



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER MO-1917**

**Appeal MA-040283-1**

**Niagara Regional Police Services Board**



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## **NATURE OF THE APPEAL:**

The Niagara Regional Police Services Board (the Police) received a request from two named individuals under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following:

- 1) copies of all notes, reports, occurrence reports and communications of a named police officer regarding a particular conversation with one of the requesters, and
- 2) a copy of the history of the Police and a particular motor vehicle and the dates and times this vehicle had been queried on the Police's information system.

In its decision letter to the requesters, the Police indicated that no records exist responsive to the first part of the request. With respect to the second part of the request, the Police denied access to responsive records on the basis of section 38(a) (discretion to refuse requester's own information), taken in conjunction with section 8(1)(a) (law enforcement).

One of the requesters (appellant A) appealed the Police's decision.

During mediation, appellant A confirmed that he was also acting as the agent for the other requester. This other individual (appellant B) provided written authorization for appellant A to act on his behalf for the purpose of this appeal.

Appellant A also confirmed that he was appealing the Police's decision respecting the issue of the reasonableness of the search for records responsive to the first part of the request.

Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process. I sent a Notice of Inquiry to the Police, initially, and received representations in response. I then sent the Notice of Inquiry, along with the non-confidential portions of the Police's representations, to the appellants. I also provided the appellants with a copy of an affidavit prepared by the Police in response to the issue of the reasonableness of the search for records responsive to the first part of the request. The appellants provided representations in response.

## **RECORD:**

The record at issue is a computer printout of queries made on a particular motor vehicle, including the license plate number of the vehicle.

## **DISCUSSION:**

### **PERSONAL INFORMATION**

In order to determine whether the exemption at section 38(a) 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). The definition states, in part, as follows:

“personal information” means recorded information about an identifiable individual, including,

- (c) any identifying number, symbol or other particular assigned to the individual,

The Police submit that the information in the record contains the “personal information” of one of the appellants, as that term is defined in section 2(1) of the *Act*. The Police state:

... it is reasonable to expect that an individual may be identified if the information is disclosed because the personal information that is contained in this record is the license plate number, which is recorded information about an identifiable individual.

The appellants do not directly address this issue in their representations.

Previous orders of this office have established that the license plate number that belongs to an identifiable individual can be considered the “personal information” of that individual, as it constitutes “an identifying number ... assigned to the individual.” (See MO-1863) I agree, and find that the record contains the personal information of appellant B. The record does not contain the personal information of appellant A.

**DOES THE DISCRETIONARY EXEMPTION AT SECTION 38(a), IN CONJUNCTION WITH SECTION 8(1)(a), APPLY TO THE RECORD?**

**General principles**

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.

Because section 38(a) is a discretionary exemption, even if the information falls within the scope of section 8, the institution must nevertheless consider whether to disclose the information to the requester.

Here, the Police rely on section 38(a) in conjunction with section 8(1)(a), which reads:

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

interfere with a law enforcement matter;

The term “law enforcement,” which appears in sections 8(1)(a), is defined in section 2(1) of the *Act* 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).

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.)).

Under section 8(1)(a), an 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*, above).

In order for section 8(1)(a) to apply, the “law enforcement matter” in question must be specific and ongoing. The exemption does not apply where the matter is completed, or where the alleged interference is with “potential” law enforcement matters (Orders PO-2085, MO-1578).

### **Representations**

The Police submit that the record concerns a specific, ongoing law enforcement matter. They state that the record contains the dates and times that a particular motor vehicle was queried on the Police’s information system, and that disclosure of the record could reasonably be expected to interfere with the law enforcement matter. The Police also provided me with confidential representations regarding the application of the exemption to the record. While I am not at liberty to disclose the contents of these submissions, the Police make it clear that the law enforcement matter is ongoing.

The appellant does not directly address the possible application of section 8(1)(a) to the record.

In the circumstances of this appeal, I am satisfied that the disclosure of the record at issue - specifically the dates and times that the motor vehicle has been queried on the Police’s information system - could reasonably be expected to interfere with a law enforcement matter. I make this finding based on my review of the record and on the confidential representations of the Police.

Accordingly I am satisfied that the exemption in section 38(a), in conjunction with section 8(1)(a) applies to the record.

Having found that section 38(a) applies to the record, I must now consider whether the Police have properly exercised their discretion by denying access to the record.

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

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 such a 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 43(2)].

Upon review of all of the circumstances surrounding this appeal, including the Police's representations on the manner in which they exercised their discretion, I am satisfied that the Police have not erred in the exercise of their discretion not to disclose the record withheld under section 38(a).

## **REASONABLE SEARCH**

### **Introduction**

As set out above, the appellant takes the position that records responsive to the first part of the request should exist. That part of the request is for:

copies of all notes, reports, occurrence reports and communications of [a named police officer] regarding a particular conversation [referenced by date and time] with [appellant A]

In appeals involving a claim that 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, the decision of the Police will be upheld. If I am not satisfied, further searches may be ordered.

A number of previous orders have identified the requirements in reasonable search appeals (see, for example, Orders M-282, P-458, P-535, M-909, PO-1744 and PO-1920). In Order PO-1744,

acting-Adjudicator Mumtaz Jiwan made the following statements with respect to the requirements of reasonable search appeals:

... the Act does not require the [institution] to prove with absolute certainty that records do not exist. The [institution] must, however, provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request (Order M-909).

I agree with acting-Adjudicator Jiwan's statements.

Where a requester provides sufficient detail about the records that he/she is seeking and the institution indicates that records or further records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records that are responsive to the request. The *Act* does not require the institution to prove with absolute certainty that records or further records do not exist. However, in my view, in order to properly discharge its obligations under the *Act*, the institution must provide me with sufficient evidence to show that it has 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 an institution's response, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

### **Representations**

In the course of this appeal and in support of their position that no records responsive to this part of the request exist, the Police provided a copy of an affidavit sworn by the named police officer.

In the affidavit, the named officer identifies himself by name, position and badge number. He identifies that he was on duty at a specified location during the date and time referenced in the request. He states that, on that day, appellant A approached him and asked about the identities of two officers who had stopped him while driving on the previous day. He then states:

I do not recall the exact time I spoke with [appellant A] on this date.

I spoke briefly with [appellant A] in the foyer of the Niagara Falls Division and then provide[d] him with the names of the two Officers involved in [the event]. I did not make any notations in my duty book pertaining to my conversation with [appellant A].

The officer's affidavit was shared with the appellants. The appellants provided me with extensive representations in response to the Notice of Inquiry and the copy of the Police representations I sent to them. Many of these submissions do not, however, address the adequacy of search issue.

With respect to the issue of whether responsive records exist, or whether the search conducted by the Police was reasonable, the appellants state that it is their position that the named officer was acting contrary to certain identified sections of the *Police Services Act* by not recording the information concerning the conversation he had with appellant A. Appellant A also refers to previous contacts he has had with the named officer and other members of the Police, and provides a substantial amount of material to me documenting these contacts.

### **Findings**

As set out above, the issue that I must decide 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, the decision of the Police will be upheld. If I am not satisfied, further searches may be ordered.

In this appeal, I have been provided with affidavit evidence from the named police officer whose records were requested indicating that he did not make a record of the incident referred to by the appellants. Although the appellants take the position that records should have been kept, the appellants do not take issue with the named officer's statement that he did not keep a record of the incident; in fact, appellant A refers to the named officer's statement, and relies on it in support of his position relating to other ancillary concerns he has about the actions of the Police.

Based on the representations provided to me, and in particular on the affidavit evidence submitted by the named officer, I am satisfied that the search conducted by the Police for records responsive to part one of the request were reasonable.

### **ORDER:**

I uphold the decision of the Police.

Original signed by: \_\_\_\_\_  
Frank DeVries  
Adjudicator

\_\_\_\_\_  
April 12, 2005