

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-2707-I

Appeal MA11-158-2

Ottawa Police Services Board

March 27, 2012

Summary: The appellant sought access to police records relating to various incidents in which he was involved with the police. The police granted access to most of the information contained in the records, but denied access to the remaining information under section 38(a), in conjunction with section 8, and section 38(b), in conjunction with section 14(1). During the mediation of the appeal, the appellant raised the issue of reasonable search. In this interim order, the adjudicator finds that the police conducted a reasonable search and upholds the police's decision, in part, under section 14(1) but does not uphold the police's decision under section 8(1)(i). The adjudicator also finds that the police did not exercise their discretion under sections 38(a) and 38(b). The police are ordered to disclose some records to the appellant, to exercise their discretion under sections 38(a) and 38(b) and to provide the adjudicator with representations on the exercise of discretion. The adjudicator remains seized of the matter pending the exercise of discretion.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2 (definition of personal information), 8(1)(i), 8(1)(l), 14(1), 14(3)(b), 17, 38(a), 38(b), 42.

Orders Considered: Orders PO-1665, PO-2563.

OVERVIEW:

[1] This order disposes of some, but not all, of the issues raised in an appeal of an access decision made by the Ottawa Police Services Board (the police) under the

Municipal Freedom of Information and Protection of Privacy Act (the *Act*) following a request for access to:

I am requesting all information collected by the Ottawa Police Service about myself, [a named individual]. The information I am requesting is any and all information collected about myself without exclusions, which is to include all documents, files, audio and video material, Incident Reports and Officers' notes.

[2] The police located responsive records and provided access to them, in part. Access to the remaining portions of the records was denied pursuant to section 38(a), in conjunction with sections 8(1)(i) and 8(1)(l) and section 38(b), in conjunction with section 14(1) of the *Act*.

[3] The appellant subsequently filed an appeal with this office. During the mediation of the appeal, the appellant advised the mediator that he believed that further records exist. The police conducted a further search and located an additional record, which was disclosed, in full, to the appellant. The police also provided the mediator with details of the additional search.

[4] In addition, the police advised the mediator that some records may have been expunged from their record-holdings, in accordance with the police's retention schedule, a copy of which was provided to the mediator.

[5] The appellant advised the mediator that he was of the view that additional records should still exist. Accordingly, reasonable search was added as an issue in this appeal, in addition to the application of the exemptions claimed by the police.

[6] The matter was then moved to the adjudication stage of the process where an adjudicator conducts an inquiry. I provided the police, initially, with the opportunity to provide representations. The police advised staff of this office that they would not be submitting representations. I then sought and received representations from the appellant. I subsequently provided the police with a further opportunity to provide representations in this inquiry, but they again advised staff of this office that they would not be providing representations.

[7] For the reasons that follow, I uphold the police's search as being reasonable and I uphold their decision, in part. I do not uphold the police's claim under section 8(1)(i) and order them to disclose some additional portions of the records to the appellant. I also order the police to exercise their discretion under sections 38(a) and 38(b) and to provide representations to this office and to the appellant setting out how they exercised their discretion to deny access to the records which were not disclosed to the appellant. I remain seized of this matter pending the police's exercise of discretion.

RECORDS:

[8] The records at issue consist of the withheld portions of general occurrence reports, witness statements and police officers' notes.

ISSUES:

- A: Did the institution conduct a reasonable search for records?
- B. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- C: Does the mandatory exemption at section 14(1) or the discretionary exemption at section 38(b) apply to the information at issue?
- D: Does the discretionary exemption at section 38(a) in conjunction with the section 8 exemption apply to the information at issue?
- E: Did the institution exercise its discretion under sections 38(a) in conjunction with section 14(1) and 38(b) in conjunction with section 8? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A: Did the institution conduct a reasonable search for records?

[9] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.¹ If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[10] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.²

¹ Orders P-85, P-221 and PO-1954-I.

² Orders P-624 and PO-2559.

[11] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.³

[12] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.⁴

[13] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.⁵

[14] The appellant provided representations in this appeal. However, his representations do not provide a reasonable basis for concluding that further records exist.

[15] During the mediation of this appeal, the police conducted a further search and provided details to the mediator of the nature and extent of the search. The police located a further record as a result of this search and disclosed it to the appellant.

[16] Based on the information provided by the police and the absence of a reasonable basis for his belief that additional records exist, I am satisfied that the police conducted a reasonable search.

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

[17] In order to determine if the mandatory exemption at section 14(1) or the discretionary exemption at section 38(b) may apply, it is necessary to decide whether the records contain “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,

³ Orders M-909, PO-2469, PO-2592.

⁴ Order MO-2185.

⁵ Order MO-2246.

- (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;

[18] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁶

[19] The appellant's representations do not address whether the records contain personal information.

[20] I have reviewed the records and, in my view, they contain personal information about the appellant and about other identifiable individuals.

⁶ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[21] In particular, most of the records contain the following information about other individuals:

- information relating to the race, national origin, colour, age, sex, marital or family status, which falls within the ambit of paragraph (a) of the definition of that term in section 2(1);
- information relating to the psychiatric, psychological or criminal history, which falls within the ambit of paragraph (b) of the definition;
- the address and telephone number, which falls within the ambit of paragraph (d) of the definition;
- the personal opinions or views of the individual except where they relate to another individual, which falls within the ambit of paragraph (e) of the definition; and
- the individual's name where it appears with other personal information relating to the individual, which falls within the ambit of paragraph (h) of the definition.

[22] In addition, some of the records contain the appellant's personal information, which consists of the views or opinions of another individual about him, which falls within the ambit of paragraph (g) of the definition in section 2(1). In addition, the records also include reference to the appellant's name along with other personal information relating to him, which falls within the ambit of paragraph (h) of the definition in section 2(1).

C: Does the mandatory exemption at section 14(1) or the discretionary exemption at section 38(b) apply to the information at issue?

[23] In their decision letter, the police denied access, in whole or in part, to the records at issue, relying on the mandatory exemption in section 14(1) or the discretionary exemption in section 38(b).

[24] 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, including section 38(b). Section 38(b) introduces a balancing principle that must be applied by institutions where a record contains personal information of both the requester and another individual. In this case, the police must look at the information and weigh the appellant's right of access to his own personal information against the other individuals' right to the protection of their privacy. If the police determine that release of the information would constitute an unjustified invasion of the other individuals' personal privacy, then section 38(b) gives the police the discretion to deny access to the appellant's personal information.

[25] In determining whether the exemption in section 38(b) applies, sections 14(1), (2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of another individual's personal privacy. Section 14(2) provides some criteria for the police to consider in making this determination; section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. In addition, if the information fits within any of paragraphs (a) to (e) of section 21(1), disclosure is not an unjustified invasion of personal privacy under section 38(b).

[26] Where a record contains personal information only of an individual other than the requester, the institution must refuse to disclose that information unless disclosure would not constitute an "unjustified invasion of personal privacy".

[27] In their decision letter, the police rely on the presumption in section 14(3)(b) of the *Act* to deny access to the personal information contained in the records. Section 14(3)(b) of the *Act* states:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where 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;

. . .

[28] Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.⁷

[29] As previously stated, the police did not provide representations in this appeal. The appellant submits that he should be given full disclosure of all responsive records in order to protect himself and his family from harm by the police, the Government of Canada and other public agencies.

[30] I have carefully reviewed the records that were withheld from the appellant either in whole or in part. I note that the majority of the appellant's personal

⁷ Orders P-242 and MO-2235.

information has been disclosed to him by the police and that most of the personal information that has been withheld from him consists of the personal information of other individuals, as identified above.

[31] In my view, all of the records at issue in this appeal were compiled by the police and are identifiable as part of various investigations into possible violations of law occurring over a number of years. I am, therefore, satisfied that the personal information remaining at issue falls within the ambit of the presumption in section 14(3)(b). The appellant submits that he requires full disclosure in order to protect his family from harm, but did not identify or provide evidence on any of the factors favouring disclosure in section 14(2).

[32] A number of the records contain only the personal information of other individuals. I am satisfied that the disclosure of this information would constitute an unjustified invasion of the personal privacy of those individuals. Therefore, I uphold the application of the mandatory exemption at section 14(1) with respect to those records.

[33] Most of the remaining records contain both the personal information of the appellant and of other individuals. I am satisfied that the disclosure of this information would also constitute an unjustified invasion of the personal privacy of the other individuals. Accordingly, I find that the withheld portions of these records are exempt from disclosure under section 38(b), subject to my review of the police's exercise of discretion.

[34] However, three records contain only the personal information of the appellant. I have no submissions from the police, and taking into account the fact that no unjustified invasion of another individual's personal privacy would result from disclosure, I do not uphold the application of the exemption at section 14(1) with respect to these records. The police have also claimed section 38(a), in conjunction with section 8, in denying access to these three records, which I will consider, below.

D: Does the discretionary exemption at section 38(a) in conjunction with the section 8 exemption apply to the information at issue?

[35] 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, including section 38(a), which states:

A head may refuse to disclose to the individual to whom the information relates personal information,

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.

[36] In this case, the police are relying on section 38(a) in conjunction with sections 8(1)(i) and 8(1)(l) to deny access to six records, in whole and one record, in part. I upheld the exemption at section 14(1) with respect to three of these records, in full and one, in part. Therefore, I will consider the exemption at section 38(a) in conjunction with section 8 to the remaining four records.

[37] Sections 8(1)(i) and 8(1)(l) state:

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

- (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;
- (l) facilitate the commission of an unlawful act or hamper the control of crime.

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

"law enforcement" means,

- (a) policing,
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or
- (c) the conduct of proceedings referred to in clause (b)

[39] The term "law enforcement" has been found to apply to a police investigation into a possible violation of the *Criminal Code*.⁸ As previously stated, I am satisfied that all of the records at issue were compiled as part of various police investigations into possible violations of the *Criminal Code*.

[40] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.⁹

⁸ Orders M-202, PO-2085.

⁹ *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

[41] 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.¹⁰

[42] The appellant's representations do not address the exemption at section 8. As previously stated, the police did not provide representations in this appeal. The index of records that the police provided to this office at the commencement of the appeal indicates that police denied access to a portion of record 11, relying on section 8(1)(l). The police denied access to the remaining three records, in full, relying on section 8(1)(i).

[43] Having reviewed the records, I note that the portion of record 11 which was withheld under section 8(1)(l) consists solely of a police "ten" code.

[44] The IPC has issued many orders regarding the release of police codes and has consistently found that section 8(1)(l) and the provincial equivalent apply to "ten" codes.¹¹ These orders adopted the reasoning in Order PO-1665, where Adjudicator Laurel Cropley found:

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

[45] Similarly, Adjudicator Cropley found that the rationale and conclusions in that order continued to be applicable in Order PO-2563, where she stated:

Moreover, given the difficulty of predicting future events in the law enforcement context and the nature of the information at issue, I find that the ministry provided "detailed and convincing" evidence to establish a "reasonable expectation of harm" with respect to the ten-codes, alerts, location and zone codes.

[46] I adopt Adjudicator Cropley's reasoning for purposes of this appeal with respect to the "ten" code information contained in the record. Although the police have not provided "detailed and convincing" evidence to establish a reasonable expectation of

¹⁰ 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.).

¹¹ See Orders M-93, M-757, MO-1715 and PO-1665.

harm with respect to disclosure of the "ten" codes, I am satisfied, based on the approach taken by this office in the past, that disclosure of "ten" codes could establish a reasonable expectation of harm. Therefore, I find that the "ten" codes contained in the record 11 qualifies for exemption under section 38(a), in conjunction with section 8(1)(l) of the *Act*, subject to my review of the police's exercise of discretion.

[47] With respect to the remaining three records, the police rely on section 8(1)(i), which states:

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

- (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;

[48] With respect to this exemption, not only have the police not provided "detailed and convincing" evidence that disclosure of these records may reasonably be expected to endanger the security of a building, vehicle or of a system or procedure established for the protection of items, they have not provided any evidence at all.

[49] Under section 42 of the *Act*, where an institution refuses access to a record or part of a record, the burden of proof that the record or part of the record falls within one of the specified exemptions in the *Act* lies upon the institution.

[50] The police have not met the burden of proof with respect to the records for which they have claimed section 8(1)(i). Therefore, I do not uphold the exemption and will order the police to disclose these three records to the appellant.

E: Did the institution exercise its discretion under sections 38(a) in conjunction with section 14(1) and 38(b) in conjunction with section 8? If so, should this office uphold the exercise of discretion?

[51] The sections 38(a) and 38(b) exemptions are discretionary, and permit 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.

[52] 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; or it fails to take into account relevant considerations.

[53] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹²

- 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.

[54] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹³

[55] The appellant's representations did not address the police's exercise of discretion. As stated above, an institution must exercise its discretion. Unfortunately, I

¹² Orders P-344, MO-1573.

¹³ Order MO-1573.

am unable to determine whether the police exercised their discretion properly, as I have not been provided with any evidence from the police on this issue despite my specific request for its representations on this issue.

[56] These exemptions are discretionary and, as such, the police must turn their mind to whether or not to disclose information and must articulate this to the appellant and this office, explaining the factors used in exercising their discretion, so that this office can be sure they considered relevant factors and did not consider unfair or irrelevant factors.

[57] I will, therefore, order the police to exercise their discretion, and provide the appellant and this office with written representations on how they exercised their discretion. I remain seized of this matter pending the resolution of the issue outlined in order provision three.

ORDER:

1. I uphold the police's search as being reasonable.
2. I order the police to disclose records 137, 147 and 157 to the appellant by **May 1, 2012** but not before **April 25, 2012**.
3. I order the police to exercise their discretion under sections 38(a) and 38(b) in accordance with the analysis set out above and to advise the appellant and this office of the result of this exercise of discretion, in writing. If the police continue to withhold all or part of the records, 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 exercise, and their explanation to the appellant, with the copy to this office no later than **May 1, 2012**. If the appellant wishes to respond to the police's exercise of discretion, and/or their explanation for exercising their discretion to withhold information, he must do so within **21 days** of the date of the police's correspondence by providing me with written representations.
4. I remain seized of this matter pending the resolution of the issue outlined in provision 3.

Original signed by: _____
Cathy Hamilton
Adjudicator

_____ March 27, 2012