Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-3302

Appeal MA14-23-2

Woodstock Police Services Board

April 15, 2016

Summary: The appellant sought access to records relating to a complaint she had filed against her neighbour. The police denied access to portions of the records on the basis of sections 38(b) (personal privacy) and 38(d) (danger to requester's mental or physical health), and the claim that other information is not responsive to her request. During the mediation stage of the appeal, the police added a new claim of section 38(a) (discretion to deny access to a requester's own information), in conjunction with section 8(1)(l) (facilitate commission of an unlawful act), to the police codes it had withheld in the records. In this order, the adjudicator partially upholds the police's decision. She orders the disclosure of information relating to one individual whose information appears in the records, based on his consent, and of the information withheld under section 38(d), given the lack of evidence supporting its application.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 2(1) (definitions), 8(1)(l), 14(3)(b), 17, 36(1), 38(a), 38(b), 38(d).

OVERVIEW:

[1] The appellant made a request to the Woodstock Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to a 2013 incident involving her neighbour, whom the appellant named in the request.

[2] The police found no responsive records dating from the month specified in the appellant's request. The appellant appealed that decision to this office. After the

appellant clarified that she had reported the incident to the police on a date some months after the date specified in her request, the police conducted a new search. The police located two responsive records and granted the appellant partial access to them, denying access to other parts on the basis of the exemptions at sections 38(b) (personal privacy) and 38(d) (danger to requester's mental or physical health). The police's denial of access to portions of the records is the matter at issue in this appeal.

[3] During the mediation stage of the appeal process, the police added a new discretionary exemption claim for some of the withheld information in the records. The police additionally rely on section 38(a), which confers a discretion to deny access to a requester's own information, in conjunction with section 8(1)(l) (facilitate commission of an unlawful act), to deny access to police codes in the records. Given this, the matter of whether the police should be permitted to raise this new claim after the expiration of the relevant period for making discretionary exemption claims, and the application of the newly-claimed exemption, are also issues in this appeal.

[4] The police also advised the mediator that some information in the records was withheld on the basis it is not responsive to the appellant's request.

[5] The appellant confirmed that she seeks access to all the withheld portions of the records.

[6] As no mediation was possible, this appeal was transferred to the adjudication stage for an inquiry under the *Act*. The adjudicator previously assigned to this appeal sought and received representations from the parties, which were exchanged in accordance with this office's *Code of Procedure* and *Practice Direction 7.* The appellant also made an unsolicited submission to the adjudicator during the inquiry process. The file was then transferred to me for final disposition. I have considered the parties' representations, including the appellant's unsolicited submission, in arriving at my decision.

[7] In this order, I allow the police's late discretionary exemption claim, and find that some of the information withheld by the police was properly withheld on the basis of section 38(a) read with section 8(1)(l). I find that other withheld information was properly withheld on the basis of section 38(b), or because it is not responsive to the appellant's request. However, I find that other information to which section 38(b) was applied ought to be disclosed to the appellant, as the individual to whom that information belongs consents to its disclosure. I also find that the police have provided insufficient evidence to establish a basis for the application of section 38(d) to some withheld information. In the result, I uphold the police's decision in part, and order the disclosure of some withheld portions to the appellant.

INFORMATION AT ISSUE:

[8] The information at issue in this appeal consists of the severances made by the police to two records: an occurrence summary and an officer's notebook.

ISSUES:

A. Is any information in the records not responsive to the appellant's request?

B. Do the records contain "personal information" as defined in section 2(1), and, if so, to whom does it relate?

C. Should the police be permitted to raise the discretionary exemption at section 38(a) of the *Act*, read in conjunction with section 8(1)(l), after the expiration of the 35-day period for raising discretionary exemptions?

D. If the police are permitted to make a late discretionary exemption claim, does the discretionary exemption at section 38(a), in conjunction with section 8(1)(l), apply to any information in the records?

E. Does the discretionary exemption at section 38(b) apply to any information in the records?

F. Does the discretionary exemption at section 38(d) apply to any information in the records?

G. Did the police exercise their discretion under sections 38(a), 38(b) and/or 38(d)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A. Is any information in the records not responsive to the appellant's request?

[9] The police have withheld print date and time information in the records on the basis it is not responsive to the request.

[10] A representative for the appellant indicates that she requires all the withheld information in the records in order to pursue a civil remedy against the police.

[11] The appellant in her unsolicited submission provides some background on an ongoing dispute with her neighbour and the neighbour's family, and an account of her dissatisfaction with the police's failure to investigate some of the complaints she has filed in past against this same neighbour.

[12] I am satisfied that the withheld printing information is not responsive to the appellant's request for records relating to one particular complaint she filed against her neighbour. To be considered responsive to a request, records must "reasonably relate" to the request.[1] In order to fulfil its obligations under section 17 of the *Act*, institutions should adopt a liberal interpretation where there is ambiguity in a request. In this case,

[1] Orders P-880 and PO-2661.

I find no ambiguity in the appellant's request, and no basis in the request or in the representations made on her behalf to extend the scope of her request to include report printing information.

[13] I dismiss this aspect of the appeal.

B. Do the records contain "personal information" as defined in section 2(1), and, if so, to whom does it relate?

[14] The police rely on exemptions in section 38 to withhold the remaining information at issue in this appeal. While section 36(1) of the *Act* gives an individual a general right of access to her own personal information held by an institution, section 38 provides a number of exemptions from this right. In making their exemption claims, the police acknowledge that the records contain the appellant's own personal information, as well as the personal information of individuals other than the appellant.

[15] "Personal information" is defined in section 2(1) of the *Act*. This section reads, in part:

> "personal information" means recorded information about an identifiable individual, including,
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> (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,
>
> (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,
>
> (g) the views or opinions of another individual about the individual[.],

[16] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under section 2(1) may still qualify as personal information.[2]

[17] Sections 2(2), (2.1) and (2.2) also relate to the definition of personal information. These sections have no application in this appeal.

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[2] Order 11.

[18] 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.[3]

[19] 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.[4]

[20] The records contain the personal information of the appellant and of individuals other than the appellant. They contain information about the appellant, as she is the complainant who made the report to police. The appellant's personal information in the records includes her address, her telephone number, date of birth and other information about her. I also find that one discrete severance in the records is an assessment of the complainant made by an officer, and qualifies as the appellant's personal information within the meaning of section 2(1)(g). As this assessment was made by the officer in his professional capacity in investigating the incident reported by the appellant, it is not the personal information of the officer. It is the personal information of the appellant only.

[21] The records also contain information about other individuals involved in the complaint, either as the person about whom the appellant complained, or because they are connected to the complaint in some other way. While I am unable to elaborate on this connection without revealing the content of the records, I confirm that the records contain the personal information of the appellant and of three individuals other than the appellant.

[22] I will next consider the exemption claims made by the police under section 38, beginning with its late claim.

C. Should the police be permitted to raise the discretionary exemption at section 38(a) of the *Act*, read in conjunction with section 8(1)(l), after the expiration of the 35-day period for raising discretionary exemptions?

[23] During the mediation stage, the police made a new discretionary exemption claim for some information that it had withheld in its decision on access, but for which it had not previously claimed section 38(a), in conjunction with section 8(1)(l), as the basis for withholding. This raises the issue of whether the police should be allowed to make a new discretionary exemption claim at a later stage of the appeal.

[24] The *Code of Procedure* (the *Code*) provides basic procedural guidelines for parties involved in appeals before this office. Section 11 of the *Code* addresses circumstances where institutions seek to raise new discretionary exemption claims during an appeal. Section 11.01 states:

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[3] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[4] Orders P-1409, R-980015, PO-2225 and MO-2344.

> In an appeal from an access decision an institution may make a new discretionary exemption claim within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

[25] The purpose of the policy is to provide a window of opportunity for institutions to raise new discretionary exemptions without compromising the integrity of the appeal process. Where the institution had notice of the 35-day rule, no denial of natural justice was found in excluding a discretionary exemption claimed outside the 35-day period.[5]

[26] This office has the power to depart from the *Code* in appropriate circumstances. In determining whether to allow an institution to claim a new discretionary exemption outside the 35-day period, the adjudicator must also balance the relative prejudice to the institution and to the appellant.[6] The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.[7]

[27] In this case, the police did not claim the application of sections 38(a) and 8(1)(l) in its decision letter sent to the appellant. However, the police raised the matter at the beginning stages of mediation, before the start of the adjudication stage. The mediator informed the appellant of the police's new exemption claim, and noted that it is being applied to information to which the police had already denied access. The new exemption claim, along with the ability of the police to raise a new discretionary claim after the expiration of the 35-day period, were included as issues in the mediator's report sent to both parties at the close of mediation.

[28] The appellant was thus made aware of the police's reliance on sections 38(a) and 8(1)(l) before the end of mediation, and before the start of the adjudication stage of the process. The parties were afforded an opportunity during adjudication to make representations on all the issues in the appeal, including the police's late raising of a discretionary exemption. The appellant made representations in support of her view that the police should not be permitted to rely on this claim. I have taken these into account in arriving at my decision to allow the police's late claim.

[29] I find that any prejudice to the appellant and to the integrity of the appeals process in allowing the late exemption claim is minimal. The inclusion of the new claim has not resulted in any delays to the appellant or to the processing of this appeal, or resulted in any more information being withheld from the appellant than in the police's

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[5] *Ontario (Ministry of Consumer and Commercial Relations v. Fineberg),* Toronto Doc. 220/95 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 1838 (C.A.). See also *Ontario Hydro v. Ontario (Information and Privacy Commissioner)* [1996] O.J. No. 1669 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 3114 (C.A.).

[6] Order PO-1832.

[7] Orders PO-2113 and PO-2331.

original decision. Both parties had the opportunity to address the application of the exemption, as well as the issue of late raising, in submissions made to the adjudicator.

[30] By contrast, I find there would be considerable prejudice to the police if it were not allowed to make the new claim. As seen below, I accept that the discrete severances for which the police claim sections 38(a) and 8(1)(l) are properly exempt on this basis. Disallowing this claim would result in disclosure of this information to the appellant, contrary to the purpose of the section 8(1)(l) exemption.

[31] In consideration of all the circumstances, I will allow the police to raise sections 38(a) and 8(1)(l) in this appeal. I will consider the application of these sections next.

D. If the police are permitted to make the late claim, does the discretionary exemption at section 38(a), in conjunction with section 8(1)(l), apply to any information in the records?

[32] Section 38(a) permits an institution to refuse to disclose to an individual her personal information where it is subject to specified exemptions. Section 38(a) reads:

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

[33] Section 38(a) recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.[8]

[34] Where access is denied under section 38(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains her personal information. I will address the police's exercise of discretion under this section at Issue G, below.

[35] In this case, the police rely on section 38(a) in conjunction with section 8(1)(l) to withhold police zone numbers and related codes from the records.

[36] Section 8(1)(l) states:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime.

[37] Many past orders of this office have found that the disclosure of police or patrol zone numbers, police codes and related information could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime under

[8] Order M-352.

section 8(1)(l).[9] The adjudicator directed the appellant's attention to these orders in seeking her representations on this issue.

[38] In making a case for disclosure of this information, the appellant's representative submits that the time that has elapsed since April 2013, the date of the incident captured in the records, ought to be a factor in assessing the risk of harm from disclosure. He also notes that police "ten-codes" are readily available to the public through internet databases or policing texts. He argues that there is no direct evidence that the appellant is involved in criminal activity, or would be, after receiving this information, and he proposes that any remaining concerns in this regard could be alleviated by releasing the information to the appellant with conditions attached to any subsequent dissemination.

[39] He also observes that some of the past orders considered police "ten-codes," rather than the "zone numbers" referred to in the police's representations, and urges that I distinguish these past orders on that basis.

[40] Having reviewed the records and the parties' representations, I find no basis for departing from this office's long-standing approach to police ten-codes, patrol zone numbers and related police code information. For the appellant's benefit, I confirm that all these types of information have been treated similarly in previous orders of this office, which have accepted that disclosure of this type of information could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. The lapse of time since the particular incident reported by the appellant, which is the subject of the records, does not diminish the risks of disclosure of this information, which continues to be used by the police.

[41] I also dismiss the argument relating to the public availability of ten-code information, and the suggestion that the information be disclosed to the appellant with conditions on its subsequent use and disclosure. The claim that police ten-code and similar information may be available through other means has been considered in past orders of this office; these orders have nonetheless upheld the application of the section 8(1)(l) exemption to this information.[10] In particular, this office has accepted that the potential availability of police code information elsewhere does not invalidate an institution's submissions on the reasonable expectation of harm resulting from its release.

[42] Previous orders have also articulated the principle that disclosure to an appellant is tantamount to disclosure to the world, so that the consequences of disclosure into the public domain, and not merely to a particular requester, are relevant considerations.[11] Similarly, the *Act* does not provide for the imposition by an institution of conditions on a disclosure made in response to an access request under the *Act*.

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[9] Orders M-757, M-781, MO-2065, MO-2175 and many others.
[10] Orders MO-1715, PO-2409, PO-2571 and others.
[11] Orders P-1537, PO-2461, MO-2304, MO-2986 and others.

[43] For these reasons, and applying the principles set out in previous orders of this office, I uphold the police's decision to withhold zone numbers and related information under section 8(1)(l). This finding is subject to my review of the police's exercise of discretion under this section, at Issue G, below.

E. Does the discretionary exemption at section 38(b) apply to any information in the records?

[44] I found above that the records contain the personal information of the appellant as well as the personal information of three other individuals.

[45] Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.

[46] Sections 14(1) to (4) provide guidance in determining whether disclosure of the information would be an unjustified invasion of personal privacy under section 38(b).

[47] In making this determination, this office will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.[12] 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). Section 14(4) also lists situations where disclosure is not an unjustified invasion of personal privacy.

[48] The following subsections of section 14 are relevant in this appeal:

> (1) A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
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> (a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;
>
> (f) if the disclosure does not constitute an unjustified invasion of personal privacy.
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> (2) 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;

[12] Order MO-2954.

> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
>
> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> (b) 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[.]

[49] To begin, I find that the personal information of one individual should be disclosed pursuant to the exception at section 14(1)(a). With her representations to this office, the appellant attached a statement in support of her access request, which is signed by that individual. I find this constitutes that individual's consent to disclosure of his information to the appellant. On this basis, I find that section 38(b) does not apply to one discrete severance in the records that clearly comprises that individual's personal information, and I will order the police to disclose it to the appellant.

[50] I now turn to consider the personal information of two other individuals named in the record, and information for which it is unclear in the records to whom it belongs.

[51] For this remaining information, I find that the presumption against disclosure at section 14(3)(b) is applicable. The records were prepared by officers investigating a complaint filed by the appellant against her neighbour. To apply, the presumption only requires that there be an investigation into a possible violation of law.[13] Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply.

[52] The appellant's representative suggests that the presumption against disclosure is overcome by the application of the factors at sections 14(2)(a) and (d) in support of disclosure. I do not agree.

[53] Section 14(2)(a) contemplates the disclosure of information in order to subject the activities of the government (as opposed to the views or actions of private individuals) to public scrutiny.[14] I find no basis for a finding that disclosure of the personal information of two individuals involved in the appellant's complaint would be desirable for the purpose of subjecting the police to public scrutiny. There is no evidence of a public interest in the incident described in the records, which appears to be a wholly private matter, or in reviewing the conduct of police in this matter. I do not accept the appellant's assertion that this factor favouring disclosure is engaged simply because the appellant has accused her neighbour of committing serious crimes against her.

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[13] Orders P-242 and MO-2235.
[14] Order P-1134.

[54] I also find the appellant has failed to establish that the withheld personal information is relevant to a fair determination of her rights. For the factor at 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.[15]

[55] The appellant has not provided sufficient information to show that any of these criteria has been met. The appellant's representative says the appellant believes the police acted improperly and may be liable to the appellant, and that the appellant needs all the withheld information to determine whether she should pursue a remedy against the police. This assertion, without more, does not establish that disclosure of the withheld portions is necessary to ensure a fair determination of the appellant's legal rights.

[56] I also reject the appellant's proposal that the information ought to be disclosed to her pursuant to the absurd result principle. The absurd result principle may apply in circumstances where denying access to information would yield manifestly absurd or unjust results. This office has applied the absurd result principle where, for example, a requester originally supplied the information or is otherwise aware of the information.[16] Although the records arise from an incident reported by the appellant, and it may be that some of the individuals whose personal information is contained in the records are known to the appellant, it is not evident to me that the withheld portions of the records were supplied to the police by the appellant, or that the appellant is otherwise aware of their specific contents. The absurd result principle does not apply in these circumstances.

[57] Given the application of the presumption against disclosure at section 14(3)(b), and the inapplicability of any factors favouring disclosure, or of the absurd result principle, or any of the exceptions in sections 14(1) or 14(4), I find that the personal information of two individuals was properly withheld from the records under section 38(b). I also uphold the police's decision to withhold other information where it is unclear to whom the information belongs.

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[15] 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.).

[16] Orders M-444, P-1414, PO-1679 and others.

[58] In summary, I uphold the application of section 38(b) to withhold the personal information of two individuals appearing in the records, and other personal information where it is unclear to whom it belongs. I order the disclosure of the personal information of a third individual, on the basis of his consent that it be disclosed to the appellant.

F. Does the discretionary exemption at section 38(d) apply to any information in the records?

[59] Section 38(d) is another exemption from an individual's general right of access to her own personal information in section 36(1) of the *Act*.

[60] The exemption at section 38(d) states:

> A head may refuse to disclose to the individual to whom the personal information relates personal information that is medical information where the disclosure could reasonably be expected to prejudice the mental or physical health of the individual.

[61] For section 38(d) to apply, the institution must provide evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative, although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[17]

[62] The police state that disclosure of the information withheld under this section could prejudice the mental and/or physical health of the appellant. The police fail to provide any evidence in support of this claim, and the risks of harm from disclosure of the information withheld under this section is not evident to me on its face. Given the absence of evidence to support an opposite finding, I conclude that the section 38(d) exemption has not been established. Accordingly, I will order disclosure of this information to the appellant.

G. Did the police exercise their discretion under sections 38(a), 38(b) and/or 38(d)? If so, should this office uphold the exercise of discretion?

[63] I upheld, above, the police's application of section 38(a), in conjunction with section (8)(1)(l), and section 38(b) to withhold some information in the records. As they are discretionary exemptions, an institution may nonetheless choose to disclose information subject to these exemptions. An institution must exercise its discretion. On appeal, this office may determine whether the institution failed to do so.

[64] I am satisfied that the police exercised their discretion in making the discrete severances to the records that they did under these sections. I am also satisfied that the police exercised their discretion appropriately, taking into account relevant factors

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[17] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

and not taking into account irrelevant factors. The police indicate that in making their decision on access, they took into account considerations including the appellant's right of access to her own information, and the harms from disclosure of information subject to the 8(1)(l) and 38(b) exemptions.

[65] I uphold the police's exercise of discretion.

ORDER:

I uphold the police's decision in part. In particular:

1. I order the police to disclose to the appellant the information withheld in the occurrence summary on the basis of section 38(d).

   The police are to disclose this information to the appellant by **May 20, 2016** but not before **May 16, 2016**.

2. I order the police to disclose to the appellant information relating to one individual withheld in the officer's notebook on the basis of section 38(b).

   The police are to disclose this information to the appellant by **May 20, 2016** but not before **May 16, 2016**.

3. I uphold the police's decision to withhold the remainder of the information at issue on the basis of section 38(a), in conjunction with section 8(1)(l), and section 38(b).

4. To assist the police, I enclose with this order a highlighted copy of the records.

   The portions that **are to be disclosed** to the appellant are highlighted **in green**.

   The severances that I have upheld, and that are not to be disclosed to the appellant, are highlighted in yellow in the enclosed copy of the records.

Original Signed by: April 15, 2016

Jenny Ryu
Adjudicator