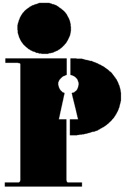

ORDER MO-2101

Appeals MA-050216-1 and MA-050216-3

Niagara Regional Police Service

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEALS:

The Niagara Regional Police Service (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for:

> "police records and possessed (sic) criminal history reports [about the requester] from the Niagara Regional Police Department. DOB is [specified date]."

The Police identified eight records as responsive to the request and issued a decision, providing full access to one record and partial access to the other seven records, citing section 38(a) (discretion to refuse requester's own information) in conjunction with sections 8(1)(c) and (l) (law enforcement) and section 38(b), together with the presumption in section 14(3)(b) (personal privacy), to deny access to the remainder. The requester, now the appellant, appealed that decision and Appeal MA-050216-1 was opened.

During the mediation of Appeal MA-050216-1, the appellant contended that there should be additional records. The Police carried out an additional search, and discovered a number of boxes of records, which they thought could possibly contain additional records responsive to the appellant's original request. The Police then informed the appellant that, due to the volume of additional records, the time limit for responding to his request would be extended from 30 days to 9 months, pursuant to section 20(1) of the *Act*.

The appellant's appeal on the exemptions claimed for the seven partially disclosed records in Appeal MA-050216-1 moved to the adjudication stage. In the meantime, the appellant appealed the time extension decision and Appeal MA-050216-2 was opened to deal with that issue.

During the mediation stage of Appeal MA-050216-2, the Police issued a revised decision with respect to the time extension, lowering the estimate to six months. The appellant then contacted this office to clarify that he wished his request to be limited only to computer-generated criminal history reports about him, obtained by police in checking worldwide databases.

Upon receiving this clarification of the request, the Police issued a new decision in Appeal MA-050216-1 relating to the appellant's Canadian criminal history, a record to which the appellant had previously been granted partial access in that appeal. In the new decision, the Police released additional information to the appellant by applying only the exemption at section 38(a) of the *Act,* in conjunction with section 9(1)(d) (relations with other governments), to certain portions of this record. The Police also directed the appellant to contact the Special Processing Unit of the Federal Bureau of Investigation (the FBI) to obtain his U.S. criminal history record.

Shortly afterwards, this office sent a Notice of Inquiry in Appeal MA-050216-1 to the Police. In the representations submitted in response, the Police confirmed that their reliance upon section 8(1)(c) to withhold portions of the appellant's Canadian criminal history was withdrawn. This office sent a complete copy of the representations of the Police to the appellant, who then provided representations in response.

In the meantime, with the Police decision issued in Appeal MA-050216-2, that appeal was closed. However, the appellant appealed the decision to withhold information from his Canadian criminal history, and Appeal MA-050216-3 was opened.

During the mediation of Appeal MA-050216-3, the Police undertook another search for the appellant's U.S. criminal record, and located three additional records. The Police issued a new decision letter denying access to the additional records under section 9(1)(d), together with section 38(a) of the *Act*. The Police confirmed that no records relating to a criminal history for the appellant in any other country were found.

The appellant then appealed the Police decision to apply the exemption at section 9(1)(d), in conjunction with section 38(a), to the three newly identified records.

No further resolution of Appeal MA-050216-3 was possible and the file was moved to the adjudication stage of the appeal process. I sent a Notice of Inquiry to the Police and received representations in return. I then sent a revised Notice of Inquiry to the appellant, along with a complete copy of the representations of the Police, and received representations in response.

Having reviewed the records and issues in Appeals MA-050216-1 and MA-050216-3, I decided to issue one order for both appeals.

RECORDS:

There are 10 records, totaling 63 pages, at issue in this appeal.

Record Number	Description and Page Numbers	Access Decision	Exemptions
1	Arrest Report [Pages 1-4]	Disclosed in part (severances)	8(1)(l)/38(a) 14(1)(f) and 14(3)(b)/38(b)
2	Court Summary [Pages 5–30]	Disclosed in part (severances)	14(1)(f) and 14(3)(b)/38(b)
3	Bail Hearing Check List Report [Pages 31-37]	Disclosed in part (severances)	8(1)(c)/38(a) 14(1)(f) and 14(3)(b)/38(b)
4-6	Incident Reports [Pages 38-43]	Disclosed in part (severances)	8(1)(l)/38(a) 14(1)(f) and 14(3)(b)/38(b)
7	Canadian Criminal History [Page 44]	Disclosed in part (severances)	9(1)(d)/38(a)
8-10	U.S. Criminal History [Pages 45-51, 52-59, and 60-63]	Denied in full	9(1)(d)/38(a)

This office is in possession of two copies of the appellant's Canadian criminal history, which were received consequent to each of the initial and revised decisions in Appeals MA-050216-1 and MA-050216-3. I have reviewed both copies and I am satisfied that they are identical, with the exception being that they were requested from the database on different dates. As alluded to above, this record was accorded two different treatments by severance based on the exemptions

applied by the Police. For the purposes of this order, it is only necessary for me to address the latter version, as it represents the most recent treatment by severance and is the version for which the Police now claim only the exemption at section 9(1)(d) in conjunction with 38(a).

In addition, appearing in the upper left hand corner of Record 7, but severed by the Police, are four lines containing numbers and abbreviations relating to the database query and printing information for the appellant's Canadian criminal history. Past orders of this office have established that administrative information relating to the date, time and by whom the report was printed is not reasonably responsive to a request (Orders PO-2409, PO-2315, PO-2316). I agree with that reasoning and will follow it in this appeal.

In my view, the information in the four severed lines is purely administrative information and I find, therefore, that the information in the four lines is not reasonably related, or responsive, to the request. Accordingly, I will not address this specific information further in this order.

DISCUSSION:

PERSONAL INFORMATION

For the purpose of deciding what sections of the *Act* may apply to information contained in a record, it is necessary to determine whether the record contains personal information and, if so, to whom it belongs.

Section 2(1) of the *Act* defines "personal information", in part, as follows:

> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the 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.

The list of examples of personal information under section 2(1) is not exhaustive. Information that does not fall under paragraphs (a) to (h) may still qualify as personal information (Order 11). To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed (Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)).

As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual (Orders P-257, P-427, P-1412, P-1621), but 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).

Representations

The Police submit that the records contain the personal information of the appellant and "numerous third party individuals", including witnesses, as contemplated by the definition of that term which is provided in section 2(1) of the *Act*. No specific paragraphs from that definition are cited by the Police in making this submission; however, the representations refer to severances having been made to the records to remove the names of individuals unknown to the appellant, as well as the addresses of other individuals. The confidential portions of the Police representations, from which I am cannot specifically cite, also allude to information that might be said to describe the appellant and the views of other individuals about him.

In his representations, the appellant takes the position that all the information he is requesting relates solely to him and "[does] not include third party individuals". The appellant states that no information should be severed from the records; however, in other sections of his representations, the appellant acknowledges that some information about other individuals may have to be removed.

Findings

Having reviewed all of the records at issue in this appeal, I find that they contain information about the appellant that satisfies the definition of "personal information" in section 2(1) of the *Act*. Specifically, I find that there is personal information about the appellant that falls within the ambit of the following paragraphs of the definition of personal information: (a) age and sex, (b) medical, criminal or employment history, (c) identifying number, (d) address and telephone number, (g) views and opinions held by other individuals about the appellant, and (h) the appellant's name along with other personal information relating to him.

In addition, many of the records also contain the personal information of other identifiable individuals. This information qualifies as the personal information of these individuals under the following paragraphs from the definition set out above: (a) colour, age, sex, marital or family status, (b) education, medical, criminal and employment history, (c) identifying number, (d) addresses and telephone numbers, (e) personal opinions or views, (g) views and opinions held by some of these individuals about other individuals, and (h) names along with other personal information relating to these individuals.

Specifically, I find that Records 1 to 6, considered in their entirety, contain the personal information of the appellant, along with other identifiable individuals, while Records 7 – 10 contain the personal information of the appellant only, and not that of other identifiable individuals.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

PERSONAL PRIVACY

The Police have withheld information by making severances to Records 1 to 6, claiming that the personal privacy exemption at sections 14(1) and 14(3)(b), in conjunction with section 38(b), applies to the withheld information.

General Principles

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 exemptions from this right. In circumstances where a record contains both the personal information of the appellant and another individual, the request falls under Part II of the *Act* and the relevant personal privacy exemption is the exemption at section 38(b) (Order M-352).

Section 38(b) reads as follows:

> 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's personal privacy.

Some of the exemptions in the *Act*, including the personal privacy exemption at sections 14(1) and 38(b), are mandatory under Part I but discretionary under Part II.

Put another way, where a record contains "mixed" personal information (of both the appellant and another individual), section 38(b) in Part II of the *Act* permits an institution to disclose information that it could not disclose if Part I were applied (Order MO-1757-I), while retaining the discretion to deny the appellant access to that information if it determines that the disclosure

of the information would constitute an unjustified invasion of another individual's personal privacy.

Section 38(b) introduces a balancing principle, which involves weighing the requester's right of access to his own personal information against the other individual's right to protection of their privacy. On appeal, I must be satisfied that disclosure of the information **would** constitute an unjustified invasion of another individual's personal privacy (see Order M-1146).

Under section 38(b), sections 14(1) to (4) provide guidance in determining whether the threshold for an unjustified invasion of personal privacy under section 38(b) is met. If the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). If any of paragraphs (a) to (c) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b).

Section 14(3) lists a number of presumptions against disclosure. The Divisional Court has stated that once a presumption against disclosure has been established under section 14(3), 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 (*John Doe*)) 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 disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the exemption (see Order PO-1764).

I must now review whether the information in Records 1 – 6 withheld by the Police qualifies for exemption under the discretionary exemption at section 38(b) of Part II of the *Act*. I will consider the exercise of discretion by the Police at the end of this order.

Section 14(3)(b)

As noted previously, the Police rely on the presumption in section 14(3)(b) of the *Act*, which states:

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

Representations

In the brief representations provided on the issue of the personal privacy exemption, the Police simply state that the information severed from the records was withheld from the appellant because "section 14(3)(b) applied to that information (i.e., this information was collected for the purpose of an investigation into a murder)."

The appellant's representations on this subject are also brief. He states:

> [M]y personal records can in no way constitute an unjustified invasion of another individual's personal privacy. As to section 14(3)(b) the information requested is history and is not part of any ongoing investigation into a possible violation of law and any prosecution of a violation has been completed as of [specified date] … at sentencing.

Analysis and Findings

Based on my review of Records 1 to 6, the personal information in the records was compiled and is identifiable as part of an investigation into possible violations of law, namely several different offences under the *Criminal Code*. Therefore, the presumption that disclosure of this information would be an unjustifiable invasion of personal privacy, pursuant to section 14(3)(b) of the *Act,* applies to much of the information severed by the Police from those records, with some limited exceptions which are outlined below.

<u>Records 1 to 3</u>

The appellant has implicitly argued that because he has been convicted of the offence to which Records 1 to 3 relate, there can be no invasion of personal privacy under section 14(3)(b). However, for the section 14(3)(b) presumption to apply, the Police need only prove that the content of the record (i.e., the personal information) was compiled as part of an investigation into the possible violation of a law. There is nothing in this section to suggest that the benefit of this presumption - to any individual whose personal information is contained in that record - will be lost if the individual is subsequently convicted of this offence. Indeed, past orders from this office have confirmed that the presumption does not cease to apply upon conviction (see Order M-389).

My specific findings on the application of the section 14(3)(b) presumption to the personal information in the records are as follows:

- Record 1 is a four page report created at the time of the appellant's arrest. The section 14(3)(b) presumption applies to the personal information of other individuals which appears on page 1 of this record because it was compiled and is identifiable as part of the investigation into a possible violation of law by the Police. An additional severance to

page 1 and the only severances to pages 2-4 were made under section 8(1)(l)/38(a) of the *Act* and will be addressed later in this order.

- Record 2 is a 26 page document listing Crown witnesses and outlining Crown evidence relating to the same charges for which the appellant was arrested under Record 1. The personal information which appears on pages 6-18, 21-24, and 26-30 fits within the scope of the presumption in section 14(3)(b) as it was compiled and is identifiable as part of the investigation into a possible violation of law by the Police. No severances were made by the Police to pages 5, 19, and 25 prior to their release to the appellant. The severance made to page 20 is addressed separately below.

- Record 3 is a 7 page report related to the appellant's bail hearing. I find that only the personal information severed from page 36 of this record falls within the ambit of the presumption at section 14(3)(b). No severances were made to pages 31-32, and 34-35 prior to their release to the appellant. The severances made to pages 33 and 37 are addressed below.

The severance made on page 20 (Record 2) contains no personal information and it cannot, therefore, qualify for exemption under sections 14(1) or 38(b). No other exemptions were cited or representations provided by the Police on this severance. In the absence of any evidence to support the withholding of this information, I will order it disclosed to the appellant.

In my view, the personal information severed from page 33 (Record 3) relates to both the appellant and other individuals; however, it was generated – and reflects information compiled - after the completion of the police investigation. It was not, therefore, compiled and identifiable as part of the investigation as required in order for the presumption in section 14(3)(b) to apply. I will, however, consider it in the context of the section 14(2) factors, below.

The personal information severed from page 37 (Record 3) belongs solely to the appellant and, as stated above, it was gathered after the police investigation was completed for the purpose of determining bail for the appellant. Its release to him would not, therefore, result in a presumed unjustified invasion of personal privacy. The possible application of the section 8(1)(c)/38(a) exemptions to page 37 is discussed under the section relating to section 8, below.

<u>Records 4 to 6</u>

These records are Police reports, each consisting of two pages, which outline three separate incidents in which the appellant was involved. The severances made to these records appear on pages 38-39 and 41-43 and are clearly the personal information of individuals other than the appellant as they contain the birth dates of those other individuals. Based on my reading of these records, this information was compiled and is identifiable as part of an investigation into possible violations of law, namely an offence under the *Criminal Code*. The fact that no charges, or legal proceedings, resulted from these investigations does not negate the application of section

14(3)(b) (see Order P-223). I find, therefore, that this information is exempt under section 38(b) as its disclosure is presumed to constitute an unjustified invasion of personal privacy.

In summary, and subject to my findings about the Police's exercise of discretion, I find that the undisclosed personal information in Records 1 to 6, other than that found on pages 33 and 37, falls within the ambit of the section 14(3)(b) presumption and is, therefore, exempt under section 38(b) of the *Act*.

I must now consider whether page 33 from Record 3 is exempt under section 38(b) when evaluated in the context of the factors listed in section 14(2).

Section 14(2) Factors

In the event that none of the presumptions listed in section 14(3) applies, the factors listed at section 14(2) provide guidance to the institution in determining whether the disclosure of information would constitute an unjustified invasion of personal privacy. Similarly, these factors assist an adjudicator reviewing that determination.

The Police make reference to only one section 14(2) factor in their representations. Noting that some of the records were compiled for the trial of the appellant and were created after the completion of the investigation, the Police simply state that section 14(2)(f) [highly sensitive personal information] applies to those records. Section 14(2)(f) reads:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> > the personal information is highly sensitive;

The appellant initially responded to the Police reference to section 14(2)(f) by commenting that if the concern is purported to be about national security, he does not believe the concern is justified in the context of the subject matter of his request. After seeking clarification from this office regarding this factor, the appellant also submitted that:

> the requested information could be considered "highly sensitive" to myself only if it is/was being improperly used to adapt [sic] negative or improper and false opinions. I will assure you that no personal distress will be caused me if the information is released under the … [*Act*].

The appellant does not make specific reference to other factors listed at section 14(2) which might support disclosure of the information to him.

As previously stated, Record 3 relates to bail proceedings involving charges against the appellant. I have reviewed the information severed from page 33 and I agree with the Police that

it contains personal information relating to other identifiable individuals that is highly sensitive. I cannot elaborate on this information further without running the risk of divulging its content. In my view, none of the factors – listed or otherwise - which might support the disclosure of this information are applicable in the circumstances. Accordingly, I find that its disclosure would constitute an unjustified invasion of the personal privacy of individuals other than the appellant.

I will now consider the application of section 38(a), in conjunction with sections 8(1)(c) and (l), to certain severances to Record 1, and Records 3 to 6.

LAW ENFORCEMENT

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

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if section 6, 7, **8**, 8.1, 8.2, 9, 10, 11, 12, 13, or 15 would apply to the disclosure of that personal information. [emphasis added]

As with section 38(b), even if the information at issue falls under one of the listed exemptions, the institution must still exercise its discretion in deciding whether or not to disclose the information to the requester. The exercise of discretion by the Police in these appeals will be reviewed under a separate heading in this order.

The Police have severed information from pages 1-4 of Record 1, page 37 of Record 3, and pages 38-39 and 41-43 of Records 4 to 6 under section 38(a) because they take the position that the information fits within sections 8(1)(c) and (l) of the *Act*.

The relevant portions of section 8(1) provide:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement; …
> >
> > (l) facilitate the commission of an unlawful act or hamper the control of crime.

To establish the application of sections 8(1)(c) or (l), the Police 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.)].

Section 8(1)(c)

I will address section 8(1)(c) first as it appears to relate to only one of the remaining severances. In the initial decision letter in Appeal MA-050216-1, the Police relied upon this section to withhold information from the appellant's Canadian criminal history. While the Police subsequently withdrew their claim to this exemption in relation to that record, no specific mention was made regarding the application of section 8(1)(c), which seems to have been relied upon to withhold information from page 37 of Record 3. I received no representations specific to this severance other than the general statements made relating to the application of section 14(3)(b), which I have already found does not apply to this information. Not having been provided with any explanation for why the disclosure of this particular information could reasonably be expected to reveal current law enforcement techniques or procedures, the type of harm sought to be protected by section 8(1)(c), I will order the information disclosed to the appellant.

Section 8(1)(l)

The remaining information withheld from Records 1 and 4 to 6 are police codes. On the application of section 8(1)(l), the Police state:

> The discretionary exemption at section 8(1)(l) applies to the records. The Information and Privacy Commissioner has consistently found that section 8(1)(l) applies to "ten-codes" (see Orders M-393, M-757, and PO-1665). The codes withheld from these records are 900 codes, a direct correlation of the ten-codes.

On the subject of police codes, the appellant admitted uncertainty as to what these codes are; however, as regards section 8(1)(l), the appellant simply states that the information he is requesting, if provided in correct and truthful form, could not possibly lead to "the commission of an unlawful act or deter the control of crime".

Analysis and Findings

The codes severed by the Police pursuant to section 8(1)(l) appear on 10 of the 63 pages at issue in this appeal. There are several versions of these numerical codes, including the 900 codes specifically identified by the Police in their representations. The Police have referred in their representations to a line of decisions emanating from this office upholding the application of the 8(1)(l) exemption to confidential police codes, but provided no specific explanation regarding the use of such codes or why their disclosure might reasonably lead to the harm sought to be prevented by the exemption at section 8(1)(l).

However, to provide context for this office's decisions about police codes, I can turn to Order MO-1715, in which Adjudicator Bernard Morrow quoted from the representations made by the institution in that appeal as follows:

> The use of ten-codes by law enforcement is an effective and efficient means of conveying a specific message without publicly identifying its true meaning. In fact, the word "code" implies the intention that the information not be widely disclosed.
>
> By encoding a particular meaning with a ten-code, the police seek to reduce the ability of those involved in criminal activity from using such knowledge to circumvent detection by police while committing criminal activities. This information could also be used to counter the actions of police personnel responding to situations. This could result in the risk of harm to either police personnel or members of the public with whom the police are involved; i.e., victims and witnesses.
>
> . . . . .
>
> The ten-codes referred to in the records do not, in isolation, provide a specific meaning, however, when read in the context of the records at issue, the corresponding meaning would easily be revealed. Thus, the security of those codes would be compromised if they were released…

In the context of the above-quoted submissions and earlier orders of this office, as cited by the Police in these appeals, Adjudicator Morrow went on to find that disclosure of the confidential police ten-codes in the records at issue could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. I agree.

In my view, the rationale provided for withholding ten-codes is equally applicable to other confidential police codes (see also Order MO-2014). Based on my review of the records in these appeals and past orders of this office, I accept that disclosing these confidential police codes could reasonably be expected to render law enforcement activities and police officers vulnerable to interference of the kind contemplated – and sought to be avoided – by the exemption at section 8(1)(l) of the *Act*.

Accordingly, subject to my review of the Police's exercise of discretion, I find that the confidential police codes that were severed from pages 1-4 of Record 1 and pages 38-39 and 41-43 of Records 4 to 6 qualify for exemption under section 8(1)(l), and are, therefore, exempt under section 38(a).

RELATIONS WITH OTHER GOVERNMENTS

The Police have applied section 9(1)(d) to deny access in part to Record 7, and in full to Records 8 to 10. As with the personal privacy and law enforcement exemptions discussed in the preceding pages, in view of my finding that Records 7 – 10 contain the appellant's personal information, the exemption at section 9(1)(d) must be considered in the context of section 38(a) of Part II of the *Act*.

Section 9 states:

> (1) A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,
>
> (a) the Government of Canada;
>
> (b) the Government of Ontario or the government of a province or territory in Canada;
>
> (c) the government of a foreign country or state;
>
> (d) an agency of a government referred to in clause (a), (b) or (c); or
>
> (e) an international organization of states or a body of such an organization.
>
> (2) A head shall disclose a record to which subsection (1) applies if the government, agency or organization from which the information was received consents to the disclosure.

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" (Order M-912).

For me to uphold the application of this exemption, the Police must provide "detailed and convincing" evidence to establish that disclosure of the record at issue could reasonably be expected to reveal information which the Police received from one of the government agencies or organizations listed in the section, **and** that this information was received by the Police in confidence.

Representations

The Police submit that section 9(1)(d) applies to the severed information in Record 7 and all of Records 8 to 10 because:

> [the] information was received from an agency (the FBI [Federal Bureau of Investigation]) of the government of a foreign country (the U.S.A.). The information was received in confidence from the FBI. The records contain the stipulations that they may be used only for criminal justice purposes as defined by the NCIC (National Crime Information Center) Advisory Board or that they are provided for official use only and may be used only for the purpose requested.
>
> The Police did not seek the consent of the FBI to disclose the records as we were advised by NCIC that the records were not to be released to non-law enforcement agencies.

In response to the representations provided by the Police on this issue, the appellant states:

> The letter [from the Police] states that if I want information concerning myself which could be/was provided by other law enforcement agencies then I must request this information from those agencies myself.
>
> … [The] stated reasons should not apply for refusal of the requested information because it is not confidential as some of it has appeared in news reports and given to the Correctional Services Canada in a form I feel may be enhanced and is being used in a negative aspect.

Analysis and Findings

In evaluating the application of section 9(1)(d), I must first consider whether the information was received from one of the governments, agencies or organizations listed in the section. Based on my review of the contents of these records, I find that all of the information in Records 8 to 10 was created by the FBI and received by the Police from the FBI.

Record 7, which is referred to in this order as the appellant's Canadian criminal history, is a record generated through an inquiry to Canadian Police Information Centre (CPIC). CPIC is a computerized database system which hosts information supplied by law enforcement agencies and from which these same agencies can obtain a wide range of information relating to law enforcement. From my review of the information severed from Record 7, I am satisfied that the information relating to the appellant's foreign [U.S.] charges was supplied to CPIC by the FBI. In the circumstances, I find that the information remaining at issue in Record 7 was received by the Police from the FBI.

I must now consider whether this information was received *in confidence*. The appellant appears to be arguing that because some of the information was made public at the time of his arrest, or was shared with Correctional Services Canada in some form, the Police cannot now claim that it is confidential, or received "in confidence" as the exemption requires. However, notwithstanding the appellant's stated concerns about the media's use of information about him or the form in which Correctional Services Canada may have received such information, these

considerations do not define the issue before me in this appeal, which is to determine whether the expectation of confidentiality between the Police and the FBI has a reasonable and objective basis.

In Order MO-1288, Adjudicator Holly Big Canoe reviewed the nature of the expectation of confidentiality under section 9(1)(d) as follows:

> An expectation of confidentiality must have been reasonable, and must have an objective basis. 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. It is not sufficient to simply assert an expectation of confidentiality with respect to the information received by the institution.

In my view, the Police have provided me with sufficiently detailed evidence to substantiate a finding that the severed information in Record 7 and Records 8 to 10 in their entirety were received by the Police from the FBI in confidence. I am satisfied that the confidentiality stipulations, or strict limitations, on the dissemination of the information received from the FBI were known and accepted by the Police upon receipt of Record 7, and existed as a pre-condition for receiving Records 8 to 10.

In my view, the disclosure of the severed portions of Record 7, or of Records 8 to 10 in their entirety, could reasonably be expected to reveal information received by the Police in confidence from the FBI, an agency of a foreign government. As a result, I find that this information qualifies for exemption under section 9(1)(d) and is, accordingly, exempt under section 38(a).

EXERCISE OF DISCRETION

As already discussed at several points in this order, the Police had the discretion under sections 38(a) and 38 (b) of the *Act* to disclose the information contained in the records.

On appeal, an adjudicator may review the institution's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so. I may find that the Police erred in exercising their discretion where, for example, it does so in bad faith or for an improper purpose, it takes into account irrelevant considerations, or it fails to take into account relevant considerations. In these cases, I may send the matter back to the Police for an exercise of discretion based on proper considerations (Order MO-1573). However, I may not substitute my own discretion for that of the Police.

The Police describe the factors considered in exercising their discretion not to release information to the appellant. The Police state that they considered the fact that the criminal history requested by the appellant is his personal information and that he should be entitled to it. The Police add that they granted the appellant access to those portions of the records which they considered to be in their "custody and control" (his Canadian criminal history). They go on to add they did not release the appellant's American criminal record because it had been received

from the FBI with the understanding that it would not be released to non-law enforcement agencies. The Police submit that it is their customary practice to share such information only with other law enforcement agencies. Finally, the Police state that they made inquiries with the FBI to facilitate the appellant in obtaining this information through that agency.

The appellant's representations refer only indirectly to the exercise of discretion by Police. The appellant refers to his own compelling need to receive the information and relates it to a desire to see any misinformation corrected so that this same information cannot be, in his view, misused.

> I have requested records from both the United State FBI and Interpol and will need the Police records and information to make note of any discrepancies and opinions which I believe are both unfair and harmful to myself.

I have reviewed the representations of the Police and the appellant and, in the circumstances of these appeals, I am satisfied that the Police have taken appropriate factors into consideration in exercising their discretion and that they have not erred in exercising their discretion to withhold information in the records under section 38(a) and 38(b) of the *Act*. In my view, there is no basis upon which to interfere with the exercise of discretion by the Police. I find that the exercise of discretion by the Police in withholding the information that I have not ordered to be disclosed was appropriate.

ORDER:

1. I uphold the decision of the Police to deny access to all of the information severed from Records 1 to 10, with the exceptions noted in paragraph 2, below. For greater certainty, I have highlighted in **orange** the exempt information on the copy of the records provided to the Police with this Order. The highlighted information is **not** to be disclosed.

2. I order the Police to disclose to the appellant the information on pages 20 and 37, of Records 2 and 3, respectively, as it appears on the copy of the records included with this Order, highlighted in **green**, by providing it to the appellant by **November 7, 2006**.

3. In order to verify compliance with the terms of this order, I reserve the right to require the Police to provide me with a copy of the records as disclosed to the appellant, upon request.

Original signed by: October 17, 2006
Daphne Loukidelis
Adjudicator