



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER MO-1647**

**Appeal MA-020225-2**

**Leamington Police Services Board**



80 Bloor Street West,  
Suite 1700,  
Toronto, Ontario  
M5S 2V1

80, rue Bloor ouest  
Bureau 1700  
Toronto (Ontario)  
M5S 2V1

416-326-3333  
1-800-387-0073  
Fax/Télé: 416-325-9195  
TTY: 416-325-7539  
<http://www.ipc.on.ca>

## **NATURE OF THE APPEAL:**

The appellant wrote to the Leamington Police Services Board (the Police) seeking access under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to records relating to criminal charges brought against him.

The Police failed to respond to the request within the 30 day period required by the *Act*, and the appellant appealed this “deemed refusal” to this office.

During the mediation stage of the deemed refusal appeal, the Police wrote to the requester advising that they were providing partial access to the requested records, and enclosing an index of records. The Police claimed the application of the exemptions at sections 8 (law enforcement) and 14 (personal privacy) as the basis for withholding records in whole or in part. In particular, the Police cited sections 8(1)(g) and 8(2)(a), as well as sections 14(1)(f), 14(3)(a) and 14(3)(b). As a result of this decision, the deemed refusal appeal was closed.

The appellant responded to the Police, advising that he believed additional records existed. The appellant provided some detail as to the nature of the records he believed the Police should have identified as responsive.

The Police wrote back to the appellant with a detailed response to his letter. This letter included additional responsive records, as well as a revised index of records.

The appellant then appealed the decision of the Police to this office, indicating that he was not satisfied both with the application of the exemptions and the explanation of the Police regarding the issue of additional responsive records.

During the mediation stage of the appeal, the Police indicated that as well as sections 8 and 14, the exemptions at sections 38(a) and (b) are applicable to the records since they contain the appellant’s personal information.

Also during mediation, the Police issued a supplementary decision, in which they disclosed additional records, provided an “itemized response to [the appellant’s] concerns”, and provided a third, revised index. In this index, the Police claimed the application of the exemption at section 8(1)(g) for three additional records.

Mediation was not successful in resolving all of the issues in the appeal, and the appeal was streamed to the adjudication stage of the process.

I sent a Notice of Inquiry setting out the issues in the appeal to the Police, who provided representations in response. I then sent the representations of the Police together with the Notice of Inquiry to the appellant, who in turn provided representations.

In their representations, the Police indicate that they have sent the appellant a copy of Record 61. The appellant acknowledges having received this record. As a result, this record is no longer at issue in this appeal.

## RECORDS

There are three records at issue in this appeal. The Police disclosed portions of all three. The records and the exemptions claimed for them are described in the following table.

<b>Record</b>	<b>Pages</b>	<b>Description</b>	<b>Exemption claimed</b>
74	197-198	General occurrence report #124688-7 dated October 4, 1999	Sections 38(a)/8(1)(g) and sections 38(b)/14
75	199	Supplementary report #124688-7 dated October 4, 1999	Sections 38(a)/8(1)(g)
78	204-206	Police officer's notes dated October 5-8, 1999	Sections 38(a)/8(1)(g)

## DISCUSSION:

### PERSONAL INFORMATION

The first issue for me to determine is whether the records contain personal information and, if so, to whom that information relates.

Under section 2(1) of the *Act*, "personal information" is defined, in part, to mean recorded information about an identifiable individual.

The appellant submits that all of the records contain his personal information. The Police submit that the withheld portions of Record 74 consist of another individual's personal information.

All three of the records contain information about the appellant and his involvement in events subject to a police investigation. In addition, the records contain information relating to an individual witness, including their name, address, telephone number and other information regarding their actions during the events in question. I find that this information is "about" these individuals and, therefore, the records contain the personal information of the appellant and a witness.

### RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/UNJUSTIFIED INVASION OF ANOTHER INDIVIDUAL'S PRIVACY

The Police rely on the personal privacy provisions of the *Act* to withhold portions of Record 74.

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.

Sections 14(1) to (4) provide guidance in determining whether the “unjustified invasion of personal privacy” threshold under section 38(b) is met. In this case, the Police rely on the presumption of an unjustified invasion of privacy in section 14(3)(b) which 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;

The Police submit that the withheld information was “prepared in the course of law enforcement”.

The appellant states that the Police “have not stated that it is the personal information of another individual” and that “having not seen the information I have no idea whether this exemption could even apply.”

The information the Police withheld from Record 74 is the personal information of the witness, and clearly was compiled and is identifiable as part of an investigation into a possible violation of law, specifically certain alleged violations of the *Criminal Code*. Therefore, the section 14(3)(b) presumption applies, and disclosure of the information would constitute an unjustified invasion of the witness’s privacy under section 38(b) of the *Act*.

## **RIGHT OF ACCESS TO ONE’S OWN PERSONAL INFORMATION/UNJUSTIFIED INVASION OF ANOTHER INDIVIDUAL’S PRIVACY**

### **Introduction**

The Police rely on section 38(a) in conjunction with section 8(1)(g) with respect to all of the information withheld from Records 74, 75 and 78. Since I have already found that the information at issue in Record 74 is exempt under section 38(b), I will not consider the application of section 38(a) to this record.

### **Timing of the exemption claim**

Although the Police originally claimed the application of section 38(a) in conjunction with section 8(1)(g) for Records 56 and 61, it appears that they first raised with this office the possible application of section 38(a) in conjunction with section 8(1)(g) to Records 74, 75 and 78 after the second appeal was launched with respect to this request, subsequent to the original deemed refusal appeal.

Section 11.02 of the IPC's *Code of Procedure* states:

An institution does not have an additional 35-day period within which to make a new discretionary exemption claim after it makes an access decision arising from a Deemed Refusal Appeal.

I asked the Police to provide representations on why I should permit them to raise the application of this new discretionary exemption to additional records in light of the earlier deemed refusal appeal.

The essence of the submissions of the Police on this point is that the failure to claim the section 38(a)/8(1)(g) exemption for these records was inadvertent.

The appellant submits that he is concerned the Police are "attempting to manipulate the freedom of information process" so as not to provide him with access to information that may be damaging to the Police.

The section 8(1)(g) exemption reads as follows:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,

interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons

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].

In my view, section 8(1)(g) is designed to protect a very serious interest shared by both law enforcement agencies and the public at large. In addition, the Police are not what I would consider an institution with significant experience with requests and appeals under the *Act*. Finally, I note that the Police did claim the section 8(1)(g) exemption with regard to other records, so the appellant was made aware of its possible application at an early stage in the process. Based on the above, I have decided not to reject the section 8(1)(g) claim for Records 75 and 78 solely on the basis of the timing of the claim.

**Application of section 8(1)(g) in conjunction with section 38(a)**

The Police submit that disclosure of the withheld information in Records 75 and 78 would reveal law enforcement intelligence information respecting the appellant.

The appellant submits that there is no reasonable expectation of harm from disclosure of the information, since the events in question occurred more than five years ago and that there have been no recent incidents of a similar nature in the meantime. The appellant also submits:

. . . [T]his whole situation came about from a specific occurrence whereby a complainant made allegations against [me]. It is clear that the records in question did not come about as a result of covert police operations.

The appellant also submits that the Police claimed section 8(1)(g) with respect to other records (Records 56 and 61) and that, on his review, those records do not meet the definition of intelligence information.

The withheld information in Records 75 and 78 on its face clearly consists of law enforcement intelligence information, and thus the section 38(a)/8(1)(g) exemption applies. The fact that the events in question occurred several years ago does not negate the application of this exemption; the section does not expressly or by implication contain a temporal limit. In addition, this exemption applies to these records, regardless of whether it may or may not apply to other records disclosed to the appellant.

Further, there is no basis for concluding that the Police erred in their exercise of discretion under section 38(a)/8(1)(g).

## **REASONABLE SEARCH**

The appellant believes that the Police should have found additional records responsive to his request.

In appeals involving a claim that further responsive records exist, as is the case in this appeal, the issue to be decided is whether the Police have conducted a reasonable search for the records as required by section 17 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the decision of the Police. If I am not satisfied, I may order further searches.

Where a requester provides sufficient detail about the records that he is seeking and the Police indicate that further records do not exist, it is my responsibility to ensure that the Police have made a reasonable search to identify any records that are responsive to the request. The *Act* does not require the Police to prove with absolute certainty that further records do not exist. However, in order to properly discharge its obligations under the *Act*, the Police must provide me with sufficient evidence to show that they have made a *reasonable* effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in the Police's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

Under the “reasonable search” issue, the appellant re-iterates his earlier submissions that he is concerned the Police are “attempting to manipulate the freedom of information process” so as not to provide him with access to information that may be damaging to the Police.

The Police submit that they undertook searches for responsive records both at the request stage and during the mediation stage of the appeal process.

In my view, the appellant has not provided me with a sufficient basis to believe that additional records exist that are responsive to his request. Therefore, I find that the Police have conducted a reasonable search for responsive records.

**ORDER:**

I uphold the decision of the Police and dismiss the appeal.

Original signed by: \_\_\_\_\_  
David Goodis  
Senior Adjudicator

\_\_\_\_\_ May 13, 2003