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

ORDER MO-1913

Appeal MA-040089-1

London Police Service

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NATURE OF THE APPEAL:

This appeal concerns a decision of the London Police Service (the Police) made pursuant to the provisions of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) requested information relating to a specific motor vehicle accident in which he was involved.

The Police issued a decision letter in which they granted access to portions of five records and denied access to other portions of these records pursuant to section 38(a) of the *Act*, read in conjunction with the law enforcement exemptions in sections 8(1)(c) (investigative techniques), 8(1)(d) (confidential source of information) and 8(1)(l) (unlawful act/control of crime), and section 38(b) of the *Act*, read in conjunction with the section 14(1) personal privacy exemption, and supported by sections 14(2)(h) (information supplied in confidence) and 14(3)(b) (investigation into violation of law). In making their decision to deny access to some of the requested information the Police claimed the application of section 15(a) (information available to the public). The Police also claimed that information contained in one of the records is non-responsive to the appellant's request.

The appellant appealed the Police's decision.

During the mediation stage of this appeal the appellant confirmed that he is not pursuing access to police codes, such as 10-codes or unit IDs. The Police had claimed the application of section 38(a), in conjunction with section 8(1)(l), for these codes. Accordingly, the police codes contained in the records, along with section 38(a), in conjunction with section 8(1)(l), are no longer at issue in this appeal.

The Police subsequently issued a new access decision in which they claimed the application of section 52(3) to exclude a portion of one of the records from the application of the *Act*. The Police have claimed the application of section 38(a), read in conjunction with section 8(1)(c), to deny access to this information.

I commenced my inquiry by sending a Notice of Inquiry to the Police. The Police submitted representations and agreed to share them in their entirety with the appellant. I then sent a Notice of Inquiry to the appellant and included with it a copy of the Police's representations. The appellant's representative submitted representations; however, significant portions of them were not legible. Our office spoke to the appellant's representative by telephone and he indicated that he would send a legible copy of his client's representations. When, after two weeks, a legible copy had not been received by our office, I wrote to the appellant's representative providing an additional two weeks for the delivery of a legible copy of the appellant's representations. In my letter I indicated that I would proceed with my inquiry, with or without a legible copy of the representations, after that date. Our office never received a legible copy of the appellant's representations. With respect to the representations that were received from the appellant's representative, I note that they do not address the relevant issues in this appeal.

I subsequently invited the appellant to submit representations on the responsiveness issue with regard to one of the records at issue. The appellant chose not to submit representations.

RECORDS:

The following five records remain at issue:

Record #	Description	Withheld or Severed	Sections of the *Act*
1	Police officer's notes (2 pages)	Severed	Responsiveness of record 38(a)/8(1)(d) 38(b)/14
2	Motor vehicle accident report, dated May 22, 2003 (2 pages)	Severed	38 (a)/15(a)
3	Incident report, dated May 22, 2003 (1 page)	Severed	38(a)/8(1)(d) 38(b)/14
4	Incident report, dated May 23, 2003 (1 page)	Severed	38(a)/8(1)(d) 38(b)/14
5	General occurrence report (7 pages)	Severed	38(a)/8(1)(c) 38(b)/14 52(3)

DISCUSSION:

ARE PORTIONS OF RECORD 1 MARKED NON-RESPONSIVE BY THE POLICE RESPONSIVE TO THE APPELLANT'S REQUEST?

To be considered responsive to the request, records must "reasonably relate" to the request [Order P-880].

The Police take the position that two portions of record 1 marked non-responsive are not responsive to the appellant's request. In support of this position the Police state that this information relates to other incidents and persons that a police officer was involved with before and after the motor vehicle accident on the same day.

The appellant claims that the information marked non-responsive is responsive to his request. However, he has not provided any evidence to support his position.

Record 1 comprises two pages of a police officer's notebook. I am satisfied that the portions of record 1 marked non-responsive have absolutely nothing to do with the motor vehicle accident involving the appellant and the affected person or the appellant's request. On the contrary, these portions of record 1 are clearly related to other matters that this police officer had investigated and recorded in his notebook on the same day as the motor vehicle accident.

Accordingly, I find that the portions of record 1 marked non-responsive are, in fact, not responsive to the appellant's request.

DOES PART OF RECORD 5 QUALIFY AS A LABOUR RELATIONS OR EMPLOYMENT RECORD?

Preliminary issue: can section 52(3) apply to part of a record?

As stated above, the Police have taken the position that section 52(3) applies to a portion of the information at issue in record 5. Generally, this office has interpreted section 52(3) to be record-specific and fact-specific. Therefore, if section 52(3) applies to a specific record, in the circumstances of a particular appeal, and none of the exceptions listed in section 52(4) are present, then the record is excluded from the scope of the *Act* and not subject to the Commissioner's jurisdiction.

In light of the Police's position with regard to record 5, I must decide whether section 52(3) can apply to a discrete portion of a record, while the balance of the record remains subject to the *Act*. The Police have raised the application of section 52(3) to page 7 of record 5. This page consists of information relating to a "critique" of a police officer's occurrence report, with specific instructions to "correct" portions of the report.

In Order PO-1696, Adjudicator Holly Big Canoe found that section 65(6) (the provincial equivalent of section 52(3)) could apply to part of a record. In that case, record 2 had been prepared by the Audit Services Branch of the Ministry of the Attorney General (the Ministry), and used by the Court Services Division of the Ministry to review the performance of certain Ministry employees, or their compliance with financial policies and guidelines, and to receive recommendations to correct any problems identified by the auditors. Adjudicator Big Canoe, in concluding that section 65(6) could apply to part of a record, stated:

> Record 2 […] was prepared to investigate two unrelated matters: the circumstances surrounding the issuance of a divorce certificate prior to a divorce having been granted; and to appraise the effectiveness of the financial management and operational controls in the family law section of the court. Although the first matter reviewed in this record is not specifically focussed on the employment of any specific person or persons, given the particular circumstances (which are only apparent on reviewing the record) I consider it reasonable to conclude that it is an "employment-related matter" as the term is used in section 65(6).
>
> However, the second aspect of the audit, the appraisal of the effectiveness of the financial management and operational controls in the family law section of the court, is not what I would consider an "employment-related matter". I do not agree with the Ministry's submission that this term should include a general audit which does not relate to the employment of an individual or individuals

> specifically, but generally relates to the Ministry's "right to control the method of carrying out work".
>
> However, even if I were to find that each of the records involves an employment-related matter, the Ministry would still have to establish that it was a matter in which the Ministry "has an interest".

While ultimately Adjudicator Big Canoe concluded that section 65(6)3 did not apply to record 2 since the Ministry had not established the requisite "interest" in an employment-related matter, she did, significantly, find that section 65(6) could apply to part of a record.

Senior Adjudicator David Goodis reconsidered Adjudicator Big Canoe's decision in PO-1696 (see Order PO-2073-R) and found that section 65(6)3 applied to all of record 2. However, in making his decision Senior Adjudicator Goodis did not comment on the application of section 65(6) to part of a record.

Applying Adjudicator Big Canoe's finding to this appeal, I am satisfied that section 52(3) could apply to part of record 7. In this case, pages 1-6 of record 5 document a police officer's investigation into a motor vehicle accident, which is the subject of this appeal. I find that page 7 is notionally separate and discrete from the officer's investigation report. It represents the observations and instructions of another police officer regarding steps that must be taken to correct portions of the report. Accordingly, I am satisfied that pages 1-6 and page 7 can be viewed separately. Having reached this conclusion, I must now examine whether section 52(3) applies to exclude page 7 of record 5 from the scope of the *Act*.

General principles under section 52(3)

The Police did not identify which paragraph(s) under section 52(3) they rely on. However, on my review of the Police's representations, it would appear that they are relying on sections 52(3)1 and 3.

Sections 52(3)1 and 3 state:

> Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

The term "in relation to" in section 52(3) means "for the purpose of, as a result of, or substantially connected to" [Order P-1223].

The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships [Order PO-2157, *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.)].

If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507].

I will first examine the application of section 52(3)3 to the portion of record 5 at issue.

For section 52(3)3 to apply, the institution must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

The parties' representations

The Police state:

> [T]he investigating officer submitted his final report for approval by the auditing unit. The auditors discovered this report required a number of corrections […]. The report was directed back to the officer by way of "critique". This is a procedure used by the London Police to correct reports and a means of monitoring the performance of its officers.
>
> These critiques are sent to the investigating officer as well as his/her Sergeant. The Sergeants are required to monitor the performance of their officers and provide corrective measures in the event of re-occurring critiques. These critiques could result in entries onto their Performance Management Occurrence report. These same reports are viewed by the Sergeants when completing the officers' annual Performance Appraisal Report.

. . . . . .

> The information contained in these Performance Appraisal Reports have a direct impact on an officer's standard "reclassification" schedule. As well, these reports will have a direct impact on any internal job competition the officer may choose to compete for.

The Police also state these critiques could have disciplinary consequences. The Police have included excerpts from the "London Police Procedure Manual", specifically parts of "Chapter C: Performance Management System", in support of their representations.

The appellant did not offer any representations on this issue.

Analysis and findings

Although forming part of record 5, I view page 7 of this record as a separate document that critiques the manner in which an investigating officer completed an occurrence report. It is unrelated to the substantive results of the Police investigation that is documented on pages 1 to 6 of the record.

On my review of this portion of the record and the Police's representations, I am satisfied that this critique was prepared for the purpose of monitoring and evaluating the investigating officer's job performance. I accept the Police's position that this critique could result in an entry into the investigating officer's Performance Management Occurrence Report, which would then be taken into account in the completion of his annual Performance Appraisal Report. I am satisfied that this information could result in discipline proceedings or have a direct impact on this officer's future employment prospects, including career advancement.

Accordingly, I am satisfied that page 7 of record 5 meets parts 1 and 2 of the test under section 52(3)3. I find that it comprises a "communication" that was "prepared" by the Police for use "in relation to" "employment-related matters", namely the evaluation of the investigating officer's job performance.

I must now determine whether the matter which is the subject of this portion of this record is one in which the Police "ha[ve] an interest". The phrase "in which the institution has an interest" means more than a "mere curiosity or concern" [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507].

In my view, the preparation and proposed use of the critique (at page 7 of record 5) for job evaluation purposes has clear implications for both the investigating officer and the Police in regard to their employment relationship. A "communication" pertaining to the investigating officer's employment performance would clearly be a matter in which the Police have "an

interest" that is more than a "mere curiosity or concern". Accordingly, I am satisfied that part 3 of the test under section 52(3)3 has been met.

Therefore, I find that page 7 of record 5 is subject to the exclusion set out in section 52(3)3. I also find that none of the exceptions listed in section 52(4) applies. Accordingly, I find that this portion of record 5 falls outside the scope of the *Act*. In light of this finding I will not be dealing further with this information in this order.

DO THE RECORDS REMAINING AT ISSUE CONTAIN PERSONAL INFORMATION?

What constitutes "personal information"?

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

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> …
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except where they relate to another individual,
>
> …
>
> (g) the views or opinions of another individual about the individual,
>
> (h) 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;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information (Order 11).

The Police state that as a result of receiving a report from an affected person regarding a motor vehicle accident, they interviewed both the affected person and appellant. The Police submit that the records clearly contain the personal information of both the affected person and the appellant following their investigation.

The appellant did not submit representations that address this issue.

I find that all of the records contain the personal information of both the appellant and an affected person within the meaning of paragraphs (a) and (d) of section 2(1), including their names, dates of birth, home addresses, telephone numbers and driver's licence numbers. I also find that some of the records contain the appellant's and affected person's personal opinions and views regarding the motor vehicle accident and that this information qualifies as their personal information pursuant to paragraph (e) of section 2(1). With respect to record 5 specifically, I note that this record contains the opinions or views of the affected person about the appellant. This information qualifies as the personal information of the appellant by virtue of paragraphs (e) and (g) of section 2(1). I also note that records 2 and 5 contain the personal information of another individual, including his address and telephone number, relationship to the affected person and comments relating to the motor vehicle accident. I find that this information qualifies as this individual's personal information pursuant to paragraphs (a), (c), (d), (g) and (h) of section 2(1).

Having found that the records contain the personal information of both the appellant and other individuals, I must now consider the application of the section 38(a) and 38(b) exemptions to these records.

DOES THE DISCRETIONARY EXEMPTION AT SECTION 38(a), IN CONJUNCTION WITH SECTION 15(a), APPLY TO RECORD 2?

General principles

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.

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.

Because section 38(a) is a discretionary exemption, even if the information falls within the scope of section 15, the institution must nevertheless consider whether to disclose the information to the requester.

Here, the Police rely on section 38(a), read in conjunction with section 15(a).

Section 15(a): information currently available to the public

Section 15(a) states:

> A head may refuse to disclose a record if,
>
> > the record or the information contained in the record has been published or is currently available to the public;

For this section to apply, the institution must establish that the record is available to the public generally, through a regularized system of access, such as a public library or a government publications centre [Orders P-327, P-1387].

To show that a "regularized system of access" exists, the institution must demonstrate that

- a system exists
- the record is available to everyone, and
- there is a pricing structure that is applied to all who wish to obtain the information

[Order P-1316]

Examples of the types of records and circumstances that have been found to qualify as a "regularized system of access" include

- unreported court decisions [Order P-159]
- statutes and regulations [Orders P-170, P-1387]
- property assessment rolls [Order P-1316]
- septic records [Order MO-1411]
- property sale data [Order PO-1655]
- police accident reconstruction records [Order MO-1573]

The exemption may apply despite the fact that the alternative source includes a fee system that is different from the fees structure under the *Act* [Orders P-159, PO-1655, MO-1411, MO-1573]. However, the cost of accessing a record outside the *Act* may be so prohibitive that it amounts to an effective denial of access, in which case the exemption would not apply [Order MO-1573].

The parties' representations

The Police submit that record 2 is available through a "regularized system of access" and, therefore, is exempt from disclosure under section 38(a), read in conjunction with section 15(a). In support of their position the Police rely on Order MO-1573. The Police submit that any member of the public can obtain a motor vehicle accident report by requesting it in writing through the Ministry of Transportation, Licensing Administration Office, Main Floor, Room 178, Building A, 2680 Keele Street, Downsview, Ontario M3M 3E6 and paying the required $12.00 fee, by cheque or money order, made payable to the Minister of Finance.

The appellant does not offer representations that address this issue.

Analysis and findings

The appeal that is the subject of Order MO-1573 arose out of a request for access to records relating to a motor vehicle accident. The records at issue consisted of a motor vehicle accident report, field sketch, police officer's technical notes, photographs, scale diagram and attached total station data, vehicle inspection report and corresponding statement and invoice with technical notations. In describing the records in this order Senior Adjudicator David Goodis stated that "[t]he Police sometimes refer to these records collectively as a "Traffic Reconstruction Report". In that decision Senior Adjudicator Goodis clearly established that section 15(a) can apply to "traffic reconstruction reports". In finding that a regularized system of access existed with respect to the traffic reconstruction report at issue in Order MO-1573, Senior Adjudicator Goodis stated:

> Most freedom of information statutes in Canada permit the government to refuse to disclose information that is available to the public. As stated by McNairn and Woodbury in *Government Information: Access and Privacy* (DeBoo: Toronto, 1989) at p. 2-28:
>
> > Someone who is seeking information for which there is already a system of public access in place will normally be required to proceed in accordance with the rules of that system. A person who puts in an access request for a deed to property or a list of directors in a company's information return, for example, will likely be instructed to visit the land or companies registry to locate and view the relevant document. A government institution is unlikely to undertake a search for such a document when it has provided the facility for that to be done by members of the public or their representatives. If copies of a deed or a company return, once located, are ordered from the public office, charges will be levied in accordance with the scale of fees under the land registration or companies legislation, rather than that under the access legislation.

> The authority for diverting the requester to another access system in these circumstances is fairly clear under the Nova Scotia, Ontario and Saskatchewan Acts. While the other access statutes are silent on this matter, they should not be interpreted as creating a right to use their access processes in preference to resorting to the public record. In other words, the existing systems for access to particular kinds of information will take priority even if not as convenient or cost effective for the requester . . .

In Ontario, this office has stated that in order for the section 15(a) "publicly available" exemption to apply, the institution must establish that the record is available to the public generally, through a regularized system of access, such as a public library or a government publications centre [see Orders P-327, P-1316, P-1387]. In Order P-1316, former Commissioner Tom Wright expanded on the meaning of the phrase "regularized system of access":

> . . . [I]n order to establish that a regularized system of access exists for the computer tape, the Ministry must demonstrate that a system exists, the tape is available to everyone and there is a pricing structure which is applied to all who wish to obtain the information.
>
> . . . . .
>
> In my view, the Police have established that a regularized system of access exists for the traffic reconstruction records. While the system is not formalized, in the sense that there is a detailed procedure for access spelled out in a law or policy, this is not fatal (see Order P-1316). The pricing structure is clearly set out in detail in the by-law issued under the *Municipal Act*, and the by-law also implicitly states that a requester can seek either the entire report (consisting of a compilation of records) or individual records. In addition, the Police have described the informal system in some detail, which I accept has been applied consistently in a number of cases over the past two years since the by-law came into effect. I am also satisfied that the system would apply to any member of the public who sought access, despite the fact that, as a practical matter, it is unlikely that a non-party would be interested in obtaining these types of records in the usual case. I note also that a number of police services throughout Ontario have similar systems in place for access to traffic reconstruction records, with similar fee scales, and that these systems have been in place for a number of years.

In this case, the section 15(a) argument relates only to a motor vehicle accident report (record 2), which was one of several records that Senior Adjudicator Goodis dealt with in Order MO-1573 and found exempt under section 15(a). In my view, Senior Adjudicator Goodis' analysis applies to record 2 in this appeal.

I accept the Police's submission that that there is a "regularized system of access" for motor vehicle accident reports. As in Order MO-1573 it does not appear that the system is "formalized" to the extent that the Police have not provided evidence that a detailed procedure for access exists in a law or policy. However, it appears that there is a clear and accessible process for obtaining these reports directly from the Ministry of Transportation and the cost of doing so is well established. Accordingly, I find that record 2 is exempt from disclosure pursuant to section 38(a), read in conjunction with section 15(a).

DOES THE DISCRETIONARY EXEMPTION AT SECTION 38(b), IN CONJUNCTION WITH SECTION 14(1), APPLY TO RECORDS 1, 3, 4 and 5?

General principles

In addition to section 38(a) of the *Act*, another exemption to the general right of access is found in section 38(b) of the *Act*, which reads:

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

Under section 38(b), where a record contains the personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. On appeal, I must be satisfied that disclosure *would* constitute an unjustified invasion of another individual's personal privacy [see Order M-1146].

If the information falls within the scope of section 38(b), the institution may choose to exercise its discretion to disclose the information to the requester. I will review the Ministry's exercise of discretion under section 38(b) later in this order, after I have decided whether the exemption applies.

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 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.

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 section 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767], though it 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) apply, the institution 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.

In addition, if any of the exceptions to the section 14(1) exemption at paragraphs (a) through (e) apply, then disclosure would not be an unjustified invasion of privacy under section 49(b).

In this case, the Police have raised the application of the presumption in section 14(3)(b) and the factor in section 14(2)(h). I will first address the application of section 14(3)(b). Section 14(3)(b) reads:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where 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 parties' representations

The Police submit that they responded to a call by the affected person of a reported a hit and run motor vehicle accident. The Police state that they treat this type of call as an official law enforcement matter. As a result of the call, the Police indicate that they initiated an investigation into a possible violation of law under the *Criminal Code of Canada* and/or the *Highway Traffic Act*. Subsequently, the Police state that they compiled a report in relation to their investigation, which included the affected person's personal information. The Police submit that that the release of the undisclosed personal information would constitute an unjustified invasion of the affected person's personal privacy.

The appellant's does not offer representations that address the application of the section 14(3)(b) presumption.

Analysis and findings

A portion of record 5 that was disclosed to the appellant indicates that the appellant was issued a

summons for "fail to remain" and a "PON for failing to change his home address", both of which are *Highway Traffic Act* offences. Although neither the records nor the parties' representations address the disposition of these offences, previous orders have determined that even if no proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law [Order P-242].

In my view, the undisclosed portions of records 1, 3, 4 and 5 were compiled and are identifiable as part of an investigation by the Police into a possible violation of law. As a result, the disclosure of most of the undisclosed personal information contained in these records is presumed to constitute an unjustified invasion of the affected person's personal privacy under section 14(3)(b).

Therefore, I am satisfied, with some exceptions in record 5, that disclosure of the withheld information in these records would constitute an unjustified invasion of the affected person's personal privacy pursuant to section 38(b). The appellant has not raised the possible application of section 16 to the information and I find that none of the exceptions in section 14(4) apply. Accordingly, I find this information exempt under section 38(b).

I find, however, that certain information in record 5 contains the personal opinions or views of the affected person relating to the appellant and this represents the personal information of the appellant. This information is severable from the exempt information and, once it has been severed, it is the personal information of the appellant only, and is not exempt under section 38(b).

DOES THE DISCRETIONARY EXEMPTION AT SECTION 38(a), IN CONJUNCTION WITH SECTION 8(1)(d) APPLY TO THE INFORMATION REMAINING AT ISSUE IN RECORD 5?

As stated above, 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 exceptions from this right. One of those exceptions can occur in circumstances where section 8 applies. In this case, the Police rely on section 38(a), read in conjunction with section 8(1)(d) to deny access to the information remaining at issue in record 5.

However, since section 38(a) is a discretionary exemption, even if the information falls within the scope of section 8(1)(d), the institution must nevertheless consider whether to disclose the information to the requester.

Section 8(1)(d) states:

> A head may refuse to disclose a record where 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;

The Police argue that if an individual requests police assistance and supplies information to the Police as part of its investigation, it is reasonable to assume that this information would remain in confidence. The Police state further that they wrote to the affected person to seek his consent to the release of his personal information and that he declined to provide his consent.

I am not convinced by the Police's arguments. Firstly, the purpose of this exemption is to protect confidential informants [see Orders P-139, M-707, MO-1795]. The events that gave rise to the Police investigation in this case involved only two individuals, the appellant and the affected person. Therefore, because the affected person reported this matter to the Police, it is reasonable to expect that he would be asked to testify in any criminal and/or quasi-criminal proceedings that flowed from the motor vehicle accident and subsequent Police investigation, suggesting that his involvement could not reasonably be expected to remain confidential. Secondly, in any event, as stated above, I find that this remaining information is the personal information of the appellant and can be severed from the exempt information. Once severed, it represents the personal information of the appellant only. Accordingly, in these circumstances, I do not find that revealing the appellant's personal information to him will reveal a confidential source of information.

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. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

The exercise of discretion under section 38(b) involves a balancing principle. The institution must weigh the appellant's right of access to his or her own personal information against the other individual's right to the protection of their privacy. If the institution determines that the 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 appellant.

The Police state that in exercising their discretion to deny access to the withheld information, they considered the information and weighed the appellant's right of access to his own information against the affected person's right to the protection of privacy. The Police state that in the circumstances of this case they felt that the personal privacy of the affected person clearly outweighed the appellant's right of access.

The appellant did not make any submissions on this issue.

In the circumstances, I am satisfied that the Police have properly balanced the appellant's right of access against privacy considerations in denying the appellant access to the portions of the records that I have found exempt under section 38(b).

ORDER:

1. I order the Police to disclose portions of record 5, no later than **May 2, 2005** but not before **April 26, 2005**, in accordance with the highlighted version of this record included with the Police's copy of this order. To be clear, the Police should not disclose the highlighted portions of this record.

2. In order to verify compliance with provision 1 of this order, I reserve the right to require the Police to provide me with a copy of this record, as disclosed to the appellant.

Original signed by: March 31, 2005
Bernard Morrow
Adjudicator