

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2737-F

Appeal MA11-158-2

Ottawa Police Services Board

May 23, 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 Interim Order MO-2707-I, the adjudicator found that the police conducted a reasonable search and upheld the police's decision, in part, under section 14(1) but did not uphold the police's decision under section 8(1)(i). The adjudicator also found that the police did not exercise their discretion under sections 38(a) and 38(b). The police were 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. This is the final order, disposing of the remaining issue in the appeal, which is the police's exercise of discretion, which is upheld.

OVERVIEW:

[1] This is my final order in this appeal. It addresses the exercise of discretion by the Ottawa Police Service (the police), disposing of the final issue raised as a result of an access decision made by 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 the exemptions in 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] On, March 27, 2012, I issued Order MO-2707-I, upholding the police's search as being reasonable and upholding their decision, in part. I did not uphold the police's claim under section 8(1)(i) and ordered them to disclose some additional portions of the records to the appellant.

[4] In that order, I commented as follows on the police's exercise of discretion:

Unfortunately, I 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.

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.

[5] Accordingly, I included Order Provision 3, which contained the following term relating to the exercise of discretion:

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.

[6] The police complied with the provision by sending the appellant a letter dated April 30, 2012 setting out the results of their exercise of discretion. In that same letter, they advised the appellant that he could make an appointment with them to pick up the records I had ordered disclosed in MO-2707-I. The appellant confirmed with staff of this office that he received the police's letter of April 30, 2012, stating that the police continue to refuse to disclose any further information other the records I ordered them to disclose to him.

[7] The appellant did not provide further representations on the police's exercise of discretion.

DISCUSSION:

Did the police properly exercise their discretion under sections 38(a) and 38(b) of the *Act*?

[8] The sections 38(a) and 38(b) exemptions are discretionary. Therefore, once it is determined that a record qualifies for exemption under this section, the police must exercise their discretion in deciding whether or not to disclose it.

[9] Under section 39(a) in conjunction with section 8(1)(l), the exercise of discretion involves a weighing of the appellant's right of access against the police's ability to control crime.

[10] Under section 38(b), the exercise of discretion 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.

[11] 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.

[12] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹

¹ 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 and 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; and
- the historic practice of the institution with respect to similar information.

[13] The police submit that, in exercising their discretion, they took into consideration the fact that the withheld portions of the records were compiled and identifiable as part of an investigation into a possible violation of law. This information, the police state, is confidential to maintain fairness toward citizens and their presumption of innocence. The police also submit that, as part of their exercise of discretion, they weighed the appellant's interest in access to information against the protection of the other individuals' personal privacy.

[14] It is also significant that the appellant has received all of the records of his interactions with the police in response to his request, and that the withheld information relates only to other individuals.

[15] Under all the circumstances, therefore, I am satisfied that the police have appropriately exercised their discretion under sections 38(a) and 38(b).

ORDER:

I uphold the police's exercise of discretion to apply the exemptions in sections 38(a) and 38(b) to the withheld information that I did not order disclosed in Order MO-2707-I.

Original Signed By: _____

May 23, 2012

Cathy Hamilton
Adjudicator