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

INTERIM ORDER MO-2341-I

Appeal MA07-143-3

Hamilton Police Services Board

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NATURE OF THE APPEAL:

The Hamilton Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

> …copy of letter from the Ontario Ministry of the Attorney General [the Ministry] to the [Police] concerning [the appellant] and which was presented by [named detective] to [the appellant] and [named individual], from Hamilton, at the meeting around mid-June 2004 in the office of [named detective] at [address of the Police].

The Police located the responsive record and denied access to it pursuant to sections 38(a), in conjunction with 8(1) (law enforcement) and 9(1) (relations with other governments), of the *Act*.

The Ministry also received a request from the same requester under the *Freedom of Information and Protection of Privacy Act* (the provincial *Act*). The Ministry located its copy of the same record and denied access to it.

The requester, now the appellant, appealed both the decisions of the Ministry and the Police.

The appellant's provincial appeal was considered by me in Appeal PA07-258 which resulted in the issuance of Order PO-2714, concurrently with this order.

During the course of mediation, the Ministry provided the appellant's representative with some additional information about the record at issue, namely, that the record identifies a concern about the appellant and communicates that concern to the Police.

As mediation was not successful in resolving the issues in this appeal, the file was transferred to me to conduct an inquiry. I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the Police, initially. The Police did not provide representations in response. I also sent a letter to the Ministry asking if it relied on its representations made in file PA07-258, concerning the appellant's request to the Ministry for a copy of the same record at issue in this appeal. The Ministry confirmed that it was relying on its representations. I sent a copy of the Ministry's letter referring to its representations in file PA07-258, along with a Notice of Inquiry, to the appellant seeking his representations. I received representations from the appellant in response. Both the Ministry and the appellant provided representations on the applicability of the "public interest override", as set out in section 16 of the *Act*, to the record.

I also sought and received further representations from the appellant on the applicability of the personal privacy exemption in section 38(b) with respect to any personal information of other identifiable individuals that may be contained in the record.

RECORD:

The record at issue in this appeal consists of a two-page letter.

DISCUSSION:

PRELIMINARY ISSUE

The appellant has asked for an oral hearing for his appeal. In his representations, he requests:

> …an opportunity to make oral submissions, and hear from several, other witnesses, as it is the only way to accurately and factually explore the issues. [He] considers the opportunity to present oral submissions to be fundamental in terms of ensuring a full exploration of the relevant issues…
>
> [The appellant's] oral submissions and related evidence would further explore the background events leading up to the letter and demonstrate the origins of the letter…
>
> [He] would adduce testimony as to the impact of this letter and its circumstances (persecution motive behind this abuse of political power to personal freedom, liberty, human rights) on him…

Analysis/Findings

With respect to the right to make representations at the inquiry, section 41(13) of the *Act* states that:

> The person who requested access to the record, the head of the institution concerned and any other institution or person informed of the notice of appeal under subsection 39(3) shall be given an opportunity to make representations to the Commissioner, but no person is entitled to have access to or to comment on representations made to the Commissioner by any other person or to be present when such representations are made.

Oral representations are specifically referred to in this office's Practice Direction 15, which states that:

> During an inquiry, the Adjudicator may request additional information from any party, either orally or in writing.

The appellant wishes to make oral representations concerning the history of his interaction with the Ministry and the Police and to provide background information concerning the origin of this letter and its impact. However, in my view, these matters are not relevant to my determination of whether the claimed exemptions apply.

In this appeal, I agree with and adopt the reasoning of former Assistant Commissioner Irwin Glasberg in Order M-875 where he stated the following concerning a request for an oral hearing in an appeal where multiple exemptions were claimed:

> It is the usual practice of the Commissioner's office to invite the parties involved in an inquiry to submit their representations in writing. The parties to this appeal have provided detailed and well articulated written submissions which fully address the issues raised in this appeal. On the basis that the appellant's representations are clear and understandable, I have decided that this is not a situation where it would be appropriate to depart from the Commission's usual approach for the receipt of representations.

Therefore, based upon my review of the representations and the record at issue, I have decided to proceed with this inquiry in writing.

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].

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

Effective April 1, 2007, the *Act* was amended by adding sections 2(3) and 2(4). These amendments apply only to appeals involving requests that were received by institutions after that date. Section 2(3) modifies the definition of the term "personal information" by excluding an individual's name, title, contact information or designation which identifies that individual in a "business, professional or official capacity". Section 2(4) further clarifies that contact information about an individual who carries out business, professional or official responsibilities from their dwelling does not qualify as "personal information" for the purposes of the definition in section 2(1).

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 Ministry submits that:

> The only personal information contained in the document is personal information about the appellant. Names of his family members are also mentioned in passing, in connection with public court documents. Several other people are named or referred to in the letter, but only in their official capacities. There is no personal information at issue except that of the appellant himself.

The appellant does not disagree with the Ministry's representations on this issue.

Analysis/Findings

Upon my review of the record, I note that it contains the personal information of the appellant, and that it also contains the personal information of the appellant's family members, who, the Ministry acknowledges are named in the record in the context of certain court documents that were apparently enclosed with the record. This personal information consists of these individuals' marital or family status (paragraph (a)), the views or opinions of another individual about these individuals (paragraph (g)), and these individuals' names, where it appears with other personal information (paragraph (h) of the definition of "personal information" in section 2(1)).

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION

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

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

In this case, the Police rely on section 38(a) in conjunction with sections 8(1)(c) and (e) and 9(1)(b).

LAW ENFORCEMENT

The relevant portions of section 8(1) state:

> (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;
>
> (e) endanger the life or physical safety of a law enforcement officer or any other person;

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, and

(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* fulfillment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

Section 8(1)(c): investigative techniques and procedures

In order to meet the "investigative technique or procedure" test, the institution 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 Ministry's relies on its representations in file PA07-258. In that appeal, it submits that:

> The letter in question refers on the second page to a particular investigative technique in current use by police, and discusses the application of that technique. The technique in question is investigative; it is not an enforcement technique. Releasing the letter will reveal something about the investigative technique.
>
> It is signficant that any information released to the appellant effectively becomes public, since there is no restriction on how the appellant might use the information. The effectiveness of law enforcement techniques is diminished when they become widely known. In this case the technique identified in the letter should not be revealed.

In response, the appellant the appellant submits that:

> The [Police have] not provided any "detailed and convincing" evidence to establish a "reasonable expectation of harm" that releasing the letter will reduce the effectiveness of a particular investigative technique. Presumably, if there was ever any merit to this position, it was abrogated when the detective of the [Police] made a decision to share the contents of the letter with [the appellant and his friend]. Moreover, the use of the letter by the detective and interviewing [the appellant] on that letter, appeared to [the appellant] to be the only investigative technique employed. Conversely, it seems reasonable to infer that if revealing the contents of the letter would erode the effectiveness of particular investigative techniques, then the officer would not have shared the letter with [the appellant] and his friend…
>
> As the [Police have] not provided detailed and convincing evidence that they were employing an unknown investigative technique, this exemption should not be upheld. Moreover, there appears to be an issue as to whether the "technique" in question is investigative – and potentially protected, or enforcement – which is not protected (Orders PO-2034, PO-1340).

The Ministry addressed the appellant's claim that he was shown a copy of the record, as follows:

> There has been some suggestion from the appellant that the Hamilton Police showed the letter briefly to the appellant on one occasion. The Ministry is unable to confirm or deny this claim… It is the Ministry's understanding that the police officer recalls meeting with the appellant and did have the letter with him in a folder with other papers, but does not recall intentionally showing the letter to the appellant. Neither does the officer deny showing it - he simply has no specific memory of this detail.

Analysis/Findings

As I have only recived representations from the Ministry in this appeal, I am making the same finding that I have made in Order PO-2714 as to the applicability of the law enforcement exemption in section 8(1)(c) of the *Act*, which is the equivalent to section 14(1)(c) of the provincial *Act*.

In particular, upon my review of the letter, I agree with the Ministry that some of the information on page two makes reference to an investigative technique. The remainder of the letter contains background information provided by the Ministry to the Police.

While the record at issue in this appeal does not relate to enforcement techniques and procedures, I find that its disclosure would reveal an investigative technique in use in law enforcement. [Order PO-1340 and PO-2034].

However, in my view, the Ministry has not provided "detailed and convincing" evidence in its submissions to establish that disclosure of the record will reduce the effectiveness of the particular investigative technique referred to on page 2 of the record. The investigative technique is identified in the letter, but the procedure undertaken to utilize this technique is not. Neither the record, nor the Ministry's representations, contains details as to how disclosure of the technique referred to in the letter could reasonably be expected to hinder or compromise its effective utilization by law enforcement agencies [Order PO-2582].

It is not sufficient for an institution to take the position that the harms under section 14 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfillment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

Based on the information from the record which is referred to in his representations, I also accept the appellant's evidence that he has seen a copy of the letter. Therefore, in the particular circumstances of this appeal, I conclude that disclosure of the record would also not reasonably be expected to hinder or compromise its effective utilization by law enforcement agencies in these circumstances of the appellant's case.

Therefore, I find that the Ministry has not provided the necessary "detailed and convincing" evidence to establish a "reasonable expectation of harm" should the record be disclosed.

As a result, section 8(1)(c) is not applicable to exempt the information in the record from disclosure.

Section 8(1)(e): life or physical safety

As the Ministry withdrew its reliance on this discretionary exemption (the equivalent section in the provincial *Act* is section 14(1)(e)) and the Police did not provide representations on this exemption, I have insufficient evidence to find that disclosure of the record could reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person. Therefore, I find that section 8(1)(e) does not apply to the record.

RELATIONS WITH OTHER GOVERNMENTS

I will now determine whether the mandatory exemption at section 9(1)(b) applies to the record.

Section 9(1)(b) states:

> 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,
>
> > the Government of Ontario or the government of a province or territory in Canada;

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

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

The Ministry submits that it sent the record to the Police in confidence and that it has not waived the confidentiality of the record.

The appellant disputes this claim as he was shown a copy of the record by the Police. He states that:

> It is clear from the [the appellant's] recollection of the events that took place at the Hamilton Police station on the relevant day that the detective did not regard the Ministry's letter as confidential in nature. The record presented by the [Police] was used to alert [the appellant] of a possible arrest and warn him not to communicate with any political or government/public service offices.

Analysis/Findings

Although disclosure of the record could reasonably be expected to reveal information the institution received from the Government of Ontario, I find, based on the contents of the record and the manner in which it was treated by the Police, that the Police did not receive the information in confidence from the other government.

Furthermore, there is nothing in the record to indicate that it was being sent to the Police by the Ministry in a confidential manner or that the contents should be treated by the Police in confidence.

Therefore, I find that the mandatory exemption in section 9(1)(b) does not apply to the record.

PERSONAL PRIVACY

The sole remaining issue is whether the discretionary exemption at section 38(b) applies to the personal information of identifiable individuals other than the appellant which I have found are contained in the record.

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

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.

If the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). The information at issue does not fit within these paragraphs.

In deciding whether the exemption in section 38(b) applies, sections 14(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(2) provides some criteria for the 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. Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

If any of paragraphs (a) to (d) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). The information does not fit within these paragraphs.

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 section 38(b). The information does not fit within these paragraphs.

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 [Order P-239].

The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2) [Order P-99].

The appellant refers to the applicability of the factors in favour of disclosure of the record in sections 14(2)(a), (b) and (d). These sections read:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;
>
> (b) access to the personal information may promote public health and safety;
>
> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

I will deal with each factor raised by the appellant separately.

14(2)(a): public scrutiny

The appellant submits that:

> [He] strongly believes that the letter was created in response to his efforts to resolve difficulties he was experiencing with various government offices. Those circumstances, as previously detailed, raise serious concerns as to whether the Ministry engaged in inappropriate conduct and whether the [Police have] exercised its discretion in bad faith or for an improper purpose. More importantly, they demonstrate that full disclosure of the documents is desirable in terms of its value as a tool for subjecting the activities government agencies to public scrutiny.

Analysis/Findings

With respect to whether section 14(2)(a) is a factor in a given situation, and whether the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny, previous orders have stated as follows:

> Simple adherence to established internal procedures will often be inadequate, and institutions should consider the broader interests of public accountability in considering whether disclosure is desirable for the purposes outlined in clause (a) [Order P-256].

Although the appellant is clearly interested in access to the record, I have not been provided with sufficient evidence to support the view that this factor is relevant in the circumstances. The appellant clearly has a personal interest in obtaining the record, but I do not find that the disclosure of the personal information of the identifiable individuals other than the appellant found in the record is desirable for the purpose of subjecting the activities of either the Ministry or the Police to public scrutiny [Order PO-2420].

In my view, section 14(2)(a) is not a relevant factor favouring disclosure in these circumstances.

14(2)(b): public health and safety

The appellant submits that:

> the non-disclosure of the information in question has impacted his health and his son's health, which constitute part of the broader public health and safety.

Analysis/Findings

On my review of the personal information at issue in this appeal, I am not satisfied that its disclosure may promote public health and safety. The information in the record concerns the

appellant specifically. The appellant has seen the record. The appellant has not directed me to any specific personal information in the record that is relevant to public health and safety. Therefore, I find that section 14(2)(b) is not a factor favouring disclosure in this appeal.

14(2)(d): fair determination of rights

The appellant submits that disclosure of the personal information at issue is necessary for a determination to be made of how his rights have been affected.

Analysis/Findings

For section 14(2)(d) to apply, the appellant must establish that:

(1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and

(2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and

(3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and

(4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing

[Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.)].

I find that the appellant has not established that the personal information at issue is relevant to a fair determination of his rights. He has not established that there is a legal right which is related to an existing or contemplated proceeding. Therefore, I find that section 14(2)(d) is not a factor favouring disclosure in this appeal.

Summary

I have found that the factors in favour of disclosure in sections 14(2)(a), (b) and (d) raised by the appellant have no application to the personal information of the identifiable individuals in the record other than the appellant. Based upon my review of this personal information, I find that the listed factor in section 14(2)(f) (that the personal information is highly sensitive) favouring non-disclosure of this information does apply. To be considered highly sensitive, it must be found that disclosure of the information could reasonably be expected to cause significant

personal distress to the subject individual [Order PO-2518]. Although this personal information of identifiable individuals other than the appellant may be contained in public court documents, disclosure of this information, along with remaining information in the record, could reasonably be expected to cause significant personal distress to these individuals. Considering that the sole factor which I have found relevant under section 14(2) favours privacy protection, I find that the disclosure of the personal information of individuals other than the appellant will give rise to an unjustified invasion of their personal privacy.

Accordingly, I find that the personal privacy exemption in section 38(b) applies to the personal information of the identifiable individuals other than the appellant in the record.

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 appellant submits that:

> [T]he names of [the appellant's] family are mentioned in connection with public court documents. This indicates that the information contained in the documents at issue relating to parties other than the appellant would be readily accessible to any member of the public through other means. There were no publication bans or other orders that would impede the ability of any member of the public from accessing this information…
>
> [T]he information discussed in the document relating to the third parties is clearly within the knowledge of [appellant]… [T]he information relates to [the

> appellant's] family's involvement in public court proceedings that also directly involved [the appellant].

Analysis/Findings

Although the appellant was present or involved in the incidents detailed in the record and has seen a copy of the record, I find that the absurd result principle is inapplicable to allow disclosure of the personal information of identifiable individuals other than the appellant referred to in the record. In the particular circumstances of this case, I agree with the findings of Adjudicator Laurel Cropley in Order MO-1524-1, where she stated that:

> The privacy rights of individuals other than the appellant are without question of fundamental importance. One of the primary purposes of the *Act* (as set out in section 1(b)) is to protect the privacy of individuals. Indeed, there are circumstances where, because of the sensitivity of the information, a decision is made not to apply the absurd result principle (see, for example, Order PO-1759). In other cases, after careful consideration of all of the circumstances, a decision is made that there is an insufficient basis for the application of the principle (see, for example, Orders MO-1323 and MO-1449). In these situations, the privacy rights of individuals other than the requester weighed against the application of the absurd result principle.

I also adopt the findings of Adjudicator Frank DeVries in Order PO-2440, where he stated:

> I have carefully reviewed the circumstances of this appeal, including the specific records at issue, the background to the creation of the records, the unusual circumstances of this appeal, and the nature of the allegations brought against the police officer and others. I also note that the Ministry has, in the course of this appeal, disclosed certain records to the appellant. I find that, in these circumstances, there is particular sensitivity inherent in the personal information contained in the records, and that disclosure would not be consistent with the fundamental purpose of the *Act* identified by Senior Adjudicator Goodis in Order MO-1378 (namely, the protection of privacy of individuals, and the particular sensitivity inherent in records compiled in a law enforcement context). Accordingly, the absurd result principle does not apply in this appeal.

The portions of the record that contain the personal information of identifiable individuals other than the appellant contain the personal information of individuals involved in highly sensitive personal situations. I find that the sensitivity of this personal information constitutes a compelling reason for not applying the "absurd result" principle. Disclosure of this personal information would be inconsistent with the purpose of the exemption, which must include the protection of the personal privacy of individuals in the law enforcement context.

Therefore, I find that the absurd result principle is inapplicable in this case and that it would not be absurd to withhold the personal information of identifiable individuals other than the appellant that I have found to be exempt under section 38(b).

PUBLIC INTEREST OVERRIDE

I will now consider whether the public interest override applies to allow disclosure of the personal information of identifiable individuals other than the appellant that I have found to be exempt.

Section 16 states:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

Even though section 38(b) is not listed, because section 16 may override the application of section 14, it may also override the application of section 38(b) with reference to section 14 [see for example Order PO-2246, which deals with the equivalent sections of the *Freedom of Information and Protection of Privacy Act*]. If section 16 were to apply in this case, it would have the effect of overriding the application of section 38(b), and the appellant would have a right of access to the personal information at issue.

For section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Order P-984].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

A public interest is not automatically established where the requester is a member of the media [Orders M-773, M-1074].

The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984].

Any public interest in *non*-disclosure that may exist also must be considered [*Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.)].

A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)]

- the integrity of the criminal justice system has been called into question [Order P-1779]

- public safety issues relating to the operation of nuclear facilities have been raised [Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805]

- disclosure would shed light on the safe operation of petrochemical facilities [Order P-1175] or the province's ability to prepare for a nuclear emergency [Order P-901]

- the records contain information about contributions to municipal election campaigns [*Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773]

A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations [Orders P-123/124, P-391, M-539]

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568]

- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding [Orders M-249, M-317]

- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter [Order P-613]

The appellant did not provide specific representations concerning the application of section 16 to the personal information of other identifiable individuals. He did submit, however, that:

> …there is a basic public interest in knowing about the operations of government and their interactions with, and effects on, the public…
>
> [The appellant] strongly believes that the letter was created in response to his efforts to resolve difficulties he was experiencing with various government offices. Rather than follow up with him directly, the Ministry involved the [Police] to "silence him down"; therefore, this raises serious issues as whether the Ministry engaged in inappropriate conduct and whether the [Police have] exercised its discretion in bad faith or for an improper purpose.
>
> It is certainly not in the interest of the public if government institutions can refuse to disclose records, which result from the possible abuse of government political power. Refusing access to the letter may mean that the integrity of the interaction or communication between the client and law enforcement personnel is negatively impacted due to the lack of transparency and respect for the client's freedom to access the record. Both [the appellant] and the public can clearly perceive this, in general, as an abuse of power, unless the validity of the record's contents can be examined and challenged and resolved, if appropriate. A decision to uphold the exemptions that the [Police] have relied on effectively restricts [the appellant's] freedom of expression to counter the record and delay his attempt to resolve his previous issues with the Ministry's officc.

Analysis/Findings

In my view, the interests being advanced by the appellant are essentially private in nature. Accordingly, I find that the privacy interests protected by section 38(b) concerning the personal information of identifiable individuals other than the appellant in the record that I have not ordered disclosed above cannot be overcome in this case by the "public interest override" in section 16. There is no compelling public interest in the disclosure of this personal information that clearly outweighs the purpose of this established exemption. Upon review of the record, I find that it was created in response to a specific incident concerning the appellant and that the appellant is requesting the information for a predominantly personal reason [Order M-319]. Furthermore, based on the provisions of this order, a significant amount of information will be disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568].

EXERCISE OF DISCRETION

The section 38(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

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 [section 54(2)].

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information

- the historic practice of the institution with respect to similar information

The appellant did not address this issue directly in his representations and the Police did not provide representations at all in this appeal.

Analysis/Findings

In the absence of representations from the Police, I am not satisfied that they exercised their discretion in a proper manner, taking into account relevant factors and not taking into account irrelevant factors in not disclosing the personal information of identifiable individuals other than the appellant in the record. Therefore, I will order the Police to re-exercise their discretion with respect to this information.

ORDER:

1. I uphold the Police's decision not to disclose the personal information of identifiable individuals other than the appellant in the record. For ease of reference I have highlighted the portions of the record that should not be disclosed to the appellant on the copy of the record sent to the Ministry with this order.

2. I order the Police to disclose the remainder of the record to the appellant by **October 3, 2008** but not before **September 26, 2008.**

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

4. I order the Police to re-exercise their discretion with respect to the personal information in the record of identifiable individuals other than the appellant and to advise the appellant and this office of the result of this re-exercise of discretion, in writing. If the Police continue to withhold all or part of this remaining information, I also order them to provide the appellant with an explanation of the basis for exercising their discretion to do so and to provide a copy of that explanation to me. The Police are required to send the results of their re-exercise, and their explanation to the appellant, with the copy to this office, no later than **September 22, 2008**. If the appellant wishes to respond to the Police's re-exercise of discretion, and/or their explanation for exercising their discretion to withhold information, the appellant must do so within 21 days of the date of the Police's correspondence by providing me with written representations.

5. I remain seized of this matter pending the resolution of the issue outlined in provision 4.

Original signed by: August 29, 2008
Diane Smith
Adjudicator