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

ORDER MO-2258

Appeal MA-050181-2

Toronto Police Services Board

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

BACKGROUND:

The requester, who later became the appellant in this appeal, was arrested in 2002. The arrest arose from an allegation by his younger brother that the appellant and another individual (a third brother) had sexually assaulted him more than 40 years prior to the arrest. The arrest occurred shortly after the sexual assault allegation was brought to the attention of the Toronto Police Service. As a result, the appellant was charged with indecent assault on a male pursuant to section 148 of the *Criminal Code*. The charge was eventually withdrawn by the Crown.

After the charge was withdrawn, the appellant engaged in lengthy correspondence with the Toronto Police Service, beginning before he made the access request that is the subject of this appeal, and continuing during the processing of this appeal, based on his concern that as a consequence of the charge that was laid against him and subsequently withdrawn, he would not be able to obtain a clear "Police Reference Check". The appellant is a member of a volunteer organization that has asked him to provide a Police Reference Check.

As well, throughout the adjudication stage of this appeal, the appellant has been involved in a separate complaint process with the Toronto Police Services Board in relation to his concerns about his arrest and his problems getting a clear Police Reference Check. The Board found, earlier this year, that "no further action is warranted" in relation to a policy complaint review, and closed that aspect of the matter, but opened a "conduct complaint". The conduct complaint was recently dismissed as well. These processes, while addressing similar concerns to those raised by the appellant in this appeal and in his related privacy complaint, are nonetheless entirely separate from the appeal and the privacy complaint.

It is also to be noted that, during the processing of this appeal, the appellant met with the Police's Manager for Records Management Services and obtained copies of what the Police would disclose in response to a request for a Police Reference Check, which would include a detailed letter to the appellant outlining the charge under section 148 and its disposition, and a letter to the volunteer organization identifying the existence of "information on file with this service". In other words, the appellant would not be given a clear Police Reference Check.

NATURE OF THE APPEAL:

The appellant submitted the following request to the Toronto Police Services Board (the Police) under the *Act*:

> Correct C.P.I.C. record re: bogus offense. In addition, I wish all documents, records etc. re arrest on bogus offense to be returned to me. I will then be able to have a clear criminal record check.

Several days later, the appellant wrote to the Police and requested that the "bogus offense entry" be corrected, and that records regarding his arrest be returned to him.

The Police issued a decision letter granting partial access to the records responsive to the request. Access was denied to severed portions of the records pursuant to sections 14(1), 14(3)(b) and

38(b) of the *Act*. The decision did not, however, address the appellant's request for correction to his C.P.I.C. records, or that all police records relating to the "bogus offense" be returned to him.

The appellant then filed an appeal of the decision of the Police. Appeal file MA-050181-1 was opened and assigned to a mediator. Appeal file MA-050181-1 was subsequently closed following several unsuccessful attempts by the mediator to contact the appellant to discuss his appeal. The appellant later advised this office that he wished to proceed with his appeal and the current appeal file (MA-050181-2) was opened.

During the mediation stage of this appeal, the appellant clarified his view that records relating to the charge against him should not be held by the Police and that all such records should be destroyed. The appellant wrote to this office and submitted the following clarification:

> ... all records in relation to the alleged sexual assault should be destroyed since the charges were withdrawn.

This correspondence from the appellant was forwarded to the Police. In response, the Police issued a letter advising the appellant that "you have been removed from the C.P.I.C. database". This letter included a copy of a letter previously sent to the appellant by the Criminal Records Department, which confirmed that the appellant's photographs and fingerprints taken by the Toronto Police Service have been destroyed. The letter also stated that:

> Other records pertaining to your arrest(s) may exist. These documents will be purged in accordance with the Police Service Record Retention Schedule, By-law 689-2000.

As the above decision did not address the appellant's request for correction of his police records, which is governed by section 36(2)(a) of the *Act*, the mediator asked the Police to issue a decision regarding correction of records in their custody.

The Police responded by issuing a further decision letter advising the appellant that, pursuant to the Toronto Police Service Record Retention Schedule, City of Toronto By-law 689-2000, records of arrest remain permanently on the Toronto Police Service database, and in this case, the C.O.P.S. (Centralized Occurrence Processing System) records also remain permanently within the Records Management Section of the Service. The decision also advised the appellant that he does "... not qualify for correction under section 36(2)(a) of the *Act* nor destruction pursuant to the by-law." The decision also advised that he may submit a "'Statement of Disagreement' that can be attached to the general occurrence."

The appellant advised the mediator that he was not satisfied with the above decision issued by the Police and that he wished to proceed to the adjudication stage of the appeal process.

Also during mediation, the appellant asked the mediator to inquire from the Police about his criminal records in the Toronto Police files. The Police advised the mediator that they do not

consider "criminal records", which they indicate may include convictions and dispositions, to be responsive to his request. As a result, these records were not included in its decision respecting access. However, as the appellant's original request and the clarifications of his request refer to all responsive records, the scope of the request was made an issue in this inquiry. Mediation did not resolve any further issues so this appeal was moved to the adjudication stage of the appeal process, in which an adjudicator conducts an inquiry under the *Act*.

I began the inquiry by issuing a Notice of Inquiry to the Police, and inviting the Police to submit representations on the issues in this appeal. Before sending their representations to me, the Police sent a letter to the appellant stating that he "does not have a criminal record with this Police Service; therefore, access to the requested record cannot be provided because such record does not exist." Subsequently, the Police submitted representations.

I then issued a Notice of Inquiry to the appellant, enclosing a complete copy of the representations of the Police. I invited the appellant to make representations on the issues in the Notice and to respond to the representations of the Police. The appellant submitted representations.

During the adjudication stage of this appeal, the appellant filed a privacy complaint against the Police in connection with the personal information contained in the records at issue. Privacy Complaint file MC-060020-1 was opened and I was subsequently assigned the role of investigator. As the facts and circumstances of that complaint are related to the facts and circumstances of the appeal, I decided to deal with the appeal and the privacy investigation at the same time. Therefore, I issued a Supplementary Notice of Inquiry and Notice of Privacy Complaint to the Police inviting them to reply to the representations of the appellant, and also inviting representations on the further issues set out in the Notice. I also invited the Police to make representations on the issues set out in the Notice that related to the privacy complaint.

At the same time, I sent a Notice of Inquiry to the appellant's co-accused brother, an affected party who appeared to have an interest in the records at issue. He submitted representations and also stated in writing that he had no objection to the release of his personal information to the appellant.

Although I decided that it would be expeditious and more convenient to the parties if the representations in the appeal and privacy complaint were dealt with together, I advised the parties that I intended to issue a separate Order and Privacy Complaint Report at the conclusion of the appeal and the privacy complaint. Accordingly, this order disposes of the issues in Appeal MA-050181-2 and Privacy Complaint Report MC-060020-1 disposes of the issues raised in the privacy complaint. However, in arriving at my decision at the conclusion of this appeal and the privacy complaint, I have taken into account the complete representations of the parties.

I received representations from the Police in response to the Supplementary Notice of Inquiry and the Notice of Privacy Complaint. I then sent a Supplementary Notice of Inquiry and Notice of Privacy Complaint to the appellant. I invited him to make representations in response to the

Notice, and enclosed a complete copy of the representations of the Police. The appellant submitted representations. Upon receipt of the representations of the appellant, I sent a modified Notice to the Police inviting them to make representations in reply. The representations that I received from the Police raised issues to which I determined that the appellant should be given an opportunity to submit sur-reply representations. As a result, I sent a complete copy of the Police reply representations to the appellant and invited the appellant to submit sur-reply representations. I received sur-reply representations from the appellant.

RECORDS:

The records identified by the Police as responsive to the request, which are at issue in this appeal, are as follows:

1. C.O.P.S. Archive Report: General Occurrence Report (5 pages) (partly severed),
2. C.O.P.S. Archive Report: Record of Arrest (5 pages) (partly severed).

On the question of what records might be responsive, addressed in more detail below, I observe that in the Police's response to the appellant regarding the purging of all information about the charge, the Police state that database entries relating to the arrest and charge will be maintained permanently. This appears to be a reference to the Crime Information Processing System (C.I.P.S.) database, whose subject is described by by-law 689-2000 as "arrests/charges", and whose retention period is "permanent." Contents of this database relating to the appellant have not been identified as responsive to the request and have not been produced to me.

The Police also refer to the C.O.P.S. or Centralized Occurrence Processing System records and state that these remain permanently within the Records Management Section of the Service. By-law 689-2000 describes C.O.P.S. as "Occurrence Processing System" and calls for retention for "3 years + current year," rather than permanent retention. According to by-law 689-2000, occurrence reports and records of arrest are retained for various periods, but in relation to sexual offences, they are retained permanently. If there are C.O.P.S. records relating to the charge against the appellant other than the occurrence report and record of arrest referred to above, they have not been identified as responsive to the request and have not been produced to me.

DISCUSSION:

This order addresses the issue of the appellant's access request, including the scope of that request and the question of whether he is entitled to have access to the withheld portions of the records. Under the heading, "Correction of Personal Information," it also addresses the appellant's request to have the records corrected and/or destroyed.

SCOPE OF THE REQUEST/RESPONSIVENESS OF RECORDS

Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
>
> . . . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880]. To be considered responsive to the request, records must "reasonably relate" to the request [Order P-880].

During mediation, the appellant inquired about his "criminal records" held by the Police. As already noted, the Police did not consider "criminal records", which may include convictions and dispositions, to be responsive to his request, but during adjudication and prior to providing their first representations, the Police addressed this issue by writing to the appellant advising him that he has no criminal record with the Police and therefore there are no responsive "criminal records" concerning him. As well, in their representations, the Police note that the appellant's fingerprints and photographs, as well as his C.P.I.C record, have been destroyed or removed.

I appreciate that the appellant has no "criminal record" in the sense of not having been found guilty or convicted of an offence. Nevertheless, I do not consider it reasonable in the circumstances of this case to interpret his use of this term in that fashion. Given that the Police retain the records at issue (described above) under the by-law, and as a consequence, they would include references to the existence of "information" about the appellant in their response to a police reference check request, I am not satisfied by the explanation that there are no "criminal records". In view of the effect of the retention of the records at issue – an occurrence report and a record of arrest – on the police reference check outcome, it strains credulity to exclude them, or any other records relating to the charges, from the category of "criminal records".

I conclude that information in the C.I.P.S. database, and any C.O.P.S. records about the appellant other than the occurrence report and record of arrest already identified, would "reasonably relate" to the appellant's request, which as originally stated was for access to "all documents, records etc. re arrest …". Given the narrow scope ascribed to the request by the Police, and the very likely existence of a C.I.P.S. record, at a minimum (based on the description of this

database in the by-law as discussed above under the heading, "Records"), I am not satisfied that the Police have interpreted this request correctly.

Accordingly, I will order the Police to conduct further searches for records in these two areas, and to make an access decision with respect to any records they locate.

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) 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,
>
> (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,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (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].

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 a 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].

The Police submit that the records contain the personal information of individuals other than the appellant who were involved in the investigation. The appellant notes that "all or most" of the information was contained in the Crown disclosure materials given to him and his co-accused brother in connection with the charges against them, but does not directly dispute that this constitutes personal information.

Having reviewed the records at issue, I find that both of them contain information about the following identifiable individuals in their personal capacities: the appellant; his co-accused brother; the appellant's younger brother (the complainant in relation to the criminal charges); the appellant's parents; and other siblings of the appellant. I find that this constitutes the personal information of these individuals. I also note that the personal information that only pertains to the appellant has already been disclosed to him. The withheld information relates to the other individuals.

PERSONAL PRIVACY

I have found, above, that the records contain the personal information of the appellant and other individuals. Under section 38(b), where a record contains 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.

If the 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 a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy. I will address this issue below under the heading, "Exercise of Discretion".

Sections 14(1) to (4) provide guidance on the question of whether disclosure of the withheld information would be an unjustified invasion of personal privacy within the meaning of section 38(b) of the *Act*.

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 sections 38(b) or 14.
If paragraph (a) or (b) of section 14(4) applies, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under sections 38(b) or 14.

If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under sections 38(b) and 14. Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the "public interest override" at section 16 applies. [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

If no section 14(3) presumption applies, section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy under section 38(b) [Order P-239].

Section 14(1)(a)

This section indicates that personal information can be disclosed "upon the prior written consent of the individual, if the record is one to which the individual is entitled to have access." As noted above, the appellant's co-accused brother provided his written consent to the disclosure of his personal information in the records to the appellant. I am satisfied that the appellant's co-accused brother would be entitled to have access to this information, and on this basis, I am satisfied that section 14(1)(a) applies to this individual's personal information in the records. I therefore find that disclosure of this information would not be an unjustified invasion of personal privacy, and I find that section 38(b) does not apply. I will order this information disclosed. The discussion that follows pertains only to the undisclosed personal information of individuals other than the appellant and his co-accused brother.

14(3)(b): investigation into violation of law

This section 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;

Even if no criminal 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].

Relying on the records as evidence, the Police submit that the personal information under consideration was in fact compiled through an investigation of a possible sexual assault. The Police further submit that, as a result of the investigation, charges were laid under section 148 of the *Criminal Code*.

The appellant provides only a general submission on section 38(b), stating: "I do not know how this Issue is relevant to a clear Police Reference check." I would respond to this submission by observing that the issue under section 38(b) is whether the appellant is entitled to have access to those portions of the records he requested that have been withheld to protect the personal privacy of other individuals. The appellant is correct that this does not directly relate to the Police Reference Check.

Having examined the records in detail, I agree with the representations of the Police. Subject to the "absurd result" discussion below, I find that the presumed unjustified invasion of privacy in section 14(3)(b) applies to the personal information of individuals other than the appellant and his co-accused brother.

Absurd Result

Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 38(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Orders M-444, MO-1323].

The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement [Orders M-444, M-451]

- the requester was present when the information was provided to the institution [Orders M-444, P-1414]

- the information is clearly within the requester's knowledge [Orders MO-1196, PO-1679, MO-1755]

If disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge [Orders M-757, MO-1323, MO-1378].

The Police submit that "... the appellant was provided with as much detail as possible under [the *Act*] and therefore the absurd result [principle] does not apply." The appellant did not specifically comment on this issue.

However, it is clear from the appellant's representations generally, and from the circumstances underlying this appeal, that he would be aware of withheld information in the records about other

family members, including his younger brother. This information relates to living arrangements and other basic information pertaining to the family at the time of the alleged offence, as well as the identity of the alleged victim. In my view, withholding this information, which would clearly be within the appellant's knowledge, would be absurd and not consistent with the purpose of the exemption. Therefore, it would not be an unjustified invasion of personal privacy to disclose this information and it is not exempt under section 38(b). This finding does not extend to information that is not within the appellant's knowledge, such as the current addresses of other family members.

Conclusion

I have found that certain information is not exempt under section 38(b) on the basis of section 14(1)(a) and the absurd result principle. I find that the remaining personal information of individuals other than the appellant is subject to the presumed unjustified invasion of personal privacy in section 14(3)(b). I further find that sections 14(4) and 16 do not apply in this appeal. Accordingly, I conclude that disclosure of the personal information of individuals other than the appellant (except where section 14(1)(a) or the absurd result principle applies) would constitute an unjustified invasion of personal privacy and therefore this information is exempt under section 38(b).

I will provide highlighted copies of the records to the Police with this order, in which the exempt information is highlighted. I will also order the non-exempt information disclosed.

CORRECTION OF PERSONAL INFORMATION

Section 36(1) gives an individual a general right of access to his or her own personal information held by an institution. Section 36(2) gives the individual a right to ask the institution to correct the personal information. If the institution denies the correction request, the individual may require the institution to attach a statement of disagreement to the information. Sections 36(2)(a) and (b) read:

> Every individual who is given access under subsection (1) to personal information is entitled to,
>
> (a) request correction of the personal information where the individual believes there is an error or omission therein;
>
> (b) require that a statement of disagreement be attached to the information reflecting any correction that was requested but not made;

Grounds for Correction

For section 36(2)(a) to apply, the information must be personal information and must be "inexact, incomplete or ambiguous". This section will not apply if the information consists of an opinion [Orders P-186, PO-2079].
Section 36(2)(a) gives the institution discretion to accept or reject a correction request [Order PO-2079]. Even if the information is "inexact, incomplete or ambiguous", this office may uphold the institution's exercise of discretion if it is reasonable in the circumstances [Order PO-2258].

The appellant's initial request to the Police asked that "bogus" C.P.I.C. information be corrected, and that records relating to his request be "returned" to him. As noted previously, any C.P.I.C entries in relation to the appellant have been purged, and the C.P.I.C. issue mentioned in the request has therefore been fully dealt with. Fingerprints and photographs have also been destroyed. As this appeal progressed, it emerged that the appellant also sought destruction of the records at issue as a means of correction. Correction of these records is the remaining issue in relation to section 36(2)(a).

Are the grounds for correction present in this case?

I have already found that the records contain personal information.

On the question of whether the records are "incomplete, inexact or ambiguous", the Police submit:

> It is the understanding of the writer that the appellant believes that due to the **outcome** of the investigations into the historical Sexual Assault/Indecent Assault Male C.C. 148 was "withdrawn", that a correction must be made. The appellant has not argued or brought forth any proof that the reports are fiction, or that the officer recorded the information incorrectly. The facts are; the Toronto Police Service was asked to investigate an alleged sexual assault, a report was generated on the findings (General Occurrence), the appellant was arrested (Record of Arrest) and after court proceedings, those charges were withdrawn. Those are the facts. The reports in question state those facts.
>
> The information therefore does not fall into the classifications of "inexact, incomplete [or] ambiguous" nor does either record consist of an opinion. … Therefore, without proof that the two records at issue contained incorrect or incomplete information, this institution denies the request for correction.

The appellant provided representations on this issue in response to these submissions of the Police. The appellant's comments are, in essence, a critique of the investigating officer's conduct of the case and his decision to lay charges. Again, the appellant focuses on having the records "purged". He also indicates that, in his view, the officer should have investigated

further. Even if that were true (a subject upon which I am not making a finding), it would not mean that the record is "incomplete", which in this appeal relates to whether the information presented to the officer was adequately recorded, rather than whether he should have asked more questions. In my view, this portion of the appellant's representations does not advance his argument that the records should be corrected.

As well, the appellant questions the applicability of the City's retention by-law (689-2000) in the circumstances of his case. In my view, this by-law has no bearing on whether the records should be corrected under section 36(2)(a) of the *Act*. Rather, the question is whether the records are "inexact, incomplete or ambiguous."

In Order M-777, I dealt with a correction request involving a "security file" which contained incident reports and other allegations concerning the appellant in that case. The nature of the records is similar to those at issue here, in which the Police have recorded allegations and information reported to them. I stated:

> … the records have common features with witness statements in other situations, such as workplace harassment investigations and criminal investigations. If I were to adopt the appellant's view of section 36(2), the ability of government institutions to maintain whole classes of records of this kind, in which individuals record their impressions of events, would be compromised in a way which the legislature cannot possibly have intended.
>
> In my view, records of this kind cannot be said to be "incorrect" or "in error" or "incomplete" if they simply reflect the views of the individuals whose impressions are being set out, whether or not these views are true. Therefore, in my view, the truth or falsity of these views is not an issue in this inquiry.
>
> …
>
> … these same considerations apply to whether the records can be said to be "inexact" or "ambiguous". There has been no suggestion that the records do not reflect the views of the individuals whose impressions are set out in them.

In my view, the occurrence report and record of arrest in this case represent factual records of allegations received by the Police, the investigation they conducted, and the arrest of the appellant. The fact that the charges were later withdrawn by the Crown does not undermine or affect this conclusion in any way.

Accordingly, based on the interpretation of section 36(2)(a) developed in the orders cited above, I find that the records are not "inexact, incomplete or ambiguous", and I find that section 36(2)(a) does not provide any basis to order them corrected.

Before leaving the issue, however, there are two further matters to consider, which I raised by way of Supplementary Notice of Inquiry. One relates to Order PO-1881-I, in which records were ordered sequestered under section 36(2)(a). The other relates to section 36(2)(a) and the *Canadian Charter of Rights and Freedoms* (the *Charter*).

Order PO-1881-I

In Order PO-1881-I, the appellant had sought, among other remedies, the correction of his OHIP Claims Reference File (CREF) in the possession of the Ministry of Health and Long-Term Care. In that case, an identified doctor had made fraudulent billing claims with respect to medical services that were never provided to him but that were recorded on the appellant's CREF. The appellant took the position that, because of the nature of the incorrect information, attempts to explain it away or deny its validity were not acceptable options. After finding that the information in the record was the personal information of the appellant, the Commissioner stated as follows in Order PO-1881-I:

> I accept the Ministry's position that, for billing and accounting purposes, the record is not inexact, incomplete or ambiguous – the record reflects the exact claims submitted for payment, and the CREF substantiates that the Ministry made the payment for the services identified on the claims. However, as discussed earlier, other purposes for which the record is used cannot be ignored – to do so would be irresponsible. When considered from the context of the appellant's health history, which is a common use of the CREF by Ministry staff and outside third parties, this same CREF is both inexact and incomplete. Inexact, in that it contains information that does not reflect actual medical conditions or health services provided to the appellant; and incomplete because without any indication that the claims are fraudulent, it fails to adequately reflect the complete status of the claims entered on the appellant's CREF.
>
> Accordingly, when considered in the context of its uses for purposes other than billing and accounting, I find that the information at issue is inexact and incomplete, establishing the second requirement of section 47(2) [of the *Freedom of Information and protection of Privacy Act*, which is the equivalent of section 36(2) of the *Act*].

Among other remedies, the Commissioner ordered the Ministry to create a separate database for claims of this nature and to transfer the appellant's OHIP billing record to this file. She also ordered that it be flagged as a case of fraudulent billing.

The Police submit that Order PO-1881-I is distinguishable from the present appeal because the records in that case were fraudulently created. This conclusion was based on the results of a prosecution. In the present appeal, the appellant's representations on this issue attempt to cast the allegations of his younger brother in a similar manner, by stating that they were "bogus and false." The appellant goes on to state that if his complaint about the conduct of the investigation

is upheld, he will go on to request that the Police lay public mischief charges against his younger brother.

As noted, the appellant's complaints have both been closed with the notation, "no further action warranted." To my knowledge, no mischief charges have been laid. I agree with the Police that Order PO-1881-I is distinguishable because the records reflect a fraud to which the perpetrator in fact pleaded guilty, as noted in that order. In this case, the charges against the appellant were withdrawn before they were tested in court, leaving no court ruling on the merits of the charge against the appellant, nor has there been a finding that the appellant's younger brother was guilty of public mischief in relation to the complaint that led to the appellant being charged.

In my view, the analysis in Order PO-1881-I is not applicable in this case because the facts are significantly different. Despite the withdrawal of the charge against the appellant, I have no basis upon which to conclude that the information in the records has any fraudulent origin, nor that its provision to the police was a public mischief.

Section 36(2) and the Canadian Charter of Rights and Freedoms

In some situations, the *Canadian Charter of Rights and Freedoms* (the *Charter*) may require that a statute be interpreted "consistently with *Charter* values". The Supreme Court of Canada discussed this principle in *Bell ExpressVu Limited Partnership v. Rex*, [2002] S.C.J. No. 43 (at paras. 62-64):

> Statutory enactments embody legislative will. They supplement, modify or supersede the common law. More pointedly, when a statute comes into play during judicial proceedings, the courts (absent any challenge on constitutional grounds) are charged with interpreting and applying it in accordance with the sovereign intent of the legislator. In this regard, although it is sometimes suggested that "it is appropriate for courts to prefer interpretations that tend to promote those [Charter] principles and values over interpretations that do not" […], it must be stressed that, to the extent this Court has recognized a "Charter values" interpretive principle, *such principle can only receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations*. [Emphasis added.]
>
> This Court has striven to make this point clear on many occasions [citations omitted].
>
> These cases recognize that a blanket presumption of Charter consistency could sometimes frustrate true legislative intent, contrary to what is mandated by the preferred approach to statutory construction. Moreover, another rationale for restricting the "Charter values" rule was expressed in *Symes v. Canada*, [1993] 4 S.C.R. 695, at p. 752:

> [T]o consult the Charter in the absence of such ambiguity is to deprive the Charter of a more powerful purpose, namely, the determination of a statute's constitutional validity. If statutory meanings must be made congruent with the Charter even in the absence of ambiguity, then it would never be possible to apply, rather than simply consult, the values of the Charter. …

I invited the parties to comment on whether section 36(2) is ambiguous, which *Bell ExpressVu* establishes as a precondition for interpreting this section to be consistent with "*Charter* values". I did not receive representations in this regard.

In my view, however, the provisions of section 36(2)(a) cannot be said to be ambiguous in the sense discussed in *Bell ExpressVu*. Rather, they confer a discretionary power on the Police and other institutions to correct information in records when requested to do so. In my view, the approach adopted by this office, that only "incomplete, inexact or ambiguous" information is required to be corrected, and not statements of opinion, is a reasonable interpretation of the statutory language and one that is consistent with legislative intent. Accordingly, I am not in a position to re-interpret the section to be consistent with *Charter* values.

That is sufficient to deal with this issue, but in the name of completeness, I will also discuss the merits of the *Charter* argument. In my Supplementary Notice of Inquiry, I referred to two recent judicial decisions under the *Charter* and invited submissions on their impact.

In *R. v. Doré*, [2002] O.J. No. 2845, the Ontario Court of Appeal addressed the issue of retention of fingerprints. Feldman J.A., for the majority of the Court, stated:

> As affirmed in *Colarusso* and subsequent cases, the "protective mantle" of s. 8 [of the *Charter*, which protects against "unreasonable search or seizure"] extends during the duration of the holding and retention of the thing seized in order to protect the privacy interest of the person from whom it was seized. [para. 37]
>
> On the issue of whether a person does retain any expectation of privacy in the informational component of fingerprints, I conclude that there is no basis in the case law or otherwise, to infer that a person who was subjected to fingerprinting upon arrest will not have some reasonable expectation of maintaining or regaining his or her privacy in fingerprint information if the charge is disposed of in his or her favour. There is no reason to differentiate the expectation of privacy that an acquitted person has in such information from the expectation that a person who has never been charged with an indictable offence would have, because it is information about and from one's own body not normally available without one's consent. Added to that in the context of retention is the nature of the storage by the police which tends to stigmatize as a criminal the person whose fingerprints are retained. Although it may be that because of the nature of that information, the expectation of privacy is minimal when compared, for example, to

> information which can disclose the genetic make-up of the person and not merely the person's identity, I conclude that a person can have some privacy interest in retained fingerprints. [para. 64]
>
> … [I]t seems to me that a reasonable balance is struck by holding that the right to be left alone in those circumstances arises if and when the person asserts his or her privacy interest by asking for the fingerprints to be returned or destroyed. It is at that point that further retention of the fingerprints would become unconstitutional retention unless, in the particular circumstances, it could be shown that there were other factors that would trump the privacy interest. [para. 71]

I note that in *Doré*, the issue related to fingerprints, whose retention was found to be a breach of section 8 of the *Charter* as an unreasonable continuing seizure. In my view, the facts of the case before me are distinguishable from *Doré* because the appellant's photographs and fingerprints have been destroyed.

Before concluding my analysis of the *Doré* case, however, it is important to note that the continuing retention of the appellant's personal information in the circumstances of this case *may be* a continuing seizure, to which the standards found in section 8 of the *Charter* would apply, just as the retention of fingerprints was found to be a continuing seizure in *Doré*. My reasoning, above, should *not* be interpreted as a finding of fact that there is no continuing seizure. However, because of *Bell ExpressVu*, I am not able to apply *Charter* values in the interpretation of section 36(2). If there is a *Charter* violation, it must be addressed in another forum.

As well, I note that *Doré* was followed in *Lin v. Toronto Police Services Board*, [2004] O.J. No. 170 (Ont. Sup. Ct.). In the *Lin* case, the Court awarded general and punitive damages based on the delay by the Police in destroying the plaintiff's fingerprints and photographs after charges against him were withdrawn. These damages were awarded under section 24 of the *Charter*.

Again, I note that in the appeal before me, the appellant's fingerprints and photographs have been destroyed. His C.P.I.C. record has been expunged. As well, the question of whether the appellant is entitled to damages is not before me, nor is it an issue I am able to address. This remedy, if available, could only be awarded in an action such as the one brought by the plaintiff in *Lin*. In my view, the *Lin* case does not speak to the interpretation or application of section 36(2) of the *Act*, which is a totally separate matter to be decided based on the criteria I have applied, above.

Conclusion

I find that the records are not inexact, incomplete or ambiguous. I therefore uphold the decision of the Police not to correct them under section 36(2)(a) of the *Act*. The appellant may, however, require the Police to attach a statement of disagreement as provided for in section 36(2)(b).

EXERCISE OF DISCRETION

Sections 36(2) and 38(b) are discretionary. Section 36(2) permits an institution to correct a record, and section 38(b) 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.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution if it finds that a discretionary exemption applies [section 43(2)].

The Police submit that they have considered a number of factors in exercising their discretion under sections 38(b) and 36(2)(a).

Under the section 38(b) exemption, these factors relate to the protection of individual privacy and the fact that the information was personal information of other individuals. I am satisfied that, with respect to the information I have found to be exempt under section 38(b), the Police considered relevant factors and did not consider irrelevant ones, and I uphold their exercise of discretion.

Under section 36(2)(a) and in relation to the appellant's correction request, the Police note that the appellant's C.P.I.C. entry was in fact expunged, and to that extent, his correction request was accommodated. They also note that they have not been provided with evidence to demonstrate that the general occurrence report and records of arrest were incomplete, inexact or ambiguous, and accordingly, they have not corrected them. In their representations, the Police refer to Order M-777 and my comment in that order that "[i]f I were to adopt the appellant's view of section 36(2), the ability of government institutions to maintain whole classes of records of this kind, in which individuals record their impressions of events, would be compromised in a way which the legislature cannot possibly have intended." Although the Police did not specifically refer to this issue in their representations on discretion, it is evident that they did consider it in addressing the appellant's correction request. Without diminishing in any way the appellant's distress regarding this whole situation, I am nevertheless satisfied that the Police's exercise of discretion under section 36(2) was proper.

COSTS

Throughout his representations and other correspondence, the appellant repeatedly refers to the expense he incurred in defending himself from the charge against him, and asks that I consider the matter of his reimbursement in this regard, as well as obtaining an apology from the Police. I have no jurisdiction in relation to the costs of defending a charge in the criminal courts, nor does the *Act* empower me to order an apology. As regards the latter, I have in any event upheld the Police's refusal to correct the records at issue.

ORDER:

1. I uphold the decision of the Police to deny access to the portions of the records that are highlighted on a copy of the records to be provided to the Police with this order. The highlighted portions are *not* to be disclosed.

2. I do not uphold the decision of the Police to deny access to other portions of the records. I order the Police to disclose the portions of the records that are not highlighted on the copy provided to them with this order by sending a copy to the appellant on or before **January 16, 2008.**

3. I uphold the decision of the Police not to correct the records under section 36(2)(a). The appellant may require the Police to attach a statement of disagreement to the records if he chooses to do so.

4. I order the Police to conduct further searches of their C.I.P.S database and C.O.P.S. records to determine whether further responsive records exist, and to communicate the results of this search, including an access and correction decision in relation to any further records that may be located, to the appellant and myself, on or before **January 16, 2008.**

5. I reserve the right to require a copy of the records disclosed to the appellant pursuant to provision 2, above.

December 21, 2007

John Higgins
Senior Adjudicator

POSTSCRIPT:

In this decision, I have upheld the decision of the Police not to correct the records. This outcome will not satisfy the appellant, whose basic objective was the destruction of these records. In the concurrent Privacy Complaint Report MC-060020, I found that a disclosure in response to a police reference check request, of the nature proposed by the Police, would not be in accordance with section 32 of the *Act*, and the report recommends that the Police modify the reference check program to comply with the applicable regulation under the *Police Services Act*. This will entail a discretionary process. The report also recommends that the Police exercise their discretion in relation to the appellant's police reference check. While destruction of the records is not ordered, these recommendations may assist with the appellant's concerns.

The precise question of whether the reference check program violates the *Charter* was not before me in this appeal, and I am expressly not ruling on that issue. In this regard, it is important to recognize that the correction of a record under section 36(2)(a) of the *Act* is a different issue than whether the police reference check program complies with the *Charter*.

Pursuant to its mandate to comment on proposed programs of institutions (see section 46(a) of the *Act*), this office has written to the Police in February and September of this year, pointing out that their proposed new policy on destruction of records "derogates from rights protections in sections 7, 8 and 11 of the [*Charter*]." I have referred to section 8 in the discussion of *Doré*, above. Section 7 enshrines the right to life, liberty and security of the person, and significantly, section 11(d) sets out the right of any person charged with an offence "to be presumed innocent until proven guilty…."

My recommendations in Privacy Complaint Report MC-060020-1, referred to above, encourage the Police to develop a police reference check process that is consistent with this office's previous submissions on the Police's proposed policy on the destruction of records, *i.e.*, an approach that comports with *Charter* values and privacy concerns. In this particular case, the *Charter* provision in section 11(d), that a person has the right to be presumed innocent until proven guilty, is of particular importance. The charges against the appellant were withdrawn and he has not been found guilty of anything.