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

ORDER MO-2424

Appeal MA07-177

London Police Services Board

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NATURE OF THE APPEAL:

The London Police Service (the Police) received a 5-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records related to a specific robbery to which the appellant was a witness. As the second part of the request related to general records, it was dealt with separately and was resolved. As the fourth part of the request related to records held by the Toronto Police Service, the Police transferred that part of the request to the Toronto Police Service. The balance of the request, which forms the basis for this appeal, relates to records relating to the identified robbery. Specifically, the appellant seeks access to:

> 1. A copy of the notes, journals, memorandums and/or audio recordings from the period March 7th, 1995 through March 30th, 1995 made by [the then Chief of Police] which are related to: (i) the criminal gang labeled 'the Balaclava Bandits', (ii) the request for the involvement of police resources from RCMP [Royal Canadian Mounted Police] and/or OPP [Ontario Provincial Police] in the joint forces operation which was established to monitor and subsequently arrest the Balaclava Bandits.
>
> …
>
> 3. Notebook entries and/or notes of [named police officer] for a period of March 7th, 1995 through March 30th, 1995 regarding the robbery of [a named store], St. Thomas on March 10th, 1995 and subsequent questioning of the victims of that crime;
>
> …
>
> 5. Further to IPC Order MO-1939 dated June 20th, 2005 and IPC Order 1972-R dated September 29th, 2005, all records submitted to the IPC which were withheld from me solely on the basis of an on-going police investigation and/or ongoing criminal proceedings before the courts.

The Police identified 1865 pages of responsive records and granted the appellant partial access to them. The Police denied access to some of the pages, or portions of pages, pursuant to the discretionary exemptions at sections 7(1) (advice or recommendation), 8(1)(c), (d), (e), (g), (h), (i), (l), 8(2)(a) (law enforcement), 9(1)(d), (relations with other governments), 12 (solicitor-client privilege), 13 (danger to safety or health), and 15(a) (information published and available). The Police also denied access to some of the records pursuant to the exemptions at section 38(a)(discretion to refuse a requester's own information), in conjunction with the aforementioned exemptions at sections 7(1), 8(1), 8(2), 9(1)(d), 12,13 and section 38(b) (invasion of privacy), in conjunction with the factors listed at sections 14(2)(e) and (h) and the presumptions identified at sections 14(3)(a) and (b).

The requester, now the appellant, appealed the decision.

During mediation, the appellant advised that he did not seek access to the records for which the exemption at section 15(a) had been claimed. Accordingly**,** pages 1352 to 1355, 1358 to 1362, 1365 to 1371, 1373 to 1379 and 1381 to 1389 are not at issue in this appeal.

Also during mediation, the Police provided the mediator with an Index of Records. Some of the descriptions of the records and the explanations as to why the information was withheld under the specified exemptions contained the personal information of individuals other than the appellant or would reveal information that was contained in the records themselves. Accordingly, a revised copy of the index without this information was prepared and shared with the appellant.

As no further mediation was possible, the file was transferred to the adjudication stage of the appeal process.

I began my inquiry into this appeal by sending a Notice of Inquiry to the Police. The Police responded with representations. In their representations, the Police advised that they no longer rely on sections 8(1)(b) and 8(1)(g), in conjunction with section 38(b). I amended the Notice of Inquiry to reflect this change. I then sent a copy of the Notice of Inquiry to the appellant, enclosing a copy of the Police's non-confidential representations. The appellant chose not to submit representations.

RECORDS:

The Police identified 1865 pages of responsive records which include witness statements, police officer statements and notebook entries, occurrence and supplementary occurrence reports, along with other documents relating to the Police investigation of a robbery to which the appellant was a witness.

Of the 1865 pages, pages 24, 26, 60, 631 to 648, 657 to 662, 710 to 7171, 722 to 727, 1430, 1448, 1483, 1484, 1508, 1518 and 1520 to 1527 were disclosed, in full, to the appellant. As noted above, pages 1352 to 1355, 1358 to 1362, 1365 to 1371, 1373 to 1379 and 1381 to 1389 were removed from the scope of the appeal.

The responsive records are set out in an Index of Records that was prepared by the Police and provided to both this office and the appellant. As noted above, the Index of Records sets out the page numbers of each record, whether the page was disclosed in full or in part, the section or subsection of the *Act* that was applied to exempt the information from disclosure, a brief description of the record and a brief explanation as to why the exemption was applied.

DISCUSSION:

RESPONSIVENESS

Previous orders have established that to be responsive, a record must be "reasonably related" to the request. Adjudicator Anita Fineberg stated in Order P-880:

> I am of the view that, in the context of freedom of information legislation "relevancy" must mean "responsiveness." That is, by asking whether information

> is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term descries anything that is reasonably related to the request.

I agree with Adjudicator Fineberg and adopt her reasoning in the current appeal.

In my view, the appellant's request is clear in scope. He seeks records relating to the following types of information:

- Notes, journals, memorandum and audio recording within a specified time period made by the then Chief of Police that are related either to:

    (i) a specified criminal gang
    (ii) a request for the involvement of police resources from the RCMP and/or OPP in the joint task force established to monitor and subsequently arrest the specified criminal gang.

- Notebook entries and/or notes of a named police officer for a specified period of time regarding the robbery in which the appellant was involved.

- All records that were at issue in Orders MO-1939 and MO-1972-R and withheld from him on the basis that they formed part of an on-going investigation and/or ongoing criminal proceeding by the courts.

Regarding the third bullet point, it should be noted that none of the records at issue in Orders MO-1939 and MO-1972-R that were found to be exempt from disclosure were withheld on the basis that they relate to an on-going police investigation or an ongoing criminal proceeding before the courts. As a result, from my review of the records, it appears that the Police considered as responsive all records to which the appellant was denied access in the previous orders. Accordingly, I accept that, for the purposes of this appeal, the records at issue encompass records responsive to the first two bullet points outlined above, as well as records that were previously at issue in Order MO-1930 and MO-1972-R and not disclosed to the appellant.

Among those records identified as responsive, the Police have identified certain pages, or portions of pages, as non-responsive to the appellant's request. In my view, information gathered in relation to policing matters that are unrelated to the specified robbery investigation is not reasonably related to the request and therefore not "responsive" in these circumstances. I have reviewed all of the pages and portions of pages that contain information that the Police have identified as non-responsive and confirm that the majority of them relate to policing activities or matters unrelated to the specific records sought by the appellant in his request or to the identified robbery. I accept that this information is not responsive to the appellant's request.

Also among the information that the police have identified as non-responsive are administrative notations made by the Police for record keeping or other purposes. I am satisfied that this information is also non-responsive to the appellant's request.

There are a few pages of records identified as non-responsive that warrant particular mention. Pages 28 to 34 were disclosed in part to the appellant and the remaining portions are identified as non-responsive by the Police in its index. Pages 1495 to 1501 and pages 1509 to 1515 are duplicate copies of pages 28 to 34. As these pages relate to the specific robbery in which the appellant was involved, I do not accept that this information is non-responsive to the appellant's request. However, the Police have claimed that section 8(1)(c) applies to the record found at pages 1509 to 1515. As pages 28 to 34 and 1495 to 1501 are duplicate copies of this same record, I will allow that section 8(1)(c) was also claimed for these two records and will consider them in my analysis of the application of that section below.

Finally, there are a number of pages or portions of pages that the Police have identified as responsive to the request, but, in my view, clearly are not. In particular, portions of pages 286 and 287 have been identified as non-responsive, but other portions have been withheld under section 8(1)(h). On my review of this record, which consists of a list of exhibits from occurrences other than the identified robbery, I find that none of the information is responsive to the appellant's request. Accordingly, I will not be considering it in this appeal.

Additionally, the record that comprises pages 1814 to 1865 is a computer generated printout that lists property seized as a result of the investigation into the identified robbery, as well as property seized in relation to other occurrences that formed part of the more general investigation into a series of robberies that were attributed by the same criminal gang. The Police have disclosed the pages that clearly relate to the property seized in relation to the identified robbery. The other information clearly relates to property seized during investigations into other robberies. Having reviewed the information contained in the pages and portions of pages that were not disclosed to the appellant, I find that they are not responsive to the request. Accordingly, I will not be considering them in this appeal.

PERSONAL INFORMATION

Under the *Act*, different exemptions may apply depending on whether a record at issue contains or does not contain the personal information of the requester [Order M-352]. Where a record contains the requester's own information, access is addressed under Part II of the *Act* and the exemptions at section 38 may apply. Where a record contains the personal information of individuals other than the appellant, access is addressed under Part I of the *Act* and the exemptions found at sections 6 to 15 may apply.

Therefore, 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 where 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 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. Therefore, 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.)].

The Police submit that as a result of the investigation into the identified robbery they interviewed and gathered information from a number of individuals, including the appellant, other witnesses, and the individuals who were ultimately charged in relation to the investigation. They submit that information such as addresses, telephone numbers, dates of birth and statements were collected from these individuals and therefore, the majority of the records at issue contain the personal information of a number of identifiable individuals. The Police have identified the specific pages that they submit contain personal information in the index.

I have carefully reviewed all of the records at issue in this appeal and make the following conclusions:

- A number of the records at issue in this appeal do not contain any information that qualifies as personal information within the meaning of the definition of that term in section 2(1) of the *Act*. In particular:

  - page 1 lists a number of robberies at a number of locations and identifies the precise amount stolen at each location;

  - pages 35, 37 to 46, 48, 54 to 56, 69, 91, 176, 217, 264, 1392, 1460, 1463 to 1465, 1467 to 1477, 1502 and 1813 consist of police officer statements or notes that do not contain any information related to identifiable individuals; but rather contain information such as descriptions of photographs taken of crime scenes or evidence, exhibit lists where the property cannot be linked back to an identifiable individual, photographs of exhibits or evidence, and descriptions of certain tasks undertaken by particular officers related to the investigation into the identified robbery;

  - pages 106, 298, 923 to 926, 1533 to 1538 and 1541 are either standard forms that have been filled out by officers to record box and tag numbers for seized property or photocopies of property seals or tags with their identifying numbers. Pages 927 and 1542 are police officers' notes that record times where exhibits were pulled by particular officers for consultation or review during the course of the investigation. Pages 1516 and 1517 relate to seized property;

  - page 219 is a breakdown of automobile thefts and pages 220 to 222 are a "Crime Analyst Monthly Report" from March 1995;

  - pages 718 and 1318 are handwritten diagrams related to the investigation;

  - page 1324 is a handwritten note related to action to be taken on the investigation;

- page 1447 is an internal police administrative document related to the investigation; and

- pages 1729 to 1733 are photocopies of currency.

- Some of the pages at issue contain both the personal information of the appellant as well as that of other identifiable individuals. The personal information consists of their personal views or opinions (paragraph (e)) and their names along with other personal information (paragraph (h)). In particular:

  - pages 649 to 656, 663 to 666, 668, 669 to 673, 677, 686 to 687, 688 to 694, 696 to 701, 703, 704 to 707, 709, 767, 768 and 1804 to 1810 are witness statements and police officer notebook entries related to the questioning of witnesses or victims present at the identified robbery involving the appellant;

  - pages 82, 993, 1009, 1033, 1051, 1066, 1087, 1127G, 1127X, 1136, 1144, 1160, 1176, 1206, 1216L, 1216T, 1221, 1242, 1250, 1256, 1274, 1282, 1287, 1307 and 1316 all form part of a search warrant, or an information to obtain a search warrant and list the appellant's name with other personal information, along with the personal information of other identifiable individuals, such as victims or witnesses to the identified robbery;

  - pages 1553 to 1563, 1566, 1579, 1582, 1585, 1588, 1678, 1683, 1686, 1689, 1692, 1738, 1741, 1744, 1747, and 1754 contain descriptions of the robbery in which the appellant was involved which includes identifying information about the appellant, as well as identifying information about other individuals; and

  - pages 1565, 1578, 1581, 1584, 1587, 1677, 1682, 1685, 1688, 1691, 1737, 1740, 1743, 1746 and 1753 contain lists of the personal information of witnesses to the robbery in which the appellant was involved, including the appellant.

- All of the remaining records contain the personal information of a number of identifiable individuals who were directly or indirectly contacted during the course of the Police's investigation into the robbery. These individuals include witnesses, people who were questioned, and the individuals who were investigated and ultimately charged. These records contain the personal information of these individuals, including information relating to the race, national or ethnic origin, ages, marital or family status (paragraph (a)), information relating to the criminal history of the individual (paragraph (b)), identifying numbers assigned to the individuals such as drivers licences numbers, social insurance numbers (paragraph(c)), addresses, telephone numbers, fingerprints (paragraph (d)), the personal opinions or views of individuals (paragraph (e)) and the individual's name where it appears with other personal information relating to the individual or where

> the disclosure of the name would reveal other personal information about the individual (paragraph(h)).

As noted above, if a record does not contain the personal information of the appellant, but contains either the personal information of individuals other than the appellant, or no personal information at all, a decision regarding access must be made in accordance with the exemptions in Part I of the *Act*. However, 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 decision regarding access must be made in accordance with the exemptions in that part.

Accordingly, in the circumstances of this appeal, access to the records that contain the personal information of the appellant must be determined under Part II of the *Act* in accordance with the exemptions at sections 38(a) and (b). Access to the records which contain no personal information of the appellant, but only that of other individuals or no personal information at all, must be determined under Part I of the *Act*, in accordance with the exemptions at sections 7(1), 8(1)(c), (d), (e), (g), (h), (i), (l), 8(2)(a), 9(1)(d), 12, 13 and 14(1).

DISCRETION TO REFUSE ACCESS TO APPELLANT'S OWN PERSONAL INFORMATION/PERSONAL PRIVACY

Section 38(b) of the *Act* is the relevant personal privacy exemption under Part II of the *Act*. It provides:

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

The personal privacy exemptions under the *Act* are *mandatory* at section 14(1) under Part I and *discretionary* at section 38(b) under Part II. Put another way, where a record contains the 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 the exemptions at section 14(1) in Part I were applied [Order MO-1757].

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. The institution retains the discretion to deny the appellant access to information if it determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy. On appeal, I must be satisfied that disclosure of the information *would* constitute an unjustified invasion of another individual's personal privacy [Order M-1146].

In order for disclosure to "constitute an unjustified invasion of another individual's personal privacy" under either the discretionary exemption at section 38(b) or the mandatory exemption at section 14(1), the information in question must contain the personal information of an individual or individuals other than the person requesting it.

The factors and presumptions in sections 14(2) to (4) provide guidance in determining whether the "unjustified invasion of personal privacy" threshold is met. Section 14(2) provides some criteria for the institution to consider in making this determination; section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. In this case, the Police rely on the factors at sections 14(2)(e) and (h) and the presumptions at 14(3)(a) and (b).

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 section 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (*John Doe*)] although it can be overcome if the personal information at issue falls under section 14(4) of the *Act*, or if a finding is made under section 16 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the exemption [See Order PO-1764].

I will now review whether the records that contain the personal information of the appellant as well as that of other individuals qualifies for exemption under the discretionary exemption at section 38(b) and whether the records that contain the personal information of other individuals, but not that of the appellant qualifies for exemption under the mandatory exemption at section 14(1).

Section 14(3)(b): identifiable as part of an investigation into a possible violation of law

The Police submit that the presumption at section 14(3)(b) applies to the majority of the information at issue in this appeal. Section 14(3)(b) reads:

> 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.

Whether or not the investigation is currently on-going has no relevance to the application of this presumption. The presumption at section 14(3)(b) applies to personal information that, at some point of time, was assembled or gathered together as part of an investigation into a possible violation of law [Order P-892]. However, section 14(3)(b) does not apply if the records were

created after the completion of an investigation into a possible violation of law [Orders M-734, M-841, M-1086].

The Police submit that they were "part of a Joint Forces Unit investigating a possible violation of the *Criminal Code* of Canada, more specifically, section 344 of the *Criminal Code*." They submit that because the investigation resulted in "97 charges in total against 3 individuals," disclosure of the personal information contained in the records related to this investigation would constitute a presumed unjustified invasion of the affected parties' personal privacy under section 14(3)(b).

I have reviewed all of the records that contain personal information within the meaning of the definition of that term in section 2(1) of the *Act* and find that they were clearly compiled and are identifiable as part of the law enforcement investigation into a possible violation of law, specifically the provisions of the *Criminal Code* relating to armed robbery. Additionally, I do not find that any of the records at issue were created after the completion of the investigation. Consequently, I find that the presumption at section 14(3)(b) applies to the information at issue that contain personal information.

As I have found that the presumption at section 14(3)(b) applies to all of the records that contain personal information, it is not necessary for me to determine whether the presumption at section 14(3)(a) also applies. As noted above, a presumption against disclosure cannot be rebutted by either one or a combination of the factors set out in section 14(2); therefore, it is also not necessary for me to determine whether any of the factors in section 14(2) apply. Finally, section 14(4) does not apply to the records, and, although the appellant did not raise the possible application of the public interest override at section 16, in the circumstances of this appeal, in my view, it is unlikely that it would apply as there is no public interest in the disclosure of the personal information in the records.

Accordingly, I find that, subject to my discussion on the absurd result principle and my review of the Police's exercise of discretion, the discretionary exemption at section 38(b) applies to exempt the records that contain personal information of the appellant as well as that of other individuals.

I also find that, subject to my discussion on the absurd result principle, the mandatory exemption at section 14(1) applies to exempt the records that contain the personal information of identifiable individuals other than the appellant.

ABSURD RESULT

Whether or not the factors or circumstances in section 14(2) of the presumptions in section 14(3) apply, where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under either section 38(b) or section 14(1) because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Order 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 [Order Mo-1196, PO-1679, MO-1755]

The Police submit:

> The appellant already gained access to his own statement and some statements of third parties that consented in his original request for access to records dealt with under Order MO-1939. For the record, in this appeal, the appellant is only seeking access to records that were originally denied him. Therefore, in considering the information being withheld and our representations we have made, the London Police do not the absurd result principle applies.

I have reviewed all of the records at issue in this appeal with close attention to the records that refer to the appellant. These records consist primarily of statements of third parties who have not consented to their disclosure and consists of the witnesses own description of the robbery and the actions of the persons involved, including the appellant. Additionally, the appellant's information also appears on police documents among general descriptions of the robbery in which he was involved, as well as lists of witnesses or other individuals present. While some of the information in the records relates to him, none of it was directly supplied by him. Although it is arguable that he might be aware of some of the information, in the circumstances of the appeal, I find that disclosing the information would be inconsistent with the purpose of the personal privacy exemption. Accordingly, I find that the absurd result principle does not apply to it.

LAW ENFORCEMENT

As I have found that all of the records that contain personal information qualify for exemption under either section 38(b) or section 14(1), the records that remain at issue are those that contain no personal information at all. For the majority of this remaining information, the Police have applied a variety of law enforcement exemptions to exempt these records or portions of these records from disclosure. I will now address the application of the various law enforcement exemptions in section 8 of the *Act*, to these records. The relevant sections read:

> (1) 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;

(d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;

(g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;

(h) reveal a record which has been confiscated from a person by a peace officer in accordance with an Act or regulation;

(l) facilitate the commission of an unlawful act or hamper the control of crime.

(2) A head may refuse to disclose a record,

(a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

The term "law enforcement" is used in several parts of section 8, and is defined in section 2(1) as follows:

"law enforcement" means,

(a) policing,

(b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or

(c) the conduct of proceedings referred to in clause (b)

The term "law enforcement" has been found to apply in the following circumstances:

- a municipality's investigation into a possible violation of a municipal by-law [Orders M-16, MO-1245]
- a police investigation into a possible violation of the *Criminal Code* [Orders M-202, PO-2085]

- a children's aid society investigation under the *Child and Family Services Act* [Order MO-1416]

- Fire Marshal fire code inspections under the *Fire Protection and Prevention Act, 1997* [Order MO-1337-I]

The term "law enforcement" has been found *not* to apply in the following circumstances:

- an internal investigation to ensure the proper administration of an institution-operated facility [Order P-352, upheld on judicial review in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (1993), 102 D.L.R. (4th) 602, reversed on other grounds (1994), 107 D.L.R. (4th) 454 (C.A.)]

- a Coroner's investigation under the *Coroner's Act* [Order P-1117]

- a Fire Marshal's investigation into the cause of a fire under the *Fire Protection and Prevention Act, 1997* [Order PO-1833]

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

Except in the case of section 8(1)(e), where section 8 uses the words "could reasonably be expected to", the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

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

Section 8(1)(c): investigative techniques

In order to meet the "investigative technique or procedure" test, the Police must show that disclosure of the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. The exemption normally will not apply where the technique or procedure is generally known to the public [Orders P-170, P-1487].

The Police submit that these records relate to a joint investigation between a number of police forces which was conducted into a string of robberies including that involving the appellant. During the course of the investigation a number of officers were deployed to undertake certain tasks. The Police submit that a number of search warrants were executed and the disclosure of the records that describe the work that went into the preparation of the warrants could make the public aware of the way in which they plan the execution of warrants and how they go about identifying specific targets and locations. The Police submit that the disclosure of the records for which the exemption has been claimed would reveal procedures and techniques applied in the investigation which would interfere with the use of such procedures and techniques in future law enforcement investigations.

Based on my review of the records together with the representations submitted by the Police, I find that I have been provided with sufficiently detailed and convincing evidence to establish that disclosure of some of the information could reasonably be expected to reveal investigative techniques and procedures currently in use or likely to be used in law enforcement. Specifically, I find that disclosure of information relating to communication and surveillance techniques, information related to techniques used by officers to perform certain tasks during the course of the investigation, and procedures applied by officers at crime scenes or in relation to seized property in order to gather evidence to assist in the resolution of the investigation, would reveal investigative techniques or procedures within the meaning of section 8(1)(c). Therefore, subject to my review of the Police's exercise of discretion, I find that section 8(1)(c) applies to exempt the following pages of records from disclosure:

- pages 35, 48, 54 to 56, 218, 264, 927, 1318, 1463 to 1465, 1516, 1517 and 1542.

Section 8(1)(d): confidential source

In order for this exemption to apply, the Police must establish a reasonable expectation that the identity of the source or the information given by the source would remain confidential in the circumstances [Order MO-1416].

The Police submits that section 8(1)(d) applies for the following reason:

> [T]he record at issue contains personal statements and information of third party individuals who provided information to the London Police Service during the course of an investigation into a robbery. It is reasonable for the average citizen to assume if they supply information to the Police this information will be held in confidence by the Police.

As noted above, for this exemption to apply the Police must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm" and evidence amounting to speculation of possible harm is not sufficient.

As I have found that the majority of the records at issue are exempt under either section 14(1) or 38(b), there are only two records that remain at issue for which section 8(1)(d) has been claimed: page 1 is a list of the robberies along with the amounts stolen and page 718 is a handwritten diagram drawn by an individual whose identity is unknown.

I am not convinced that the Police's arguments with respect to this exemption apply to the two records that remain at issue under section 8(1)(d). The purpose of this exemption is to protect confidential informants [see Orders P-139, M-707, MO-1795]. From my review of the records, it is not clear that the information contained within them was either provided or would disclose information provided by a confidential source. In my view, the Police have not provided the requisite "detailed and convincing evidence" to establish a reasonable expectation that disclosure of this information would either disclose the identity of a confidential source or disclose information furnished only by the confidential source. Accordingly, I find that the exemption at section 8(1)(d) does not apply to exempt pages 1 and 718 from disclosure.

I have previously found that neither of these records contain personal information and therefore, that they are not exempt under section 14(1) of the *Act*. As section 8(1)(d) is the only other exemption that the Police have claimed for these records and I do not find that it applies, I will order pages 1 and 718 to be disclosed to the appellant.

Section 8(1)(g): intelligence information

The Police claim that section 8(1)(g) applies to exempt a number of records from disclosure. As I have found that the majority are exempt under section 14(1), it is not necessary for me to determine whether section 8(1)(g) applies to them. However, the Police have claimed section 8(1)(g) applies to exempt 1729 to 1733 from disclosure. This document does not contain personal information and cannot therefore be subject to sections 14(1) or 38(b).

Previous orders have defined intelligence information as:

> Information gathered by a law enforcement agency in a covert manner with respect to ongoing efforts devoted to the detection and prosecution of crime or the prevention of possible violation of law, and is distinct from information which is compiled and identifiable as part of the investigation or a specific occurrence [Orders M-202 and P-650].

The Police submit that the information contained in pages 1729 to 1733 amounts to Police intelligence information and the disclosure which would interfere with the ability to gather this type of information. The information found on these pages consists of photocopies of Canadian currency.

In my view, the failure of the Police to identify and specifically explain how disclosure of this information would interfere with the gathering or reveal law enforcement intelligence information amounts to insufficient evidence to support the application of the section 8(1)(g)

exemption. In my view, neither the record itself nor the Police's representations establish a connection between the information and a reasonable expectation of harm resulting from its disclosure. In the circumstances of this appeal, I find that the Police have not provided the requisite detailed and convincing evidence that disclosure of the information on pages 1729 to 1733 would result in interference with the gathering of law enforcement intelligence information as contemplated by section 8(1)(g) of the *Act*.

In addition to section 8(1)(g), the Police have claimed section 8(1)(h) also applies to pages 1729 to 1733. For the reasons outlined below, I find that section 8(1)(h) does not apply to these pages. Accordingly, I find that the information on pages 1729 to 1733 does not qualify for exemption, and I will order that it be disclosed to the appellant.

Section 8(1)(h): record confiscated by police officer

The purpose of section 8(1)(h) is to exempt records that have been confiscated or "seized" by search warrant [Order PO-2095]. This exemption applies where the record at issue is itself a record which has been confiscated from a person by a peace officer, or where the disclosure of the record could reasonably be expected to reveal another record which has been confiscated from a person by a peace officer [Order M-610].

The Police submit that during the course of the investigation into the robbery to which the records relate and the subsequent prosecution, a number of search warrants were executed and evidence was collected and seized.

On my review of the pages or the portions of pages for which section 8(1)(h) has been claimed, I am not satisfied that the disclosure of the information contained in all but one of the records could reasonably be expected to "reveal a record which has been confiscated from a person by a peace officer in accordance with an Act or regulation." The Police have also claimed section 8(1)(h) applies to the following types of information:

- Records that contain descriptions by police officers of photographs taken a various locations at crime scenes or other locations relevant to the investigations;
- records that relate to property seized during the investigation and the cataloguing of such property;
- records that consist of photocopies of property tags attached to seized property;
- records that list identification numbers on property tags or boxes containing seized property; and
- records that list the breakdown of money seized during the investigation.

The exemption at section 8(1)(h) states that it applies to a "record". A "record" is defined in section 2(1) of the *Act* as:

> Any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes,
>
> (a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictoral or graphic work, a photograph, a film, a microfilm, a sound records, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof, and
>
> (b) subject to the regulations, any record that is capable of being produced from a machine readable record under the control of an institution by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution.

In my view, with the exception of page 1324 which I will discuss below, the records to which the Police have applied section 8(1)(h) are not actually records that have been confiscated by the police nor could their disclosure be reasonably expected to reveal other records which have been confiscated by the police. The majority of the records that remain at issue for which section 8(1)(h) has been claimed relate to actual *items* (for example, clothing, bags and other personal items) which have been confiscated by the police rather than *records*. Accordingly, I do not find that section 8(1)(h) applies to them and, should be disclosed to the appellant. The pages that I will order disclosed are: pages 37 to 46, 69, 106, 298, 923 to 926, 1467 to 1477, 1533 to 1536, 1538, and 1541.

The one record for which I find the exemption at section 8(1)(h) applies is page 1324 which is a handwritten note by an unidentified individual. I accept that the disclosure of this record would reveal a record which has been confiscated by a police officer pursuant to the authority detailed in the *Criminal Code* in the course the investigation into the identified robbery. Therefore, I am satisfied that 1324 qualifies for exemption under section 8(1)(h) of the *Act* and, subject to my review the Police's exercise of discretion, it should not be disclosed to the appellant.

Section 8(1)(l): facilitate the commission of an unlawful act or hamper the control of crime

The Police submit that the portions of page 1447 that it has not disclosed to the appellant are exempt under section 8(1)(l) because they reveal police codes. They submit:

> Section 8(1)(l) applies in this case as this section was applied wherever confidential police zone numbers, police beat numbers and police provincial ten-codes numbers were used. This information has historically been considered as confidential within the police community as these numbers/codes are used in police communications in an effort to non-verbalize what the officer may or may

> not be doing or what area of the city the officer may or may not be patrolling at that particular time.

This office has issued many orders regarding the release of police codes and has consistently found that section 8(1)(l) applies to "ten-codes" (for example, see Orders M-93, M-757, MO-1715 and PO-1665) as well as other coded information such as "900 codes" (see Order MO-2014). These orders adopted the reasoning stated in Order PO-1665 by Adjudicator Laurel Cropley:

> In my view, disclosure of the "ten-codes" would leave OPP officers more vulnerable and compromise their ability to provide effective policing services as it would be easier for individuals engaged in illegal activities to carry them out and would jeopardize the safety of OPP officers who communicate with each other on publicly accessible radio transmission space.

I agree with Adjudicator Cropley's reasoning and find that it is relevant in the circumstances of this appeal.

Based on the representations of the Police, previous orders relating to police codes and my review of page 1447, which is primarily an administrative document containing a number of different types of police codes, I am satisfied that the disclosure of the information on page 1447 could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. Accordingly, I find that the information on page 1447 that has been withheld from the appellant qualifies for exemption under section 8(1)(l) of the *Act*.

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

The Police submit that section 8(2)(a) applies to exempt the responsive portions of page 219 and pages 220 to 222 from disclosure. In order for a record to qualify for exemption under section 8(2)(a) of the *Act*, the Police must satisfy each part of the following three-part test:

1. the record must be a report; and

2. the report must have been prepared in the course of law enforcement, inspections or investigations; and

3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

(Order 200 and Order P-324)

It is clear that the Police are an agency charged with enforcing and regulating compliance with the law, and, given the nature of the request and having reviewed the records that make up the pages for which section 8(2)(a) has been claimed, I am satisfied that they were prepared in the

course of the Police's investigations into a number of robberies, including that identified in the request. Accordingly, whether or not the responsive portions of these pages qualify for exemption under section 8(2)(a) turns on whether each records constitute "reports."

The Police submit that the records for which it has claimed section 8(2)(a) are reports within the meaning of section 8(2)(a) because they involve "the collation and consideration" of information related to the investigation by the Police and other police agencies involved and arrive at conclusions.

The word "report" means "a formal statement or account of the results of the collation and consideration of information". Generally, results would not include mere observations or recordings of fact [Orders P-200, MO-1238, MO-1337-I].

Additionally, the title of a document is not determinative of whether it is a report, although it may be relevant to the issue [Order MO-1337-I]. Generally, and despite the appearance of the word "report" in documents names, occurrence reports and similar records of police agencies have been found not to meet the definition of "report" under the *Act*, in that they are more in the nature of records of fact than formal, evaluative accounts of investigations: see, for instances, Order PO-1796, P-1618, M-1120 and M-1141.

Having reviewed the records that remain at issue for which section 8(2)(a) has been claimed, page 219 is a document entitled "Auto Theft Breakdown" and pages 220 to 222 is entitled "Crime Analyst Monthly Report." Both of these records summarize information gathered, to the date that the document was created, during the investigation into the identified robbery, as well as others and, in my view, amount to formal, evaluative accounts of that investigation. I am satisfied that these records represent formal statements or accounts resulting from the collation and consideration of information and are properly characterized as "reports" within the meaning of that term.

Accordingly, I find that pages 219 and 220 to 222 are reports that have been prepared in the course of law enforcement investigations by an agency which has the function of enforcing and regulating compliance with a law and therefore, subject to my review of the Police's exercise of discretion, the responsive portions of these pages qualify for exemption under section 8(2)(a) of the *Act*.

RELATIONS WITH OTHER GOVERNMENTS

The Police have claimed that, in the circumstances of this appeal, the mandatory exemption at section 9(1)(d) applies to a number of records. The only record that remains at issue for which this exemption has been claimed is page 1537. Section 9(1) reads, in part:

> A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,

> (b) the Government of Ontario . . .
>
> (d) an agency of a government referred to in clause . . . (b) . . .

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. Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)]. In addition, the Police must also demonstrate that they received this information in confidence.

The Police submit that:

> During the course of a seven month investigation into a string of armed robberies, a number of police forces tasked together to investigation these crimes. During this time numerous reports were received from officers of other police agencies, including the RCMP and the OPP involved in this join forces operation. These records were clearly provided to assist in our investigation while being of interest to their own investigations. These records were clearly shared with the London Police in the strictest of confidence…To disclose such records would diminish the integrity of the confidence held between police forces and could result in the unwillingness to share such information that could be essential in future investigations.

In my view, the Police have not provided me with the requisite "detailed and convincing evidence" to substantiate a finding that the specific information on page 1537 was received by the Police from an agency of the Government of Ontario in confidence. In its Index of Records, the Police indicate that this page contains information about exhibits related to the investigation into the series of robberies that were returned from the Centre for Forensic Science. Specifically, the information consists of a list of identification numbers for boxes which contain seized property. The information is recorded on a London Police Service form and provides a general description of the items to which the identification number has been assigned. While prior orders have found that the Centre for Forensic Science is an agency of the Ministry of Community Safety and Correctional Services [see Order P-1487], and I accept it to be so, neither the Police nor the records themselves provide any information to support a finding that the specific information contained within it (the identification numbers and the descriptions of the seized property) was received from the Centre for Forensic Science. Moreover, even if the information at issue were received by the Police from that agency, the Police have not provided the requisite detailed and convincing evidence to demonstrate that it was received in confidence.

Considering all of the circumstances, I find that the Police have not established that the information in the records was received in confidence by an agency of the government of Ontario. As a result, I find that section 9(1)(d) of the *Act* does not apply to exempt page 1537 from disclosure.

SOLICITOR-CLIENT PRIVILEGE

The Police claim that section 12 applies to exempt pages 91, 176, 217, 1392, and 1460 from disclosure. Section 12 reads:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

Section 12 contains two branches as described below. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law solicitor-client privilege

Branch 1 of the section 12 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 12 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue. [Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39)].

It does not appear that the Police are claiming that litigation privilege applies in the circumstances of this appeal.

Solicitor-client communication privilege

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R.

1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

Branch 2: Statutory privilege

Branch 2 is a statutory exemption that is available in the context of counsel employed or retained by an institution giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

Again, it does not appear that the Police are claiming that the records at issue are exempt under statutory litigation privilege.

Statutory solicitor-client privilege

Branch 2 applies to a record that was "prepared by or for counsel employed or retained by an institution for use in giving legal advice."

The Police submit that "included in the records at issue are documents that include advice from the Crown Attorney." The Police also refer to Order MO-1421 in which Adjudicator Holly Big Canoe found that communications relating to the Police seeking legal advice from a Crown Attorney were subject to the common law solicitor-client privilege.

As noted above, the only records that remain at issue for which section 12 has been claimed are pages 91, 176, 217, 1392, and 1460. I have reviewed each one of these pages closely. Pages 91, 176, 217 and 1460 are statements prepared by police officers on London Police Service standard forms. These are very brief statements that describe, in a very summary fashion, tasks that the officer who prepared the statement performed on a specific day. Page 1392 is described in the Police's Index of Records as a "memo for crown and defence". However, having reviewed the record, in my view, it does not appear to be a memo to be sent to the crown and/or the defence at all ,but, a single sentence note to file from a police officer regarding information that is to be collected. None of these pages, on their face, indicate that any of their contents originated with legal counsel or form part of the continuum of communications between a solicitor and a client. Also, none of these pages, on their face, appear to be documents that were intended to be provided or ultimately provided to legal counsel.

Although I accept that, in some circumstances, communications that pass between the Police and a Crown Attorney can qualify as direct communications of a confidential nature between a

solicitor and client, I find that this is not the case with the records at issue. The Police have not provided any evidence to demonstrate that the specific information contained in the pages at issue form part of a continuum of communications between a solicitor and a client or represent information that was "prepared by or for counsel employed or retained by an institution for use in giving legal advice." Accordingly, I find that the discretionary exemption at section 12 does not apply to exempt pages 91, 176, 217, 1392, and 1460 from disclosure.

As section 12 was the only exemption claimed for pages 176, 217, and 1392, and I have found that the other exemptions claimed for pages 91 and 1460 do not apply, I will order these pages to be disclosed to the appellant.

EXERCISE OF DISCRETION

Where appropriate, institutions have the discretion under the *Act* to disclose information even if it qualifies for exemption under the *Act*. On appeal, this office 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.

Because sections 38(b), 8(1)(c), (h), (l), and 8(2)(a) are discretionary exemptions and I have found that the Police have properly applied them to exempt some of the information at issue from disclosure, I must review the Police's exercise of discretion in deciding to deny access to those records or portions of those records.

I may find that the Police erred in exercising their discretion where, for example:

- they do so in bad faith or for an improper purpose,
- they take into account irrelevant considerations,
- they fail to take into account relevant consideration.

In either case this office may send the matter back to the Police for an exercise of discretion based on proper considerations [Order MO-1573].

The Police submit that they have considered that the records at issue contain the personal information of not only the appellant but that of many other individuals involved in the investigation which resulted in *Criminal Code* charges. The Police also submit that they considered that, as a result of a previous request, the appellant has already been granted access to information including his own statement and some statements of third parties who consented.

As stated above, my jurisdiction in reviewing an institution's decision is limited in that I cannot substitute my own opinion, but can only determine whether the Police erred in their exercise of discretion by finding, for example, that they have exercised their discretion in bad faith, for an improper purpose, by taking into account irrelevant consideration or by failing to take into account relevant considerations.

Having considered the information that the Police have withheld under the various discretionary exemptions and reviewed their representations, I conclude that the Police considered the nature and content of the information at issue, the impact that disclosure of that information would have, as well as the privacy rights of and/or the expectation of privacy by the individuals. In my view, in taking these considerations into account they have not erred in exercising their discretion in bad faith, for an improper purpose or by taking into account irrelevant considerations, or by failing to take into account relevant consideration.

Therefore, I find that, given the circumstances and the nature of the information at issue in this appeal, the exercise of discretion by the Police was appropriate.

ORDER:

1. I order the Police to disclose pages 1, 37 to 46, 69, 91, 106, 176, 217, 298, 718, 923 to 926, 1392, 1460, 1467 to 1477, 1533 to 1536, 1537, 1538, 1541, and 1729 to 1733 to the appellant by providing him with a copy by **July 2, 2009**, but not before **June 26, 2009**.

2. I uphold the decision of the Police to deny access to the remaining records.

3. In order to verify compliance with Order Provision 1, I reserve the right to require the Police to provide me with a copy of the records that are disclosed to the appellant.

Original Signed by: May 27, 2009
Catherine Corban
Adjudicator