

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-2711

Appeal MA11-19

London Police Services Board

March 30, 2012

**Summary:** The police received a request under the *Act* for the full accident report regarding an accident which involved the requester. The police located the responsive records and denied access in part under sections 38(a) and (b). The police also applied the exclusionary provision in section 52(3) to a portion of the records. This order partly upholds the police's decision with respect to sections 38(a) and (b) and does not uphold the police's decision with respect to section 52(3)3.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, 52(3)3, 2(1) definition of personal information, 38(b), 14(3)(b), 38(a), 8(1)(c), (d), (h), 15(a).

**Orders and Investigation Reports Considered:** Orders MO-2424, PO-2474.

### OVERVIEW:

[1] The London Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for the full accident report regarding a hit and run motor vehicle accident which involved the requester.

[2] The police located the responsive records and issued a decision in which it provided partial access to the records, severing information under sections 8(1)(c), (d), (h) and (l) (law enforcement), section 12 (solicitor-client privilege) and section 14(1)

(personal privacy). The police also claimed that a portion of the records is excluded from the *Act* pursuant to section 52(3) (labour relations and employment).

[3] The requester, now the appellant, appealed this decision.

[4] During mediation the appellant removed from the scope of the appeal the police codes which were severed under section 8(1)(l). Therefore, section 8(1)(l) is no longer at issue in this appeal. As the appellant believed that there were audio recordings that had not been provided, reasonable search was added as an issue. The police also noted the application of sections 38(a) and (b) (right of access to one's own personal information) to all of the records.

[5] After the mediator's report was issued, the police located an audio recording that relates to the request, and issued a new decision denying access to it under sections 8(1)(d) and (h) and 14(1) of the *Act*. On receipt of this new decision, the appellant advised the mediator that search was no longer an issue in this appeal.

[6] In the index of records provided to the mediator, the police claimed the application of section 38(a) in conjunction with section 15(a) (publicly available information) to the motor vehicle accident report at page 100 of the records.

[7] This file was moved to adjudication stage of the inquiry process where an adjudicator conducts an inquiry. I sought and received representations from the police and the appellant, which were shared in accordance with *Practice Direction 7* of the *IPC Code of Procedure*. I also sought representations from the persons whose personal information may be contained in the records (the affected persons). I did not receive representations from the affected persons.

[8] In this order, I partly uphold the police's decision with respect to sections 38(a) and 38(b).

## **RECORDS:**

[9] The records consist of police general occurrence and other reports, as well as a CD of an audio recording.

## **ISSUES:**

A. Does section 52(3)3 exclude pages 74, 82 and 83 of the records from the *Act*?

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

C. Does the discretionary exemption at section 38(a) in conjunction with section 15(a) apply to the motor vehicle accident report at page 100 of the records?

D. Does the discretionary exemption at section 38(b) apply to the information at issue?

E. Does the discretionary exemption at section 38(a) in conjunction with the sections 8(1)(c), (d) and (h) exemptions apply to the information at issue?

F. Did the institution exercise its discretion under sections 38(a) and (b)? If so, should this office uphold the exercise of discretion?

## **DISCUSSION:**

### **A. Does section 52(3)3 exclude pages 74, 82 and 83 of the records from the *Act*?**

[10] Section 52(3)3 states:

Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[11] If section 52(3) applies to the records, and none of the exceptions found in section 52(4) applies, the records are excluded from the scope of the *Act*.

[12] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 1, 2 or 3 of this section, it must be reasonable to conclude that there is "some connection" between them. [Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).]

[13] The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship [Order PO-2157].

[14] If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date [*Ontario (Solicitor*

*General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507].

[15] Section 52(3) may apply where the institution that received the request is not the same institution that originally "collected, prepared, maintained or used" the records, even where the original institution is an institution under the *Municipal Freedom of Information and Protection of Privacy Act* [Orders P-1560 and PO-2106].

[16] The exclusion in section 52(3) does not exclude all records concerning the actions or inactions of an employee simply because this conduct may give rise to a civil action in which the Crown may be held vicariously liable for torts caused by its employees [*Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.)].

[17] The type of records excluded from the *Act* by section 52(3) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions [*Ministry of Correctional Services*, cited above].

[18] The police submit that:

...the investigating officer submitted his final report for approval by the auditing unit. The auditors discovered this report required corrections be made. The report was directed back to the officer by way of "critique". This is a procedure used by the London Police to correct reports and a means of monitoring the performance of officers.

These critiques are sent to the investigating officer as well as his/her Sergeant. The Sergeants are required to monitor the performance of their officers and provide corrective measures in the event of re-occurring critiques. These critiques could result in entries onto their Performance Management Occurrence report. These same reports are viewed by the Sergeants when completing the officer's annual Performance Appraisal Report...

The information contained in these Performance Appraisal Reports have direct impact on an officers standard "reclassification" schedule. As well, these reports will have a direct impact on any internal job competition the officer may choose to compete for...

It is respectfully submitted that such proceedings are clearly relating to the employment of a person by the institution, since the performance of the police officer is carefully monitored by the institution and a

culmination of such critiques could affect job competitions, or have disciplinary consequences.<sup>1</sup>

***Analysis/findings***

[19] For section 52(3)3 to apply, the institution must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and
3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

[20] Pages 74, 82 and 83 of the records contain information related to the assignment of officers to review a report. I find that these pages do not contain information about labour relations or employment-related matters. These pages do not contain information that relates to the terms and conditions of employment or human resources questions. Accordingly, I find that part 3 of the test has not been met and the exclusionary provision in section 52(3)3 does not apply.

[21] Furthermore, the appellant sought to receive in his request the “full accident report regarding a hit and run accident [he] was a victim in.”

[22] Pages 74, 82 and 83 of the records do not contain information about the accident, nor are these pages a part of the accident report. Accordingly, I also find that pages 74, 82 and 83 of the records do not reasonably relate to the appellant’s request and as such are not responsive to the appellant’s request. As these pages are not responsive to the appellant’s request, I will not be considering these pages further in this order.

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

[23] 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:

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<sup>1</sup> Order MO-1913.

“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;

[24] 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].

[25] Sections 2(2), (2.1) and (2.2) also relate to the definition of personal information. These sections state:

(2) Personal information does not include information about an individual who has been dead for more than thirty years.

(2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(2.2) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[26] 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 and PO-2225].

[27] 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 and MO-2344].

[28] 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.)].

[29] The police submit that they investigated a motor vehicle accident involving the appellant. During the investigation, they spoke to the appellant and other affected persons. Information such as addresses, telephone numbers, dates of births, gender, place of employment and statements were collected from these individuals, as such the police submit that the records contain the personal information of several identifiable individuals, including the appellant.

[30] The appellant did not provide representations as to whether the records contain personal information.

### ***Analysis/findings***

[31] Based upon my review of the information at issue in the records, I find that some of the information remaining at issue in the records consists of the personal information of the appellant and other identifiable individuals. In accordance with the definition of personal information set out above, the personal information in the records includes these individuals' home addresses, telephone numbers, dates of births, gender, employment history, and the views or opinions of other individuals about individuals,

and individuals' names that appear with other personal information relating to these individuals or where the disclosure of the names would reveal other personal information about the individuals.

[32] However, some of the information remaining at issue is not personal information but information about identifiable individuals in their professional, official or business capacity. For instance, there is information about the tow truck driver, the police officers who investigated the incident, and the name of the crown prosecutor. This information does not reveal something of a personal nature about these individuals.

[33] There is also information in the records that does not relate to individuals and is not personal information. This includes information about a truck, air bags, and a police dog.

[34] The personal privacy exemption in section 38(b) cannot apply to information that is not personal information. I will, therefore, order the information that I have found not to be personal information disclosed unless the police have also claimed section the application of section 38(a).

**C. Does the discretionary exemption at section 38(a) in conjunction with section 15(a) apply to the motor vehicle accident report at page 100 of the records?**

[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.

[36] Section 38(a) reads:

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

[37] Section 15 states,

a head may refuse to disclose a record if,

the record or the information contained in the record has been published or is currently available to the public

[38] The police submit that the one page motor vehicle accident report at page 100 of the records is available to the public through a regularized system of access. They



state that a member of the public can obtain this by contacting the Ministry of Transportation (the ministry), Licensing Administration Office<sup>2</sup> or by ordering online<sup>3</sup> and paying \$12.00. The police rely on the findings in Orders MO-1573 and MO-1913, in support of their claim that there is a "regularized system of access" for this one page motor vehicle accident report.

[39] The appellant did not provide representations on this issue.

### ***Analysis/findings***

[40] I agree with the police that there is a regularized system of access with respect to the one page motor vehicle accident report found at page 100 of the records. As one of the drivers involved in the accident, the appellant is able to access this report from the ministry's website<sup>4</sup> by paying the \$12.00 fee and providing his driver's license number and the date and location of the accident. Accordingly, as this motor vehicle accident report is publicly available, section 15(a) applies. Therefore, subject to my review of the police's exercise of discretion, page 100 of the records is exempt by reason of section 38(a) read in conjunction with section 15(a).

### **D. Does the discretionary exemption at section 38(b) apply to the information at issue?**

[41] 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.

[42] 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.

[43] 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.

[44] Sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met. If the information fits within any of paragraphs (a) to (e) of section 14(1), or if any of paragraphs (a) to (c) of section

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<sup>2</sup> Main Floor, Room 160, Building A, 2680 Keele Street, Downsview, ON M3M 3E6, phone number 416-235-2999 or 1-800-387-3445.

<sup>3</sup> [www.MTO.gov.on.ca](http://www.MTO.gov.on.ca).

<sup>4</sup> <https://www.apps.rus.mto.gov.on.ca/jtips/copyofaccidentreport.do?method=view&lang=EN>.

14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). In this appeal, neither sections 14(1)(a) to (e) or section 14(4) apply.

[45] 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). Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the "public interest override" at section 16 applies [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. Section 14(4) does not apply nor has the appellant raised the application of section 16.

[46] The police have applied section 14(3)(b) to the information that I have determined to be personal information in the records. This includes information found on all of the pages of the records except for the withheld information on pages 3, 4, 68 and 101 where the police have not claimed the application of section 38(b). Section 14(3)(b) 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;

[47] The police submit that they responded after the appellant reported a hit and run motor vehicle accident. As a result, an investigation was initiated into a possible violation of the *Criminal Code of Canada (Criminal Code)* and/or the *Highway Traffic Act* and subsequently a report, which includes the appellant's and affected persons' personal information, was compiled.

[48] The appellant states that he was aware of the name of the other driver allegedly involved in the accident. He states that he attended at court regarding this accident.

[49] In this appeal, it is clear from the records that the personal information at issue was compiled and is identifiable as part of an investigation into a possible violation of law. This violation of law relates to the police's investigation into the hit and run motor vehicle accident. Accordingly, I find that the presumption in section 14(3)(b) applies to the personal information in the records and is, therefore, subject to the personal privacy exemption in section 38(b). This includes the personal information on page 79 of the records for which the police have claimed section 12. As this is the only information that section 12 has been claimed, and as I have found the information

exempt under section 38(b), I will not be considering the application of section 12 in this decision.

[50] Accordingly, I will review the police's exercise of discretion in order to determine whether the personal information that has been identified by the police as subject to section 14(3)(b) is exempt by reason of the personal privacy exemption in section 38(b).

**E. Does the discretionary exemption at section 38(a) in conjunction with the sections 8(1)(c), (d) and (h) exemptions apply to the information at issue?**

[51] The police have also claimed that section 38(a) in conjunction with sections 8(1)(c), (d) and (h) apply to some of the records. These sections read:

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;
- (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;
- (h) reveal a record which has been confiscated from a person by a peace officer in accordance with an Act or regulation;

[52] 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)

[53] The term "law enforcement" has been found to apply a police investigation into a possible violation of the *Criminal Code* [Orders M-202, PO-2085]

[54] 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.)].

[55] 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.)].

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

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

[57] 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, MO-2347-I and PO-2751].

[58] The techniques or procedures must be "investigative". The exemption will not apply to "enforcement" techniques or procedures [Orders PO-2034, P-1340].

[59] The police provided both confidential and non-confidential representations on section 8(1). In their non-confidential representations, they submit that section 8(1)(c) applies as they conducted an extensive investigation into a hit and run motor vehicle accident which resulted in charges based on evidence gathered. Further, they submit that the techniques and systems used to extrapolate the evidence from records should not be disclosed as these are techniques used by their forensic experts. The police rely on Order MO-1786 where Adjudicator Beverley Caddigan stated:

In my view, this information is clearly "investigative" in nature and the techniques and procedures described are not generally known to the public. Accordingly, I find that section 8(1)(c) applies to exempt this information from disclosure.

The withheld information describes the steps to be followed upon receiving and responding to a call. I am satisfied that the withheld information documents investigative techniques and procedures that are unique to investigations of domestic violence. Accordingly, I find that section 8(1)(c) applies to exempt this information from disclosure.

[60] The police also rely on Order MO-2424 where Adjudicator Catherine Corban found section 8(1)(c) to apply to:

- disclosure of information relating to communication and surveillance techniques,
- information related to techniques used by officers to perform certain tasks during the course of the investigation, and
- procedures applied by officers at crime scenes or in relation to seized property in order to gather evidence to assist in the resolution of the investigation,

[61] The appellant states that he is aware that the records contain several warrants with regards to cell phone records, video surveillance and other items.

#### *Analysis/findings*

[62] The police have applied section 8(1)(c) to pages 49 to 51 of the records. The police provided specific representations on the technique or procedure in its confidential representations. I find that the specifics of this technique or procedure set out in pages 49 to 51 is not generally known to the public. Disclosure of these pages could reasonably be expected to hinder or compromise this technique or procedure's effective utilization.

[63] Therefore, I find that section 38(a) in conjunction with section 8(1)(c) applies to the information on pages 49 to 50 of the records. I will consider below whether the police exercised their discretion in a proper manner with respect to this information.

#### ***Section 8(1)(d): confidential source***

[64] The institution must establish a reasonable expectation that the identity of the source or the information given by the source would remain confidential in the circumstances [Order MO-1416].

[65] Concerning the remaining information at issue, the police have applied 38(a) in conjunction with section 8(1)(d) to parts of pages 26, 44 to 45 and 90. The police submit that during the law enforcement investigation, they interviewed several affected

persons and that these affected persons would not expect their confidential information provided to the police to be released and possibly become known. To release the information they provided could identify them through their place of business or setting in which the information was obtained.

[66] The appellant did not provide representations on the application of section 8(1)(d) to the records.

*Analysis/findings*

[67] The information at issue at pages 26, 44 to 45 and 90 does not contain personal information. The information that is at issue at page 90 also does not refer to an identifiable individual. Based upon my review of the information at issue at pages 26, 44 to 45 and 90, I find that the police have not established a reasonable expectation that the identity of the source or the information given by the source would remain confidential in the circumstances of this appeal.

[68] The information at issue was either not supplied by an identified individual as in the case of the information at page 90 or was supplied by individuals in their business capacity with no indication that there was a reasonable expectation that their identity would remain confidential. Accordingly, I find that section 38(a) in conjunction with section 8(1)(d) does not apply to the information at issue at pages 26, 44, 45 and 90. As no other exemptions have been claimed for this information, I will order it disclosed.

***Section 8(1)(h): record confiscated by a peace officer***

[69] The police claim that section 8(1)(h) applies to portions of the records at pages 3, 4, 35, 46, 47, 52, 66, 67, 68, 69, 78, 84 to 89 and 101.

[70] The purpose of section 8(1)(h) is to exempt records that have been confiscated or "seized" by search warrant [Order PO-2095].

[71] This exemption applies where the record at issue is itself a record which has been confiscated from a person by a peace officer, or where the disclosure of the record could reasonably be expected to reveal another record which has been confiscated from a person by a peace officer [Order M-610].

[72] The police provided both confidential and non-confidential representations on this issue. In their non-confidential representations, they submit that evidence was gathered during a detailed investigation into a hit and run motor vehicle accident. They state that disclosure of the information at issue would reveal evidence confiscated by a police officer in the performance of their duties pursuant to the *Police Services Act*, R.S.O. 1990, Chapter P.15.

*Analysis/findings*

[73] A "record" is defined in section 2(1) of the *Act* as:

Any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes,

(a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof, and

(b) subject to the regulations, any record that is capable of being produced from a machine readable record under the control of an institution by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution;

[74] At issue are portions of several pages of the records which consist of police officer notes and reports. Therefore, none of information itself is a record which has been confiscated from a person by a peace officer. Therefore, I must decide whether disclosure of the information at issue in the records could reasonably be expected to reveal another record which has been confiscated from a person by a peace officer

[75] The items referred to in the portions of the pages of the records at issue have been confiscated from a person by a police officer in accordance with the *Police Services Act*. However, not all of the items referred to in the portions of the records at issue are actually records as set out in the definition of this term in section 2(1) of the *Act* or could reasonably be expected to reveal another record which has been confiscated from a person by a peace officer.

[76] In Order MO-2424, Adjudicator Catherine Corban found that section 8(1)(h) did not apply to actual items (for example, clothing, bags and other personal items). Similarly, in this appeal there are several references in the pages of the records at issue to items that are physical property that in no way could be said to be a record of information.

[77] In Order PO-2474, Adjudicator Frank DeVries determined that section 14(1)(h) of the *Freedom of Information and Protection of Privacy Act*, the provincial equivalent of section 8(1)(h) of the *Act*, did not apply to information that describes in a general way the type of material seized by the police.

[78] In this appeal, I find that the information at issue on pages 47, 52 and 78 could reasonably be expected to reveal a record which has been confiscated from a person by a police officer. Therefore, I find that section 38(a) in conjunction with section 8(1)(h) applies to this information. I will consider below whether the police exercised their discretion in a proper manner with respect to this information.

[79] Concerning the remaining information in pages 3, 4, 35, 46, 47, 52, 66, 67, 68, 69, 78, 84 to 89 and 101, I find that section 8(1)(h) does not apply. As the police did not claim another exemption for this information and no mandatory exemptions apply, I will order it disclosed.

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

[80] The sections 38(a) and (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.

[81] 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.

[82] 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 43(2)].

[83] 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.

[84] Concerning section 38(a), the police state that they considered the availability of records to the public through a regularized system of access. They state that:

First and foremost we considered whether the public system of access, which exists and which entails a nominal fee, will render the records inaccessible to the requester. This determination is based on the word of the requester, whose responsibility I would consider it, to demonstrate that the fees would in fact, be prohibitive. This in conjunction with the requester's need for the records, would be a consideration as to the use of section 15(a). There has been no compelling, sympathetic or financial burden demonstrated, that would direct me to consider release of the records as permitted by the *Act*.

[85] Concerning section 38(b), the police submit that as the records at issue contain personal information of other individuals given to them during the course of an investigation involving the appellant, they weighed the right of access of the appellant's information to that of the affected persons. They submit that the affected persons' personal privacy outweighs the right of access by the appellant.

[86] The appellant disagrees with the police that his right of access to his personal information does not outweigh the personal privacy of the affected persons.

***Analysis/findings***

[87] Based upon my review of the police's representations, I find that they exercised their discretion in a proper manner taking into account relevant factors with respect to the information that I have found subject to sections 38(a) and (b). The information that is subject to these exemptions is sensitive personal or other information gathered in the course of a law enforcement investigation.

[88] Accordingly, I am upholding the police's exercise of discretion.

**ORDER:**

1. I order the police to disclose the portions of the records that are not exempt by **May 7, 2012** but not before **May 1, 2012**. For ease of reference I have enclosed a copy of the records with the copy of this order sent to the police that highlights the portions that should be disclosed in compliance with this provision.
2. I uphold the police's decision to withhold the remaining portions of the records.
3. In order to verify compliance with the terms of this order, I reserve the right to require the police to provide me with a copy of the information disclosed to the appellant pursuant to order provision 1.

Original Signed by: \_\_\_\_\_  
Diane Smith  
Adjudicator

\_\_\_\_\_ March 30, 2012