

Section 38(b) of the *Act* provides:

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

Under section 38(b) of the *Act*, where a record contains the personal information of both the requester 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.

Section 38(b) of the *Act* introduces a balancing principle. The institution 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 institution determines that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 38(b) gives the institution the discretion to deny access to the personal information of the requester.

In determining whether 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 head to consider in making a determination as to 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(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.

With respect to section 14(3), 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]. In other words, once section 14(3) is found to apply, the factors in section 14(2) cannot be applied in favour of disclosure.

In the case before me, the Police have relied on section 14(3)(b), among others, to justify withholding the personal information in the records. Section 14(3)(b) provides:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> > was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation...

The Police submit that the personal information was compiled and is identifiable as part of an investigation into an allegation of uttering death threats. The information was gathered prior to the completion of the investigation, as a result of which criminal charges were laid.

The appellant states that the charge was withdrawn, and that he is innocent of the charge. Further, he states that the records he seeks were part of "disclosure" that he should have received in a court matter.

I accept that the personal information about the witnesses (such as names and other information enabling their identification) was compiled and is identifiable as part of an investigation into a possible violation of law. With respect to the appellant's statement that the charge was withdrawn, it should be noted that the application of the presumption under section 14(3)(b) does not depend on proof of an alleged offence through a completed prosecution, or even the laying of a charge. The presumption in subsection 14(3)(b) only requires that there be an *investigation* into a possible violation of law which, on the facts before me, is not disputed.

As to the appellant's assertion that the records should have been received as part of "disclosure" in court proceedings, the operation of the *Act* is independent from the operation of other court processes that might apply to the disclosure of the records at issue. As former Commissioner Sidney B. Linden stated in Order 48:

> [I]n my view, the existence of codified rules which govern the production of documents in other contexts does not necessarily imply that a different method of obtaining documents under the *Freedom of Information and Protection of Privacy Act, 1987* is unfair.

I find, accordingly, that disclosure of the personal information of individuals other than the appellant in portions of pages 2 to 6, 11 to 12, 14 to 22, 24 to 28, 31, 32, 34, 49 to 62, 64, 65, 67, 100, 101, 103, 104, 108 and 127 is presumed to constitute an unjustified invasion of the personal privacy of these individuals. As these pages also contain the personal information of the appellant, this information qualifies for exemption under section 38(b) of the *Act*. I am satisfied that the Police have exercised their discretion under section 38(b) appropriately in denying access to the information in the severed portions.

Pages 63 and 66 do not contain the personal information of the appellant, but only of others. Their disclosure is also presumed to constitute an unjustified invasion of the personal privacy of these other individuals. Rather than section 38(b), it is section 14(1) which applies to exempt the personal information on these pages.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/LAW ENFORCEMENT

In addition to section 38(b) of the *Act*, another exception to the general right of access to an individual's own information is found in section 38(a) of the *Act*, under which the institution has the discretion to deny an individual access to his or her own personal information in instances where, among others, section 8 would apply to the disclosure of that information.

In this case, the Police have relied on section 8(1)(c) in relation to pages 7, 34, 67 to 97, 109, 110, 110B to 112, 115, 122, 123, 125 and 130, section 8(1)(d) in relation to pages 2 to 6, 11, 14 to 15, 17, 19 to 22, 24 to 28, 31, 32, 34, 49 to 66, 101, 103 and 108, section 8(1)(e) in relation to pages 12, 16, 27 and 103, section 8(1)(h) in relation to pages 34, 67 to 97, 109, 110, 110B to 112 and 115, and section 8(2)(a) in relation to pages 2 to 7, 11 to 22, 24 to 28, 31, 32, 34, 49 to 66, 68 to 97, 100, 101, 103, 104, 108 to 110, 110B to 112, 115, 122, 123 and 125 to 130.

It is not necessary to consider pages 2 to 6, 11, 14, 15, 17, 19, 20, 22, 24 to 26, 28, 31, 32, 49 to 51, 54 to 65, 100, 104 and 108 further, as all of the severed information at issue has been found to qualify for exemption under sections 14(1) and/or 38(b) above. Although I have found some portions of pages 12, 18, 21, 27, 34, 52, 53, 101, 103 and 127 exempt under sections 14(1) and 38(b), other portions are not covered by those findings. Further, below, I find pages 125 to 129 in their entirety exempt under section 9(1).

It is only necessary, therefore, to consider the application of sections 8(1), 8(2) and 38(a) to the information severed from pages 7, 13, 16, 66, 67, 109, 110B, 111, 115, the entirety of pages 68 to 97, 110, 112 and 130, and certain portions of pages 12, 18, 21, 27, 34, 52, 53, 101, 103, 122 and 123.

Section 8(1)(c): investigative techniques and procedures

Section 8(1)(c) reads:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

Previous orders of this office have established that in order to constitute an "investigative technique or procedure" it must be the case that disclosure of the technique or procedure to the public would hinder or compromise its effective utilization. The fact that a particular technique or procedure is generally known to the public would normally lead to the conclusion that such

compromise would not be effected by disclosure and accordingly that the technique or procedure in question is not within the scope of section 8(1)(c). (Order P-170, see also Orders M-761 & P-963)

Based on the representations of the Police on the information in page 7, which I am unable to detail further here, I am satisfied that disclosure of the information severed from that page could reasonably be expected to reveal investigative techniques and procedures currently in use in law enforcement. Pages 34, 67, 109, 110, 110B to 112 and 115 deal with the police procedure of obtaining and executing a search warrant. Although the use of search warrants by police forces is known to the public, I accept the submissions of the Police in this appeal that the details of how they are obtained, the required investigation, drafting of the information, and the process of obtaining and executing a warrant constitute an investigative technique or procedure that is generally not known. The appellant has made no specific submissions on the application of section 8(1)(c). I am satisfied that the information severed from these pages meets the requirements for exemption under section 8(1)(c) and, further, that the Police exercised their discretion appropriately in refusing access to the information under section 38(a) of the *Act*.

Pages 68 to 97 are more appropriately dealt with under section 8(1)(h), discussed below.

Pages 122 and 123 are entitled "Confidential Instructions for Crown Counsel". These pages contain handwritten notations about the prosecution of the appellant, all of which have been disclosed except for a portion on each page. I find that the information in these portions does not contain any information the disclosure of which could reasonably be expected to reveal instigative techniques and procedures. The information in these portions does not on its face relate to an investigation.

Finally, I am not satisfied that page 130 contains any information the disclosure of which could reasonably be expected to reveal investigative techniques and procedures. It is entitled "Screening Form", is completed by a Crown Attorney, contains no information about the investigation, and states on its face that it is to be handed to an accused on a first appearance.

Section 8(1)(d): confidential source

Section 8(1)(d) permits an institution to deny access to a record or a part of a record where disclosure could reasonably be expected to disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source. 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. Further, the institution must provide evidence of the circumstances in which the informant provided the information to the institution in order to establish confidentiality: see Orders PO-1747, 139 and MO-1383.

Of the portions of the records for which section 8(1)(d) has been claimed, only certain information on pages 21, 27, 52, 53, 66, 101 and 103 remains at issue. With respect to the portions severed from pages 21, 52 and 53, the Police have not indicated why section 8(1)(d)

applies in circumstances where it has severed (and I have upheld the severance of) any information identifying the witness whose statement is contained on these pages, and I am satisfied that disclosure of these portions could not reasonably be expected to disclose the identity of a confidential source of information, or disclose information furnished only by the confidential source.

On page 66, I have found the name of an individual exempt under section 14(1). What remains is a fax number. I find that section 8(1)(d) does not apply to exempt this fax number which, incidentally, has been disclosed by the Police in another record in any event.

On pages 27 and 101, I have found the name of two individuals exempt under section 14(1) in conjunction with 38(b). The information found in the remaining portions at issue is known to the appellant, as he has a copy of the document referred to and is aware of the sharing of this information with the Police (see below). In these circumstances, I find that disclosure of this information could not reasonably be expected to disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source. Accordingly, section 8(1)(d) does not apply to exempt these portions from disclosure.

On page 103, I have found one portion exempt under section 14(1) in conjunction with 38(b). Another portion is non-responsive. Again, I find that the information in the remaining portion is known to the appellant, as he has a copy of the document referred to and is aware of the sharing of this information with the Police. In these circumstances, I find that disclosure of this information could not reasonably be expected to disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source. Accordingly, section 8(1)(d) does not apply to exempt this portion from disclosure.

Section 8(1)(e): life or physical safety

Section 8(1)(e) states:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > endanger the life or physical safety of a law enforcement officer or any other person;

An institution relying on the section 8 exemption bears the onus of providing sufficient evidence to substantiate the reasonableness of the expected harm by virtue of section 53 of the Act (Order P-188).

The words "could reasonably be expected to" appear in the preamble of section 8(1), as well as in several other exemptions under the Act, dealing with a variety of anticipated "harms". Previous orders of this office have found that 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 and *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 and 40 (Div. Ct.)]. However, when dealing with the harms associated with the endangerment to life or physical safely of a person (sections 8(1)(e) and 13 of the *Act*), a different test applies. In these limited circumstances, the court in *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Ministry of Labour, Office of the Worker Advisor)*, (1999), 46 O.R. (3d) 395 at 403 (CA), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.) stated that, if an institution has established a reasonable basis for believing that a person's safety will be endangered by disclosing a record, and these reasons are not a frivolous or exaggerated expectation of this harm, then section 8(1)(e) may be properly invoked to refuse disclosure (See Orders PO-1772, MO-1262 and MO-1293).

Because I have upheld other exemption claims for some of the records or parts of records for which section 8(1)(e) has been claimed, only certain information on pages 12, 16, 27 and 103 remains at issue.

The Police submit that the appellant has a history of threatening behavior. They state:

> He has a criminal record for careless use of a firearm as well as possession of a restricted weapon. The appellant has displayed that he has the ability to obtain restricted weapons. Even if he had acquired a restricted weapon lawfully he has shown that he has used them carelessly. The appellant threatened to cause death to an elected official. Disclosure of the record could be expected to endanger the life or physical safety of other persons. This expectation is reasonable and supported by pages 38 to 48 of the records.

The Police do not specifically state why disclosure of the particular portions of the records at issue could reasonably be expected to endanger life or safety.

Pages 12, 16, 27 and 103 refer to or summarize the information in a document found at pages 38 to 41 of the records. In his representations, the appellant has enclosed a copy of the document found at pages 38 to 41 of the records, which is a Threat Assessment. It appears to have been provided to the appellant as part of Crown disclosure in past court proceedings. Regarding the representations of the Police, the appellant disputes that he threatened the elected official, and states that this charge was withdrawn. In general, the appellant disagrees with the Police characterization of his past history.

I am not satisfied that the Police have shown that disclosure of the information in these pages could reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person. It may well be that the appellant has a demonstrated history of involvement with the law. However, the information in these pages only summarizes or refers to information contained in a document which is clearly known to, and in the possession of, the appellant. In these circumstances, I find that there is no reasonable basis to believe that disclosure of this information will endanger the life or physical safety of any person.

Section 8(1)(h): confiscated record

Section 8(1)(h) allows the Police to deny a requester access to a record where either the record at issue is itself a record which has been confiscated from a person by a peace officer in accordance with an *Act* or regulation, or where the disclosure of the record could reasonably be expected to reveal another record which has been confiscated from a person by a peace officer, in accordance with an *Act* or regulation (see Order M-610).

Because I have upheld other exemption claims for some of the records for which the Police have claimed the application of section 8(1)(h), remaining at issue under this section are pages 68 to 97 of the records.

The Police submit that this exemption was applied in order to deny access to records they obtained in the execution of a search warrant that had been authorized by the state, specifically, the *Criminal Code*. Access was also denied to the records that provide the grounds and support required to obtain a warrant, in the Police notebook entries.

The appellant does not specifically deny that section 8(1)(h) applies to the records at issue, although he denies the allegations made against him in the Police investigation. He also submits certain documents in support of this position, which I find do not refute the submissions of the Police on the application of section 8(1)(h).

I am satisfied that section 8(1)(h) applies to exempt pages 68 to 97 of the records, as they were confiscated by the Police under a search warrant issued under the *Criminal Code*.

Section 8(2)(a): law enforcement report

Section 8(2)(a) reads as follows:

> 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;

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).

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.

[Orders 200 and P-324]

Again, it is unnecessary for me to consider the application of section 8(2)(a) to information that I have found exempt under another section of the *Act* above. Further, it is unnecessary for me to consider the application of section 8(2)(a) to pages 125 to 129, as I find this information exempt under either section 9(1), below. Remaining at issue, therefore, is information severed from pages 12, 13, 16, 18, 21, 27, 52, 53, 66, 101, 103, 122, 123 and the entirety of page 130.

In their representations, the Police state, among other things:

> The records are reports. The records are a formal account of the results of the collation and the consideration of information. The police officer has an obligation to provide a formal statement of the results of his work. The record format of the occurrence report is formally structured by the police service. The reports, in essence, answer the who, what, where, when and why of the incident. After gathering and collating this information, the information was considered and action was taken by the police service. The results of this action taken was [sic] recorded in the report. The action taken included executing a search warrant and eventually arresting the appellant.

I find that the pages of the records at issue, with the exception of page 66, were prepared in the course of law enforcement investigations, by an agency which has the function of enforcing and regulating compliance with a law. Page 66 was not prepared by the Police, but is a fax cover sheet sent by a witness.

I am not satisfied, however that any of these records meet the definition of "report" under the *Act*. Generally, occurrence reports and supplementary reports and similar records of other police agencies have been found not to meet the definition of "report" under the *Act*, in that they are more in the nature of recordings of fact than formal, evaluative accounts of investigations: see, for instance, Orders PO-1796, P-1618, M-1341, M-1141 and M-1120. In Order M-1109, Assistant Commissioner Tom Mitchinson made the following comments about police occurrence reports:

> 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".

On my review of pages 12, 13, 16, 18, 21 and 27, which are part of police occurrence reports, I am satisfied that they also do not meet the definition of "report" under the *Act*, in that they record

actions taken by the police officers in response to a complaint, and information conveyed by others. The content of these records is descriptive and not evaluative in nature. Pages 52 and 53 are part of a handwritten witness statement, and also do not meet the definition of "report". Pages 101 and 103 are taken from a police officer's notebook, are similar in nature to the police occurrence reports, and also do not meet the definition of "report".

Pages 122 and 123, titled "Confidential Instructions for Crown Counsel" contain handwritten notations with respect to the progress of the prosecution. The information is not presented in any manner that approximates a "report" for the purposes of section 8(2)(a), and also does not qualify for exemption under this section. Neither does page 130, which, again, does not present information in a manner approximating a "report".

I conclude, therefore, that section 8(2)(a) does not apply to exempt the information in pages 12, 13, 16, 18, 21, 27, 52, 53, 66, 101, 103, 122, 123 and 130 from disclosure.

Conclusion:

I have found information in the following pages to qualify for exemption from disclosure under section 8(1)(c) or (h) of the Act: **7, 34, 67 to 97, 109, 110, 110B to 112, 115.** I am satisfied that the Police have exercised their discretion under section 38(a) appropriately in denying access to the information at issue in these pages.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/GOVERNMENT RELATIONS

Under section 38(a) of the *Act*, the Police also have the discretion to deny an individual access to their own personal information in instances where the exemption in section 9 would apply to the disclosure of that information.

The Police have relied on section 9(1) with respect to information on pages 12 to 13, 16, 18, 27, 38 to 48, 101 and 126 to 130 of the records.

Section 9(1)

Section 9(1) of the *Act* provides, in part:

> 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,
>
> (b) the Government of Ontario or the government of a province or territory in Canada;
>
> (d) an agency of a government referred to in clause (a), (b) or (c);

The section 9(1) exemption has been applied in a variety of circumstances, including information provided to a police service from other police services (Order M-202), information provided to a

municipality by the Ontario Realty Corporation (an agency of the provincial government) (Order M-1131), information provided to a police service by a ministry of the provincial government (Order MO-1569-F), and information provided to a police service by Crown Attorneys (see discussion below).

In these cases, it has been said that in order for section 9(1) to apply, the institution must demonstrate that the disclosure of the record could reasonably be expected to reveal information which it received from one of the governments, agencies or organizations listed in the section **and** that the information was received by the institution in confidence (see Order MO-1581).

In this appeal, the Police have claimed that certain information on pages 12 to 13, 16, 18, 27, 101 and the entirety of pages 38 to 48 and 126 to 130 of the records is exempt under section 9(1) of the *Act*. Although the Police did not apply section 9(1) to page 125 of the records, the submissions of the Ministry of the Attorney General (the Ministry) assert that this exemption applies, and that the Ministry provided page 125 to the Police in confidence. As section 9(1) is a mandatory exemption, I will consider its application to page 125.

The Police submit that the information at issue was received in confidence from the office of the Solicitor General of Ontario and the OPP. The records received from the OPP were shared with the Police in order to assist in its investigation of the appellant. Further, some of the records relate to internal communications within the Ministry, and constitute working papers of the Crown Attorney's office as they relate to advice and direction to be provided to the Police by that office.

The Ministry takes no position with respect to the application of section 9(1) to page 122, as it states it was provided by the Police to the Ministry, and not by the Ministry to the Police. The Ministry submits that the interests of the Ministry arise with respect to pages 125 to 130. With respect to pages 125 to 129, the Ministry submits that the records reveal confidential communications between the Police, employees of the Ministry, namely an Assistant Crown Attorney and Crown Attorney, employees of the Ministry of the Solicitor General, namely probation officers, and the OPP. They are documents prepared by counsel during the course of a law enforcement investigation and in anticipation of litigation. They contain confidential instructions to the police from the Crown, information as to steps taken by the Crown during the course of a law enforcement investigation and anticipated court proceedings, and the advice/instructions given by a public servant.

The Ministry submits that they provided these records to the Police, under implicit confidentiality. These communications would ordinarily be shared with Police in strict confidence. The release of the records would jeopardize the spirit and willingness of any future exchange of information between the Crown and police agencies. It is said that the free flow of information between policing agencies and the Crown is essential to the proper administration of justice.

The Ministry indicates that it has no objection to having page 130 disclosed to the appellant, as it would normally have been provided to the appellant at the commencement of criminal proceedings in any event.

The appellant makes no specific representations on the application of section 9(1), relying on his general representations disputing the grounds of any of the charges brought against him. As I have indicated above, he has enclosed certain documents with his representations which were received by him as part of Crown disclosure in previous court proceedings. These documents include the Threat Assessment at pages 38 to 41 of the records, as well as a Crown Brief at pages 45 to 46 of the records.

In MO-1288, Adjudicator Holly Big Canoe considered a similar situation, in relation to records for which a police service had claimed the application of, among others, section 9(1)(d) of the *Act*, and of which the appellant was already in possession:

> In Order M-444, former Inquiry Officer John Higgins found that the refusal of access to information which the appellant originally provided to the Police would be contrary to one of the 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 and would, applying the rules of statutory interpretation, lead to an "absurd result."
>
> In Order PO-1708, Assistant Commissioner Tom Mitchinson applied the same principles to find that any records provided to the appellant in that case approximately six years earlier during the course of an investigation under the Police Services Act into that appellant's complaint would also lead to an absurd result.
>
> Records 16, 17, 20-23, 27, 36, 59, 61, 62, 75, 89-91, 109, 198, 205, 207-209, 219, 221 and 228 were provided to the appellant three years ago during the investigation of his complaint, for valid public policy reasons. Applying section 9(1)(d), 14(1) or 38(b) to them when the appellant requests access to them in this scheme would, in my view, be contrary to one of the purposes of the *Act*, which is to allow individuals to have access to records containing their own personal information, and therefore lead to an absurd result, despite the passage of time. Accordingly, I find that these sections cannot apply to these records and their application will not be considered further in this order. These records should be disclosed to the appellant.

I find the reasoning in the above cases sound. In the appeal before me, the application of section 9(1)(a) or (d) (which are the only parts of section 9(1) which are arguably applicable) to information which is clearly in the possession of the appellant, and which constitutes his personal information, would be contrary to one of the purposes of the *Act*, which is to allow individuals access to records containing their own personal information.

I have indicated that the appellant has included copies of certain documents received by him as part of Crown disclosure in previous court proceedings. These correspond to pages 38 to 41 and 45 to 46 of the records. The information severed from pages 12 to 13, 16 18, 27 and 101 all

refers to or summarizes the information in pages 38 to 41. The information in these pages of the records is thus clearly known to the appellant.

In these circumstances, and applying the "absurd result" principle, I find that section 9(1) has no application to the information severed from pages 12 to 13, 16, 18, 27 and 101 of the records, and the entirety of pages 38 to 41 and 45 to 46.

It remains to consider the application of section 9(1) to pages 42 to 44, 47 to 48 and 125 to 130 of the records.

In the Ministry's representations, it has indicated that page 130 is a document which is normally provided by the Crown to the accused at the commencement of criminal proceedings against him. The Ministry provided this record to the Police. However, as it would ordinarily have been shared with the appellant, it is not likely to have been provided by the Ministry to the Police in confidence. The Ministry has no objection to having this document released to the appellant. Based on these representations, I am satisfied that section 9(1) has no application to page 130.

I find that pages 42 to 44, 47 to 48 and 125 to 129 were provided to the Police by either the Ministry of the Solicitor General (or its agent), or the Ministry of the Attorney General. Based on the representations before me, I am satisfied that disclosure of these records could reasonably be expected to reveal information which it received from these Ministries, or an agent, and that the information was received by the Police in confidence.

Conclusion:

I find the information on the following pages to qualify for exemption under section 9(1) of the *Act*: **42 to 44, 47, 48 and 125 to 129.** I am satisfied that the Police have exercised their discretion under section 38(a) appropriately in denying access to the information at issue in these pages.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/SOLICITOR-CLIENT PRIVILEGE

I have decided to defer my findings under section 12, pending submissions from the Ministry. Although the Ministry was notified of this appeal, and given an opportunity to provide representations on the application of section 9(1) to the records, it was not invited to submit representations on the application of section 12. In view of grounds given by the Police for the application of section 12 in their representations, I have decided that the Ministry ought to be given an opportunity to make representations on this issue.

Of the records for which section 12 has been claimed, only portions on pages 122 and 123 remain at issue. I make no finding in this decision, therefore, on whether these portions are exempt under the *Act*.

Before concluding, I wish to deal with several issues raised by the appellant's representations.

Firstly, the appellant has submitted that he would have been in a better position to make full arguments on the issues raised by this appeal if he had a more complete index (or description) of the records. He also states that this would allow him to evaluate whether a reasonable search for records was conducted (no issue of reasonable search was raised in this appeal). Although the Index does not provide a description of the records at issue, more details about them were provided in the Notice of Inquiry, and then in the representations of the parties. I am satisfied that, balancing the need to maintain a degree of confidentiality during the course of an inquiry, and the appellant's entitlement to be given information in order to participate in the inquiry, sufficient information was provided in the circumstances of this appeal.

Further, the appellant has submitted that it is also in the public interest to release the records at issue to him. He has not made submissions, however, to establish the applicability of section 16 of the *Act* (public interest override) in the circumstances of this appeal, and I do not find a basis for its application.

Finally, I appreciate that the appellant disagrees with much of the information provided by the Police about the allegations against him in relation to threatening a provincial Cabinet minister. As I have indicated above, in deciding whether the records are exempt from disclosure under the provisions of the *Act*, it is unnecessary for me to determine the truth of those allegations. The exemptions I have upheld do not depend on a successful prosecution of those allegations by the Crown.

ORDER:

1. I order the Police to disclose to the appellant the information severed from pages **12, 13, 16, 18, 21, 27, 52, 53, 66, 101 and 103**, with the exception of non-responsive information and information that I have found exempt under sections 14(1) and/or 38(b). For greater certainty, I have enclosed with the copy of my interim order to the Police the relevant pages highlighting the portions to be severed.

2. I order the Police to disclose to the appellant the entirety of pages **38 to 41, 45, 46 and 130**.

3. I uphold the decision of the Police to withhold the remaining information in the records (except as indicated in Provision 4 below).

4. I make no finding on the application of section 12 of the *Act* to the portions of pages **122 and 123** at issue. I will issue a Supplementary Notice to the Inquiry to the Ministry shortly, providing it with an opportunity to make representations on this issue.

5. I order disclosure to be made by sending the appellant a copy of the records, severed according to my directions, by no later than **May 9, 2003**.

6. In order to verify compliance with my directions, I reserve the right to require the Police to provide me with a copy of the records sent to the appellant.

Original signed by: April 11, 2003

Sherry Liang
Adjudicator