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

ORDER MO-1896

Appeal MA-030430-1

Thunder Bay Police Force

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NATURE OF THE APPEAL:

In January of 2002, the appellant reported to the Thunder Bay Police Force (the Police) that she had been robbed and assaulted at a casino in Thunder Bay. A Thunder Bay police officer (the investigating officer) began an investigation. He noted physical injuries and arranged to have them photographed. He also contacted an Ontario Provincial Police officer assigned to the Alcohol and Gaming Commission, which operates the casino, for assistance and information.

On October 30, 2003, the appellant made an access request to the Thunder Bay Police Force under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for "the investigation records and all statements made by the (investigating) officer" in relation to that incident.

The appellant alleges that these records contain "vulgar and slanderous statements" that she is a "well-known prostitute of TH. Bay and [has] been thrown out of the TH. Bay Charity Casino several times".

The appellant states that she found out about these allegations when she applied to the Criminal Injuries Compensation Board (the Board) for compensation for harm suffered as a result of the robbery and assault. She states that she became aware of the allegations because they were produced as evidence at the Board hearing by the Thunder Bay Police investigating officer.

The Police identified as responsive to the request two records: a "General Occurrence Report" dated January 30, 2002 and a "Supplementary Occurrence Report" dated January 31, 2002. The Police gave the appellant access to most of the contents of the General Occurrence Report, but severed some portions. They also gave her access to the Supplementary Occurrence Report with the exception of two words in the first paragraph, two words in the second paragraph, and two sentences in the third paragraph.

The severed information was denied pursuant to the exemption in section 38(b) of the *Act* (invasion of privacy) and pursuant to section 38(a) in conjunction with the discretionary exemptions in sections 8(1)(a) (law enforcement) and 9(1)(b) (relations with other governments) to the duty to provide an individual with his or her own personal information.

The appellant appealed the decision to withhold the severed information.

During mediation of this appeal, the appellant agreed to limit the scope of the appeal to the two sentences in the third paragraph of the Supplementary Occurrence Report that the Police refused to disclose. The appellant believes these sentences contain pejorative statements about her described earlier, and identify a person (the affected person) who allegedly made those statements.

As the appellant explained in her letter appealing the refusal decision, what she wants is:

> personal information about myself. …Why bring up these vicious allegations at the (Board) hearing, and now withhold them?

> This information was very hurtful to myself, my family, and by the sounds of it, my C.I.C.B. claim.
>
> I have been with my husband for 15 years, (married for 10 years), and have a daughter who is 5 years old. I was very shocked when this came out at the hearing, I couldn't believe it. I was very embarrassed to have this said about me. I have never done anything like this, nor been thrown out of the Casino. (They have me mixed up with someone else).

This inquiry was initiated by sending the Police a Notice of Inquiry setting out the facts and issues in this appeal and inviting them to make representations. The Police provided representations, including several attachments. They asked that this office not share portions of their representations and one of the attachments with the appellant. This office complied with that request and did not share that information with the appellant.

A copy of the non-confidential portion of the representations of the Police was sent to the appellant, whose counsel made representations in response.

The affected person was also invited to make representations in this inquiry, particularly in relation to whether the severed portion of the record contained his personal information. In response, the affected person supplied this office with a document that he had prepared earlier.

DISCUSSION:

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1), in part, as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (e) the personal opinions or views of the individual except where they relate to another individual,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in his or her professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

In this case, the information at issue has two components. (1) a statement about the appellant, and (2) the name and title of an official who allegedly made the statement.

I find that the statement made about the appellant by the affected person is the appellant's personal information. The statement falls within the definition of "personal information" in section 2(1) of the *Act* both because it relates to her alleged criminal history and because it contains the views or opinions of another individual about the appellant.

As mentioned earlier, the affected person was contacted by this office and offered an opportunity to provide representations, in particular in relation to the issue of whether the information at issue contains his or her personal information. The affected person provided some information in response, but did not address the "personal information" issue.

In the record, the affected person is identified only in his professional capacity and any statements attributed to him appear to relate to the performance of professional responsibilities. The severed portion of the record reveals nothing of a personal nature about him. Indeed, the document he provided to this office reinforces the conclusion that this information relates to him only in a professional capacity. Moreover, under section 2(1)(e), the affected person's personal views and opinions in relation to the appellant are not his personal information.

The identity of the affected person, therefore, and the information that he allegedly provided about the appellant are not the affected person's personal information.

In summary, I find that the record contains the personal information of the appellant but does not contain the personal information of the affected person.

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

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

Since the statement allegedly made by the affected person is the appellant's information, she is entitled to it under section 36(1) unless it falls within one of the exemptions to this access right in section 38.

Under section 38(a), an institution has the discretion to deny an individual access to their own personal information where the exemptions in sections 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that information. In this case, the institution relies on section 38(a) in conjunction with sections 8(1)(a) and 9.

Under section 38(b), 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. Because I have found that the information remaining at issues in this appeal contains only the appellant's personal information and does not contain the personal information of any other individual, its disclosure to the appellant cannot be an unjustified invasion of personal privacy. Therefore, section 38(b) does not prevent the Police from disclosing to the appellant the information in the passage at issue.

I now turn to consider whether this information is exempt under section 38(a) in conjunction with sections 8(1)(a) or 9.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION: LAW ENFORCEMENT/RELATIONS WITH OTHER GOVERNMENTS

The two exceptions that the Police claim apply to this information are sections 8(1)(a) and section 9(1)(b). However, section 9(1)(b) deals with government departments or ministries. The Notice of Inquiry sent to the Police asked them to identity the government from which they allege that they received the information in confidence. In response, the Police stated:

> As part of his investigation in this law enforcement matter, the Thunder Bay Police officer contacted an Ontario Provincial Police officer, currently assigned to the Alcohol and Gaming Commission for information concerning this investigation. The Alcohol and Gaming Commission and the Ontario Provincial Police are governed by the Ministry of Public Safety and Security in the Province of Ontario.

As these entities are not Ministries of the Government of Ontario, if they fall under section 9(1), it would be because they are "agencies" of that government under 9(1)(d), rather than falling under section 9(1)(b), the exemption claimed by the Police. This raises the question of whether there will be any prejudice to the appellant or the affected person if I consider the section 9(1)(d) exemption without issuing a supplementary Notice of Inquiry referring to this issue and considering this office's policy on late raising of discretionary exemptions. (See Order P-1137).

I am satisfied that the appellant and affected person are not prejudiced if I consider the application of section 9(1)(d). The representations of the Police in which they identified the agencies for which they are claiming the section 9 exemption were shared with the appellant, who thus had an opportunity to address the question of whether section 9 applies to these agencies. Although the representations of the Police were not sent to the affected person, it is clear from the context of this appeal that the affected person would have no interest in arguing

that section 9 does not apply to this information. In my view, the inadvertent misidentification of the correct subsection of section 9 does not raise a new issue requiring any additional steps.

(a) Section 8(1)(a)

Section 8(1)(a) states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to interfere with a law enforcement matter.

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)].

Where section 8(1)(a) uses the words "could reasonably be expected to", the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Goodis* (May 21, 2003), Toronto Doc. 570/02 (Ont. Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)

It is not sufficient for an institution to take the position that the harms under section 8 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfillment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*, above].

The law enforcement matter in question must be a specific, ongoing matter. The exemption does not apply where the matter is completed, or where the alleged interference is with "potential" law enforcement matters [Orders PO-2085, MO-1578].

The institution holding the records need not be the institution conducting the law enforcement matter for the exemption to apply [Order PO-2085].

In this case, it is clear that the record in question relates to a law enforcement matter - a specific criminal investigation by the Thunder Bay Police. The question, therefore, is whether its disclosure could reasonably be expected to interfere with that investigation.

This office stated in the Mediator's Report and in the Notices of Inquiry sent to the Police and to the affected person that the only information remaining in issue in the appeal is the statements about the appellant and the identity of the official who allegedly made those statements.

In their representations, the Police acknowledge that they are aware of this. Nevertheless, their representations largely address matters no longer in issue, such as information about the appellant's assailants, and do not address how disclosure of the specific information about the appellant and source of that information could interfere with the investigation.

As the contents of the document provided by the affected person are confidential, I will not refer to them. However, I am satisfied that this document also lacks information that relates the specific information in question to any possible harm to this particular investigation.

While maintaining confidentiality may *in general* be important to the effectiveness of policing, the focus of section 8(1)(a) is the expected impact of the release of specific information on *specific* investigations. Other than having been obtained in the course of a law enforcement investigation, it is not clear that the information in question could reasonably be expected to interfere with any law enforcement matter arising from the incident at the casino.

The Police state in their representations, "The personal description of the suspects in question supplied by the appellant is of significant value concerning this investigation should the individuals in question be located and apprehended". However, the only information the appellant seeks relates to a description of her and does not relate in any way to the suspects, to police investigative techniques, to "leads", or to any other aspect of the investigation.

Although the Police have not formally closed their file and although they refer to it as "active", it appears from their representations that they have identified no suspects and that no steps are being taken or have been taken for some time. As of April 16, 2004, when the Police alleged potential interference with their investigation in their representations, more than two years had passed since the incident.

The nature of the information remaining at issue, in the context of incident in question and the state of the investigation, does not suggest that disclosure would have any real prospect of interfering with the investigation.

I find, therefore, that the Police have not established that the statements made about the appellant qualify for exemption under section 8(1)(a), and they are therefore not exempt under section 38(a) in conjunction with section 8(1)(a).

(b) Sections 9(1)(b) and (d)

Sections 9(1)(b) and (d) state:

> 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; or
>
> (d) an agency of a government referred to in clause … (b);

General

For this exemption to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

If disclosure of a record would permit the drawing of accurate inferences with respect to information received from another government, it may be said to "reveal" the information received [Order P-1552].

Section 9(1)(d)

"Agency of a government"

The first question to be addressed is whether the information in question came from an agency of a government. As indicated in the passage from the Police representations set out earlier, the Police received information from an OPP officer assigned to the Alcohol and Gaming Commission. There is ambiguity in this statement and in other statements in the Police representations as to whether the person who provided the information was representing the Ontario Provincial Police or the Ontario Alcohol and Gaming Commission in dealing with the Police. However, since it is clear that he was acting on behalf of one or the other of these agencies, it is unnecessary to determine which organization he represented, as both of them are agencies of the Ontario Government, and therefore fall within section 9(1)(d) of the *Act*.

"Received in confidence"

The next question is whether the information about the appellant in the passage at issue was "received in confidence" by the Thunder Bay Police Force.

Previous orders issued by this office have stated that for information to "have been received in confidence" there must be an expectation of confidentiality on the part of the supplier and the receiver of the information. [Orders 210, P-278, P-480, and M-871]. I agree with this analysis. For a matter to be "in confidence", there must be a mutual intention, or at least a mutual expectation, of secrecy. If one party intends that the information be kept confidential but the other party does not, the information generally cannot be considered "in confidence". The requirement for mutuality is illustrated by the *Oxford Concise Dictionary*, 1990 edition, definition of "confidence" as "the telling of private matters with mutual trust".

In determining what evidence will satisfy the onus to establish that information has been supplied in confidence under section 10, this office has made the following observations:

To satisfy the "in confidence" component of the section, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order PO-2020].

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure [Order PO-2043]

In my view, similar considerations apply to determination of whether information was received in confidence under section 9 of the *Act*.

In determining whether information was received in confidence for the purpose of this section it is also necessary to consider all the circumstances of the case. This would include

- the nature of the information
- whether the information was prepared for a purpose that would entail disclosure
- whether the information was communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- whether the institution receiving the information agreed explicitly or implicitly to accept it on the basis that it was confidential and that it was to be kept confidential
- whether the government agency that supplied the information treated it consistently in a manner that indicates a concern for its protection from disclosure prior to communicating it to the institution
- whether the institution that received the information treated it consistently in a manner that indicates a concern for its protection from disclosure after receiving it

- whether the information was otherwise disclosed or available from sources to which the public has access, either before or after the government or government agency provided it to the institution.

In considering whether the information about the appellant was received in confidence, the statements of intent and expectation made by the Police in their decision on the appellant's access request and made by the Police and the affected person in this appeal are significant evidence.

In their representations, the Police state:

> The information was received in confidence.
>
> …
>
> In order to obtain information from this agency, the Thunder Bay Police would be required to explain the circumstances and the need for the information. As such, without having any suspects apprehended and in police custody, the sharing of the information between agencies would be done so (sic) on the absolute mutual understanding that the information is shared in confidence, so as not to compromise, harm or hinder the continuance of the investigation. Confidentiality is paramount so as not to cause any unnecessary hardship in the gathering of evidence, the protection of the identity of informants as well as witnesses. *It is also a requirement to maintain the confidentiality of the information as the information shared may not necessarily always be accurate or reliable.* (Emphasis added).

In my view, the considerations set out in the passage above (apart from "protection of the identity of informants" which is addressed below) do not support a claim of expectation of confidentiality because this particular information could not reasonably be expected to result in any of the potential impacts set out there.

In the document provided to this inquiry, the affected person also addressed the issue of confidentiality. Without revealing the contents of that document, I observe that the considerations set out in the first, second, and fourth sentences of the second paragraph do not appear to have any relationship to the circumstances of this case, and therefore are of limited value in supporting the claim of an expectation of confidentiality for this particular information. The third sentence relates to the case only in a very general way.

While statements of intention made after-the-fact (in this case more than two years after the information was received) are not to be taken lightly, it is important to consider the circumstances of this particular case in determining what weight to give these representations. It is necessary to keep in mind that if the statements made about the appellant are untrue then the affected person and the Thunder Bay Police Force, whose officer made certain allegations in a public forum against the interests of the appellant, may both have a motive to attempt to

substantiate the existence of an expectation of confidentiality held at the time of the receipt of the information. The appellant asserts that the statements about her allegedly made by the affected person to the Police and the statements about her allegedly made by the investigating officer to the Board are both untrue. The evidence of the Police and the document provided by the affected person do not contradict these assertions. Therefore, the possibility of self-serving motives by both in alleging an expectation of confidentiality must be betaken into account in weighing the statements in the affected party's document and the representations of the Police.

I also note that the Police indicated that they considered the fact that information may be mistaken or inaccurate as a factor in favour of considering it to be confidential, rather than in favour of disclosing it so that it can be corrected.

In my view, in the context of this case, it is particularly important to consider whether there is any evidence to corroborate these after-the-fact assertions.

I note that there is no evidence of any explicit agreement between the Police and the government agency at the time the information was provided or evidence of any explicit requests for or assurances of confidentiality given at that time or later. Nor is there evidence of any actions taken by either party contemporaneous with the supply and receipt of the information in question to protect the information, which could indicate an implicit expectation of confidentiality.

Whether the government agency that supplied it consents to disclosure of information may be useful evidence of prior intent or expectations of that agency. As an aside, the consent of the agency that supplied the information also negates the application of the exemption under section 9(2), which requires disclosure in those circumstances. However, the head of the institution was not asked whether the institution consents to disclosure. The affected person declined to consent to disclosure of the record when approached by the Mediator. The affected person's refusal in this case has limited utility in determining the prior expectations of the agency, given the potentially self-serving nature of that decision.

In my view, the most significant evidence in regard to expectation of confidentiality is the fact that, according to the uncontradicted representations of the appellant, the investigating officer made "statements…that I am a well known prostitute in TH. Bay and have been thrown out of the TH. Bay charity casino several times. These statements…were sworn in (sic) by [the investigating officer] at the Criminal Compensation hearing held on October 23/03 on James St. S. in Thunder Bay. At the hearing were [two named individuals] who witnessed these statements… ."

The appellant's counsel made the following submissions about the actions of the investigating officer before the Criminal Injuries Compensation Board:

> The situation is compounded by the conduct of [the investigating officer] in airing this slanderous "information" in a public forum (i.e., a hearing of the Criminal Inquiries (sic) Compensation Board). Not only was this "information"

> irrelevant to the proceedings, as the Board itself made clear in its Order, but was extremely hurtful and embarrassing to the Appellant and her family.
>
> By bringing this so-called "information" forward in this fashion, [the investigating officer] removed himself (and hereby the Thunder Bay Police) from any right to protection by alleging some sort of confidentiality agreement with the informant, arguing the "greater good", or claiming fear of prosecution under the Police Services Act.

The investigating officer's disclosure of that particular information in a public forum and in the presence of the appellant appears to be inconsistent with any agreement or understanding between the Police and the government agency at the time the information in the record was provided to the Police or with an intention by the Police at that time or later to maintain the confidentiality of the information in the record.

I have considered the possibility that the officer was compelled to provide this information to the Board and to do so in public. However, I note that the Board is permitted to hear some sensitive information *in camera*. Moreover, I have been provided with no evidence to support such a conclusion. Also, the assertion of the appellant that the Board considered this information irrelevant does not suggest an inference that the disclosure was required by the Board and therefore not voluntary.

The Police also provided certain statutory provisions to demonstrate that police officers have a duty to keep certain information confidential. However, these authorities only serve to support an inference that the investigating officer must not have considered the information that he released to be confidential, as an officer would not likely deliberately disclose in public information that he believed he was required by law to keep confidential.

In summary, there is strong evidence that the investigating officer did not consider the information that he supplied to the Board to be confidential, and this supports an inference that he also did not consider the information received from the government agency to be confidential.

Considering all of the circumstances, I find that the Police have not established that the information about the appellant was received in confidence and therefore section 9 does not prevent the disclosure of the information.

As indicated earlier, section 9 (1)(d) applies to information "supplied by" a government agency.

There is no evidence that the name and title of the official in question were supplied to the Police by the government agency. There is no evidence as to how the investigating officer obtained this information. He may already have known the identity and position of the official before being supplied with information about the appellant and he may have obtained it from a source other than the government agency.

Apart from this, in my view, section 9(1)(d) deals only with the information supplied by government agencies, and not with the identities of agency representatives who supply it. This conclusion results both from a plain language reading of the section and from a purposive and contextual interpretation of the section.

The section on its face is clear and unambiguous. It states that information supplied by a government agency is exempt from disclosure. It does not address the identity of individuals who supply this information. When the Ontario Legislature intends in the *Act* and in other statutes to protect the identity of individuals who supply information, it states this explicitly, as in section 8(1)(d) of the *Act*:

> A head may refuse to disclose a record if the 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.

Similarly, section 14 of the *Act* authorizes a head to refuse to disclose an individual's personal information to others in certain circumstances. The *Act* makes it clear that this includes a person's identity by specifically including this in the definition of "personal information" at s. 2(1)(h).

If the Legislature had intended to treat the identity of an individual supplying information as confidential, it could easily have done so, as it has in other legislation as well. See, for example, s. 63(1)(e) of the *Occupational Health and Safety Act* and sections 51.4(16), 51.5(8) and 51.6(9) of the *Courts of Justice Act*.

The U.S. Government has taken the same approach to the identification of sources of information in the *Freedom of Information Act*, 5 U.S.C. 552. That Act states that the federal agencies must make information available to the public with certain exceptions. One of these exceptions is:

> Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings; (D) *could reasonably be expected to disclose the identity of a confidential source*…

As stated earlier, the purpose of this exemption is "to ensure that governments under the jurisdiction of the *Act* will continue to obtain access to records which other governments could otherwise be unwilling to supply without having this protection from disclosure". If section 9(1)(d) is interpreted to protect confidential information but not to protect the fact that an official has given some information that has not been revealed, this is unlikely to result in any harm to the government or government agency supplying information to an institution under the *Act*. In cases where the disclosure of a name may reasonably be expected to harm inter-governmental relations, this may be addressed by other sections such as 8(1)(d) and (g).

Moreover, as suggested at the bottom of page 2 and top of page 3 of the Police representations, agencies such as the two involved here rely heavily on the mutual sharing of information. Given

the nature of relationships between agencies such as the Thunder Bay Police and the other agency in this case, communications such as this one are so routine that it is unlikely that an ability of an institution to release the name alone of a representative of such an agency who has carried out a routine function would result in reducing the flow of accurate information between the two agencies. On the contrary, if this disclosure could have any impact, it is more likely that the impact would be more effort to ensure the accuracy of damaging information both when it is supplied by the government agency and when it is used by the receiving institution, a result that would be completely consistent with the purpose of the *Act*.

Therefore, I find that purposive and contextual approaches to the interpretation of s. 9(1)(d) do not require reading that section as including the name and title of the person providing the information.

I find, therefore, that the name and title of the official who allegedly supplied information about the appellant to the Police are not "information received from an agency" and therefore it does not qualify for exemption under section 9(1)(d) and is, accordingly, not exempt under section 38(a) in conjunction with section 9(1)(d).

Section 9(1)(b)

As noted earlier in this order, section 9(1)(b) applies to information received from the Government of Ontario or the government of a province or territory in Canada. The information at issue was received either from the Ontario Provincial Police or the Alcohol and Gaming Commission. These are agencies of the Ontario government, not the government itself, and I therefore find that the information does not qualify for exemption under section 9(1)(b), and is, accordingly, not exempt under section 38(a) in conjunction with section 9(1)(b).

ORDER:

1. I order the Police to disclose the severed information in paragraph 3 of the "Supplementary Occurrence Report" before **February 4, 2005** but not earlier than **January 28, 2005**.

2. To verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the material disclosed to the appellant pursuant to Provision 1.

Original Signed By: December 31, 2004
John Swaigen
Adjudicator

POSTSCRIPT

Exercise Of Discretion

The section 38(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it under sections 8 or 9. If information falls within the scope of section 38(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves the weighing of the requester's right of access to his or her own personal information against other considerations.

I have found that the personal information about the appellant is not subject to the section 38(b) exemption. Had I not made this finding, I believe it would have been necessary to send this matter back to the Police to clarify their exercise of discretion or to exercise their discretion based on proper principles, because it does not appear that the Police exercised their discretion properly.

As stated in previous orders of this office, 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. [Orders MO-1323, MO-1855]. One of the reasons for providing this access is to provide an opportunity to determine whether the information is accurate and request correction of inaccurate personal information. This is particularly important in a case where there is evidence that public agencies may be spreading information which, if false, would be unfairly injurious to an individual's reputation.

Under the heading "Issue C" in their representations, the Police address how they exercised their discretion. They state that they balanced the appellant's right of access to her personal information against other concerns. They state that one of the factors they took into account was the fact that the official alleged to have provided the information did not want the information released to the appellant. As indicated earlier, the Police also considered it relevant that "the information shared may not necessarily always be accurate or reliable".

It appears, therefore, that the Police treated the fact that information may be unreliable as a factor weighing against disclosure. However, whether the possible inaccuracy or unreliability weighs against disclosure or in favour of it depends on the circumstances of the particular case. In many cases, a prerequisite to determining the appropriate use of the fact that information may be mistaken is to investigate whether the information is in error, and if so, to consider the possible impact of that error. Only by making such inquiries will the institution be in a position to make an informed decision as to how to apply this consideration. There is no evidence that the Police made any effort to determine the truth of the statements about the appellant in the record at issue before exercising their discretion whether to disclose them.

In Order PO-1731, Adjudicator Laurel Cropley stated:

> It is apparent that the accuracy and/or reliability of the information provided about the affected persons was questionable and/or incapable of being verified. …Previous orders of this office have generally held that the likelihood that information is inaccurate or unreliable is a factor which weighs against disclosure. However, in this case, I found that the comments made about the appellants by the affected persons qualifies as the personal information of the appellants. In this context, I find that the fact that the information may be inaccurate or unreliable weighs in favour of disclosure.
>
> Further, if that inaccurate information is used against the interests of the appellants, in my view, fairness would require that the appellant be apprised of the nature of the information. Fairness in the Ministry's application process is a relevant circumstance weighing in favour of disclosure.

In her representations, counsel for the appellant stated:

> The Representations of the Thunder Bay Police suggest that there is some sort of "greater good" to be achieved by the protection of information given to a police officer in confidence, particularly if that information is given by a member of another police force. In this instance, however, the information was unverified and blatantly wrong, and was passed on to [the investigating officer] by an officer/employee of the Alcohol and Gaming Commission, who did so either negligently or maliciously. Surely no "greater good" can come from this, and no protection should be provided to the source thereof.

In my view, Adjudicator Cropley's observations apply to this case.

If the alleged statements were made and were untrue, in my view the inaccuracy of this information would be a factor in favour of disclosing the information so that it can be corrected, not withholding it.