Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2805

Appeal MA11-487

Halton Regional Police Services Board

October 26, 2012

Summary: The appellant requested records pertaining to himself held by the police. The police located responsive records and granted partial access to them, withholding portions pursuant to the discretionary exemptions at section 38(a) (discretion to refuse to disclose requester's own information), in conjunction with sections 8(1)(e) and (l) and 8(2)(a) (law enforcement) and section 38(b) (personal privacy). The appellant appealed this decision and claimed that additional records should exist. In this order, a number of preliminary issues that arose during the inquiry stage of the appeal are addressed, including a finding that sections 8(1)(e) and (l) are not at issue and that certain portions of the officers' notes are not responsive to the request. The adjudicator considered whether the appellant had raised the amount of the fees as an issue and determined that the fees are not at issue. Except for two records, the records were found to contain the appellant's personal information. One record contains only the personal information of another individual, thus raising the possible application of the mandatory exemption at section 14(1). One record does not contain personal information; nor is it responsive to the appellant's request. The decision of the police was upheld with respect to portions of the records that contain the personal information of individuals other than the appellant. Other portions of the records contain information about individuals in their professional capacity and therefore do not qualify for exemption under sections 14(1) and 38(b). The application of section 8(2)(a) was also not upheld. Finally, the search undertaken by the police was reasonable in the circumstances of this appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, 2(1) definition of personal information; 8(2)(a), 14(1), 14(3)(b), 17, 38(a), 38(b), 52(3).

OVERVIEW:

[1] The appellant submitted the following request to the Halton Regional Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

> I would like to request all information personal and general held by The Halton Regional Police on myself, including but not limited to all notes, correspondence and internal memos, records and files.
>
> Particularly by [a named inspector and a named detective] pertaining to photos, licence plates and complaints of harassment and assault made to the Professional Standards Bureau and Halton police in general.
>
> All information regarding communication with any other police forces here or abroad, the O.I.P.R.D. and O.C.C.P.S.
>
> All records, internal notes relating to an assault on me by [a named officer] on [specific date in 2010], by him or anyone else, including alleged police informer [named individual].

[2] The police located the responsive records and granted the appellant partial access to them. Access was denied to portions of the records in accordance with section 38(a) (discretion to refuse requester's own information) in conjunction with sections 8(1)(e), 8(1)(l) and 8(2)(a) (law enforcement); and section 38(b) (personal privacy), with reliance on the presumption in section 14(3)(b) (compiled as part of an investigation into a possible violation of law) of the *Act.*

[3] In addition, the police advised that records were also found in the Professional Standards Bureau, but these records fall outside the scope of the *Act* pursuant to section 52(3), as they relate to meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

[4] The appellant appealed that decision.

[5] During the mediation process, the mediator contacted the appellant's wife, who provided written consent to disclose her personal information to the appellant. The police subsequently disclosed the portions of the records that contained her personal information.

[6] During this process, the police also disclosed the portions of the records contained in the Professional Standards Bureau files that were submitted by the appellant, such as correspondence and photographs.

[7] Also during mediation, the appellant stated that additional records should exist. In particular, the appellant advised he was involved in an incident on the specified date in 2010 with a named officer. The appellant states that he is seeking access to any video or audio tapes for the incident on that date that may capture activities inside or outside the police cruiser involved. He is also seeking access to the GPS records for that police cruiser.

[8] The police took the position that a search for audio or video tapes and GPS data did not form part of the appellant's initial access request and suggested that the appellant file a new request for this information. The appellant did not believe it was necessary for him to submit a second request.

[9] As a result of ongoing discussions, the police agreed to conduct a subsequent search and provide the appellant with a separate access decision concerning the video or audio tapes and GPS data without requiring him to submit a new written request. They agreed to send the appellant a decision.

[10] The appellant was not satisfied with the disclosure of records by the police and the file was forwarded to the adjudication stage of the appeal process.

[11] The police issued a supplementary access decision during the inquiry stage of the appeal. In this decision, the police indicated that video or audio tapes for the incident in question do not exist. The police then granted access to the booking desk and sally port videos as well as a copy of the video of a numbered cell. In addition, the police granted access to the GPS data for a police cruiser involved in the incident identified by the appellant. The police removed certain patrol zone information from the GPS data on the basis of sections 8(1)(e) and (l). The issues arising from this decision were incorporated into the current appeal.

[12] During the inquiry into this appeal, I sought and received representations from the police and the appellant. The representations were shared in accordance with section 7 of the *IPC Code of Procedure* and *Practice Direction 7*.

[13] Before addressing the issues in this appeal, I note that the appellant has sent copious amounts of information and comments to this office during the mediation and adjudication stages. For the most part, this information reflects the appellant's dissatisfaction with the police and this office and discusses the issues he has with the police and certain identified individuals who he believes have pursued a "terror campaign" against him, engaging in "provocative" and "harassing" behaviour. He has submitted numerous photographs of police cars and unidentified individuals, which he alleges support and confirm his belief that he has been the subject of criminal behaviour on the part of the police. He believes that the police are withholding the evidence he requires to initiate a criminal prosecution against them.

[14] The information that the appellant submitted, including that submitted in response to the two Notices of Inquiry[1] that I sent to him did not address the exemptions claimed by the police. After reviewing all of the documentation he submitted, I find that certain portions of them were relevant to the issues of reasonable search and fees and I will refer to these portions in the discussion below. Otherwise, I will not refer to the appellant's representations in this decision.

[15] In this order I uphold the decision of the police to withhold certain personal information pursuant to sections 14(1) and 38(b). In addition, I find that information pertaining to individuals in their professional capacity is not exempt and order that it be disclosed. I also find that section 8(2)(a) does not apply in the circumstances. Finally, I find that the search conducted by the police was reasonable.

RECORDS:

[16] The records at issue consist of police occurrence documents, tapes and GPS data, as well as records in the Professional Standards Bureau files. The police have provided an unworkable index with the records that were provided to this office. In order to more efficiently refer to the records in this order I have numbered the records as follows:

- record 1 – January 1. 2008 occurrence report (items 8 and 19 on police index)
- record 2 – officer's notes various dates (item 9 on police index)
- record 3 – May 1, 2008 occurrence report (items 10 and 20 on police index)
- record 4 – officers' notes various dates (items 11 and 21 on police index)
- record 5 – May 22, 2010 occurrence report (items 12 and 22 on police index)
- record 6 – officers' notes dated May 22, 2010 (items 13 and 22 on police index)
- record 7 – October 9, 2010 occurrence report (items 14 and 24 on police index)
- record 8 – officers' notes dated Oct. 9, 2010 (items 15 and 25 on police index)
- record 9 – CPIC printout (item 17 on police index)
- record 10 – audiotape
- record 11 – GPS data regarding a named officer's cruiser
- record 12 – Professional Standards Bureau file.

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[1] Initially, the Notice of Inquiry that was sent to the parties indicated that the parties had agreed to remove any issues resulting from the supplementary decision of the police from the scope of the current appeal. Following receipt of the second party Notice of Inquiry, the appellant strongly objected to the exclusion of any records and issues relating to the supplementary decision from the appeal. Accordingly, I issued a supplementary Notice of Inquiry in which I set out the issues that would be included in the appeal and incorporating the supplementary decision and any issues that flowed from it into the appeal.

PRELIMINARY ISSUES:

[17] As I alluded to above, the appellant is a very angry individual. In reviewing the appeal file as it moved through mediation, and in dealing with the numerous contacts that this office has had with the appellant during the adjudication stage, it is apparent that he becomes fixated on certain issues and does not respond to questions and/or discussion about the issues in the appeal. In order to process this appeal in a timely manner, I have made certain preliminary decisions, some of which were outlined in the Notices of Inquiry that were sent to the appellant. My decisions to proceed as outlined below were made in this context.

Sections 8(1)(e) and (l)

[18] In the Notice of Inquiry that I sent to the appellant I indicated that it does not appear that the appellant is seeking the police 10 codes, and accordingly I indicated that these portions of the records and the exemptions claimed by the police in regard to them are not at issue. The appellant did not object to this decision or comment on it, although he clearly objected to other comments made in the Notice of Inquiry.

[19] In the circumstances, I am satisfied that the appellant does not take issue with this part of the police's decision. Consequently, sections 8(1)(e) and (l) and the portions of the records to which they are claimed are not at issue in this appeal.[2]

Non-responsive information

[20] Upon reviewing the several hundred pages at issue in this appeal, I noted that portions of the police officers' notes have been withheld. The police did not indicate the reason for withholding them either on the records themselves or in their two decision letters; nor did the police make submissions on them.

[21] After comparing the "severed" records, that is, the records as they were to be disclosed to the appellant, with the "unsevered" copies, it is apparent that large portions of the withheld information in the officers' notes pertain to other matters that the officers dealt with during their regular tour of duty on the days when they had contact with the appellant. I find that this information is not responsive to the appellant's request as worded above because it does not pertain to him in any way.

[22] Accordingly, I will not address these portions of the records further in this decision.

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[2] The portions of the records for which sections 8(1)(e) and (l) were claimed are found on records 1, 3, 4, 5, 6, 7 and 8.

Fees and disclosure of the records to the appellant

[23] The issue of fees was not raised during the mediation stage of the appeal. Although the appellant has not explicitly raised it as an issue, he has alluded to certain objections regarding the fees charged.

[24] In the supplementary (first party) Notice of Inquiry that I sent to the police, I outlined the outstanding issues as I understood them following my review of the submissions the appellant made after he received the (second party) Notice of Inquiry and the subsequent telephone conversations he had with staff of this office, as well as the additional communications he e-mailed and/or faxed to this office relating to issues as they were identified in the original Notice of Inquiry. With respect to the issue of fees, I stated:

- Regarding the fee charged of $20, the appellant indicates that he should not be required to pay "again" for the cell tapes/booking room tapes because they were already given to his lawyer.

- Regarding the fee of $120, the appellant indicates that he will only pay for the GPS information if it shows the location of the car at the apartment or [a specified street]. In other words, he wishes confirmation that the record contains the information he is seeking before he will pay for it;

[25] I then included fees as an issue in the appeal.

[26] In their submissions, the police state that the appellant was charged only for the time taken to search for GPS records. The police provide an affidavit from the officer who conducted this search. He describes the steps he took to produce the information regarding the car driven by the officer that the appellant alleges assaulted him, and confirms that it took him four hours to complete the search. The police also note that the appellant has not yet picked up the records that have been disclosed to him.

[27] These submissions were provided to the appellant for his response. The appellant does not address this issue further in his representations other than to comment on the fact that he had to pay for records that he had previously sent to the police.

[28] Based on all of the documentation before me, including the submissions made by the police and the comments sent to me from the appellant throughout the course of this inquiry, I find that the appellant's issue with the fees does not pertain to the amount charged, which, in the circumstances appears reasonable. Rather, he is searching for very specific information and will only pay for the work done by the police if it provides him with the information he wants.

[29] Moreover, although the appellant objects to paying for records that he already has, he is the one who made the request for video or audio tapes and cell tapes. The police have complied with his request and have charged him for the copies of these tapes that are to be provided to him.

[30] I note further that the police attached a waiver request form to the decision letter. The appellant has not requested a waiver of these fees.

[31] I will address the search issue raised by the appellant below. As far as the fees issue is concerned, I am satisfied that the appellant is not contesting the amount charged, and fees, therefore, are not at issue in this appeal.

ISSUES:

A: Does section 52(3) exclude the records from the *Act*?

B: Does the record 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 the section 8(2)(a) exemption apply to the information at issue?

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

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

DISCUSSION:

A: Does section 52(3) exclude the records from the *Act*?

General Principles

[32] Section 52(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:
>
> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.

2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.

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

[33] 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*.

[34] 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.[3]

[35] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships.[4]

[36] 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.[5]

[37] 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.[6]

[38] 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*.[7]

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[3] Order MO-2589; see also Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner, 2010 ONSC 991 (Div. Ct.).

[4] Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner), [2003] O.J. No. 4123 (C.A.). See also Order PO-2157.

[5] Order PO-2157.

[6] 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.

[7] Orders P-1560 and PO-2106.

[39] 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.[8]

[40] 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.[9]

[41] The police submit that a number of records held by its Professional Standards Bureau fall outside the scope of the *Act* by virtue of section 52(3)1.

Section 52(3)1: court or tribunal proceedings

Introduction

[42] For section 52(3)1 to apply, the institution must establish that:

1. the record was collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; and

3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the institution.

[43] Referring to specific portions of the appellant's request, the police indicate that a complaint was submitted to the police regarding an identified officer "as a result of his employment duties on [a specific date in September, 2010]."

[44] The appellant's complaint was initially investigated by the police and determined to be unsubstantiated. The appellant then appealed this decision to the Ontario Civilian Commissioner on Police Services, who upheld the decision of the police.

[45] The records at issue from the Professional Standards Bureau pertain to the investigation conducted by the police into the appellant's allegations.

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[8] Ontario (Ministry of Correctional Services) v. Goodis (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).

[9] Ministry of Correctional Services, cited above.

[46] Previous orders of this office have considered the application of section 52(3) to records relating to complaints made against police officers.[10] In particular, regarding the second part of the test, this office has consistently held that proceedings arising from complaints filed under the *Police Services Act* (the *PSA*) constitute proceedings before a "tribunal or other entity" for the purposes of section 52(3)1 and that they relate to employment, "because of the potential for disciplinary action" against the officer identified in the complaint.

[47] In keeping with the reasoning in previous orders, I am satisfied that the records at issue in this discussion were collected, prepared, maintained and used by the police and that this usage was in relation to anticipated proceedings, thus satisfying the first two parts of the test.

[48] Similar to the findings in previous decisions of this office, I find that the records held by the Professional Standards Bureau relate to employment, as there is the potential for disciplinary action against the named officer. Accordingly, I find that the third part of the test has been met, and the records at issue in this discussion are excluded from the *Act* under section 52(3)1.

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

[49] 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:

> "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,

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[10] See, for example: Orders PO-2678 and PO-2658.

> (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;

[50] 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.[11]

[51] 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.

[52] 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

[11] Order 11.

professional, official or business capacity will not be considered to be "about" the individual.[12]

[53] 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.[13]

[54] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed. [14]

[55] The police submit that the records at issue all contain the appellant's personal information, as well as the personal information of other identifiable individuals, including the appellant's wife.

[56] Having reviewed the records at issue, I find that with the exception of records 9 (the CPIC printout) and 2 (one police officer's notes), all of the records at issue contain the appellant's personal information as they pertain to matters in which he was involved. Some of the records also contain the personal information of the appellant's wife; however, as I noted above, his wife has consented to disclosure of her personal information and the police have already amended the pages that they intend to disclose to the appellant to include the personal information of his wife.

[57] Record 2 does not contain the appellant's personal information and in my view, does not appear to be responsive to the appellant's request for this reason. Although the notebook belongs to an officer who prepared an occurrence report regarding an incident involving the appellant, none of the notebook entries identify or refer to this matter. Accordingly, I will not consider this record further in this decision.

[58] Record 9 is a CPIC printout regarding another identifiable individual and contains only this individual's personal information. Although it does not pertain to the appellant, I find that it is reasonably related to his request as the information was requested in relation to one of the incidents described in the records at issue. Accordingly, I will consider whether the mandatory exemption at section 14(1) applies to this record.

[59] In addition to the above, I find that records 4, 5, 6, 7, 8 and 9 contain the personal information of individuals other than the appellant and his wife. These individuals are identified and/or identifiable in the records. Moreover, I find that their personal information is intertwined with that of the appellant in such a way that it is not severable. I will consider whether the discretionary exemption at section 38(b) applies to this information.

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[12] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[13] Orders P-1409, R-980015, PO-2225 and MO-2344.
[14] Orders P-1409, R-980015, PO-2225 and MO-2344.

[60] The police have withheld other portions of records 1, 3 and 7 that pertain to police personnel, including their names and the divisions to which they report. I find that this information does not constitute personal information under the *Act* pursuant to section 2(2.1). Accordingly, I will not consider this information further under the personal privacy discussion. As no other exemptions have been claimed for this information, it should be disclosed to the appellant. I have highlighted the information that should be disclosed on the copies of these records that I am sending to the police along with this order.

[61] Finally, the police have withheld a portion of record 4 that pertains to two other individuals in their official capacity. I note that the police have not severed out the name of one individual on the record that is to be disclosed to the appellant, but have severed out the information he provided to the police that is directly related to the functions he performs in his official capacity. In another part of the record the police have withheld the address information that they disclosed earlier in the record. I am not persuaded that this information pertains to or would reveal anything of a personal nature about the individuals who provided the information, or that of anyone else. Accordingly, I will not consider these portions of record 4 further in this discussion. As no other exemptions have been claimed for this information, it should be disclosed to the appellant. I have highlighted the information that should be disclosed on the copies of these records that I am sending to the police along with this order.

[62] In summary, I find that all of the records except records 2 and 9 contain the appellant's personal information. I also find that records 4, 5, 6, 7, 8 and 9 contain the personal information of individuals other than the appellant. Accordingly, I will consider the application of the exemptions below as follows: 1) whether the discretionary exemptions at sections 38(a) and/or (b) apply to records 1, 3, 4, 5, 6, 7 and 8, and 2) whether the mandatory exemption at section 14(1) applies to record 9.

C: Does the discretionary exemption at section 38(a) in conjunction with the section 8(2)(a) exemption apply to the information at issue?

Introduction

[63] 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.

[64] 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.

[65] Section 38(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.[15]

[66] Where access is denied under section 38(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

[67] In this case, the institution relies on section 38(a), in conjunction with section 8(2)(a).

Law Enforcement

General principles

[68] Sections 8(2)(a) states:

> (2) A head may refuse to disclose a record,
>
> (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

[69] 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)

[15] Order M-352.

[70] The term "law enforcement" has been found to apply in the following circumstances:

- a municipality's investigation into a possible violation of a municipal by-law[16]
- a police investigation into a possible violation of the *Criminal Code*[17]
- a children's aid society investigation under the *Child and Family Services Act*[18]
- Fire Marshal fire code inspections under the *Fire Protection and Prevention Act, 1997*[19]

[71] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[20]

[72] 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.[21]

Section 8(2)(a): law enforcement report

[73] In order for a record to qualify for exemption under section 8(2)(a) of the *Act*, the institution must satisfy each part of the following three-part test:

1. the record must be a report; and
2. the report must have been prepared in the course of law enforcement, inspections or investigations; and
3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.[22]

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[16] Orders M-16, MO-1245.
[17] Orders M-202, PO-2085.
[18] Order MO-1416.
[19] Order MO-1337-I.
[20] Ontario (Attorney General) v. Fineberg (1994), 19 O.R. (3d) 197 (Div. Ct.).
[21] Order PO-2040; Ontario (Attorney General) v. Fineberg.
[22] Orders 200 and P-324.

[74] The word "report" means "a formal statement or account of the results of the collation and consideration of information". Generally, results would not include mere observations or recordings of fact.[23]

[75] The title of a document is not determinative of whether it is a report, although it may be relevant to the issue.[24]

[76] Section 8(2)(a) exempts "a report prepared in the course of law enforcement *by an agency which has the function of enforcing and regulating compliance with a law*" (emphasis added), rather than simply exempting a "law enforcement report." This wording is not seen elsewhere in the *Act* and supports a strict reading of the exemption.[25]

[77] An overly broad interpretation of the word "report" could create an absurdity. If "report" means "a statement made by a person" or "something that gives information", all information prepared by a law enforcement agency would be exempt, rendering sections 8(1) and 8(2)(b) through (d) superfluous.[26]

[78] The police submit that the occurrence reports contain the "facts in the case and the way the officers concluded their investigation at the time, by making police occurrence reports and documenting the incidents. The officers investigated the situations, documenting their findings in the reports."

[79] I have reviewed the contents of the records at issue and find that none of them qualify under section 8(2)(a) as they do not contain "a formal statement or account of the results of the collation and consideration of information". Rather, they are more appropriately described as containing recordings of fact and observation. These records document the involvement of the officers from dispatch through investigation and observation of the individuals involved over a period of time, with updated information inserted as the investigation continued. They do not contain the requisite formalization contemplated by this section. Accordingly, I find that the records are not exempt under section 38(a), in conjunction with section 8(2)(a).

[80] I note that the police have disclosed the vast majority of the information in these records to the appellant, withholding only the small portions identified above.[27] Having found that sections 38(a) and 8(2)(a) do not apply, only the portions of records 4, 5, 6, 7, 8 and 9 that contain personal information remain at issue. I will consider the application of sections 14(1) and 38(b) to the withheld portions of these records below.

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[23] Orders P-200, MO-1238, MO-1337-I.
[24] Order MO-1337-I.
[25] Order PO-2751.
[26] Order MO-1238.
[27] For example, non-responsive information, information to which sections 8(1)(e) and (l) have been claimed, information about individuals in their professional and personal capacities.

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

General principles

[81] 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.

[82] 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.

[83] 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.

[84] Under section 14, 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".

[85] In both these situations, sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met.

[86] 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). In *Grant v. Cropley,*[28] the Divisional Court said the Commissioner could:

> . . . consider the criteria mentioned in s.21(3)(b) [the equivalent provision in the provincial *Act* to section 14(3)(b)] in determining, under s. 49(b) [which is equivalent to section 38(b)], whether disclosure . . . would constitute an unjustified invasion of [a third party's] personal privacy.

[28] [2001] O.J. 749.

[87] The police submit that the presumption at section 14(3)(b) applies to the personal information in the records. This section states:

> 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;

[88] The police state that they were called to investigate various incidents, and these investigations were conducted "with a view to determine whether or not there was a possible violation of law." The police note further that the personal information contained in the records at issue was compiled in order to investigate the various incidents.

[89] The appellant essentially believes that if the records pertain to incidents involving himself, he has the right to obtain them, in their entirety.

Analysis and findings

[90] The presumption at section 14(3)(b) can apply to a variety of investigations, including those relating to by-law enforcement[29] and violations of the Ontario Human Rights Code.[30]

[91] 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.[31] The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.[32]

[92] Section 14(3)(b) does not apply if the records were created after the completion of an investigation into a possible violation of law.[33]

[93] Having reviewed the information at issue in this discussion, I am satisfied that all of the personal information contained in the records was compiled and is identifiable as part of a law enforcement investigation. The records document several incidents involving the appellant. Some of them also involve other identified individuals. They pertain to incidents in which the police were called to investigate and/or to provide

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[29] Order MO-2147.
[30] Orders PO-2201, PO-2419, PO-2480, PO-2572 and PO-2638.
[31] Orders P-242 and MO-2235.
[32] Orders MO-2213, PO-1849 and PO-2608.
[33] Orders M-734, M-841, M-1086, PO-1819 and PO-2019.

assistance. In responding to complaints, the police were acting in a law enforcement capacity and the information compiled by them in these matters is clearly identified and identifiable as such.

[94] I am not persuaded by the appellant's documentation that any of the factors favouring disclosure applies in the circumstances of this appeal.

[95] Accordingly, I find that record 9 is exempt pursuant to the mandatory exemption at section 14(1) of the *Act*. I find further that the portions of records 4, 5, 6, 7 and 8 that contain personal information qualify for exemption under section 38(b). I will now consider whether the police's exercise of discretion to withhold these portions of the records should be upheld.

Exercise of discretion

[96] The section 38(b) exemption is discretionary, and permits 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.

[97] 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.

[98] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[34] This office may not, however, substitute its own discretion for that of the institution.[35]

[99] The police indicate that they understand that information should generally be available to the public and that exemptions should be limited and specific. They indicate further that they "undertook the third party process and upon receiving responses, edited the records accordingly." The police state that in exercising their discretion they attempted to sever the records in a way that would allow for the disclosure of as much of the appellant's personal information as possible without disclosing the personal information of others.

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[34] Order MO-1573.
[35] Section 43(2).

[100] As I noted above, the police have disclosed the vast majority of the records at issue in this appeal. The portions that have been withheld are limited to only the information that would identify or permit the identification of other individuals, who clearly have a right to expect that their personal privacy would be protected in the circumstances under which it was provided, particularly given the appellant's temperament and persistence in voicing and acting on matters from his own unique perspective.

[101] Based on all of the above, I find that the police have properly exercised their discretion to withhold the personal information at issue. Accordingly, I find that section 38(b) applies to this information and it is, therefore, exempt from disclosure.

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

[102] 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.[36] 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.

[103] 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.[37] To be responsive, a record must be "reasonably related" to the request.[38]

[104] 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.[39]

[105] 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.[40]

[106] 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.[41]

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[36] Orders P-85, P-221 and PO-1954-I.
[37] Orders P-624 and PO-2559.
[38] Order PO-2554.
[39] Orders M-909, PO-2469, PO-2592.
[40] Order MO-2185.
[41] Order MO-2246.

[107] A requester's lack of diligence in pursuing a request by not responding to requests from the institution for clarification may result in a finding that all steps taken by the institution to respond to the request were reasonable,[42]

[108] In responding to this issue, the police provided affidavits sworn by an information analyst (the analyst) and an officer of the Professional Standards Bureau, who conducted the search for the GPS record.

[109] The analyst outlines the steps she took to respond to the appellant's access request, including:

- collecting all occurrence reports and investigating officers' notebook entries;
- conducting searches of the Niche and Legacy Record Information Management Systems;
- requesting another staff member to conduct secondary searches to ensure nothing was missed.

[110] The analyst indicates further that the Freedom of Information Co-ordinator collected the records from the Professional Standards Bureau. She notes that once the records were obtained portions of the appellant's request were transferred to two other police services as they had a greater interest in those records.

[111] The analyst indicates that after numerous attempts to contact the appellant she finally reached him at the beginning of October 2011 to confirm that the disclosed records were ready for pick-up and to inform him of the cost of processing his request. The analyst indicated that she was not aware at that time that the appellant was seeking GPS data.

[112] The analyst indicates that several months later the mediator assigned by this office to the appeal contacted her to advise that the appellant also wanted the GPS information. She states that she contacted the Fleet Services Coordinator to request access to the GPS information relating to the vehicle driven by the officer identified by the appellant. The analyst confirmed that "the GPS information that has been processed pertains to incident number [number] of the vehicle driven by [named officer] who is the officer that the appellant is alleging assaulted him."

[113] With respect to video or audio tapes that may capture activities inside or outside the police cruiser the analyst indicates that she contacted the Manager, Court Services (the manager) to confirm whether such tapes exist in the cruisers used by the police. The manager confirmed that video-audio recordings do not exist.

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[42] Order MO-2213.

[114] In his affidavit, the Professional Standards Bureau officer identified the officer that the appellant complained about, the car he was driving, and the date and locations of the car at that time. He states:

> I downloaded the GPS data for that date and had 21,808 lines of data for all of the vehicles operated that date. Through the use of the Microsoft excel program I was able to parse out the data pertaining to this time, place and particular unit and I created a spreadsheet containing 165 lines of data in relation to the Global Position of the vehicle.
>
> I also was able to produce a video representation of the trip the officer took on that date and taped it with the Snag-it-software and copied it onto a Digital Video Disk (DVD).

[115] In response to the submissions made by the police, the appellant focusses on the GPS information. It appears that the essence of his belief that additional records exist arose from a dispute between the police and the appellant regarding the vehicle about which he is seeking GPS data. The appellant states:

> [The] vehicle used in assault by [named officer] was parking in the driveway beside apartment building, the police say it wasn't. The GPS data will prove whose story is correct."

[116] Initially, the appellant indicated that he is only interested in the location of the one cruiser that he states was parked in the apartment building driveway. He believes the GPS data will show the vehicle he was assaulted in arriving, parking and leaving. However, at another point in his representations, the appellant indicated that if necessary, he seeks GPS data on all five vehicles.

[117] After reviewing all of the representations, I was not certain that the police had fully addressed this aspect of the appellant's concerns. Accordingly, I sent a Reply Notice of Inquiry to the police in which I stated:

> I have received representations from the appellant in the above-noted appeal. His representations raise one issue that I would like to have clarified by the police. It appears that there might have been some misunderstanding regarding the vehicles that the appellant refers to throughout this appeal. In his representations, he states that there were two vehicles involved on the day that he alleges he was assaulted. The appellant clarifies that the vehicle he was assaulted in was parked in the driveway of the apartment building, which is at a right angle to [named] Street, not on and parallel to [named] Street. He states further that this was not the vehicle used by [named officer] to take him to the police

station. I have set out below a portion of the appellant's representations that clarifies this issue:

> [Professional Standards Bureau officer] said in his affidavit on Aug. 21/12 he was asked by [the Freedom of Information Co-ordinator] on May/8/12 to provide GPS data on the vehicle driven by [named officer] that took me to the [named] police station. Why! It was the wrong car. In her affidavit per item 3 [the analyst] said on Feb 1/12 [the mediator] specified the appellant required GPS data on vehicle used in the alleged assault. This was the vehicle parked in the driveway next to the apartment building. This was not the vehicle used to take me to the police station. The vechicle in the driveway might have been used later by [another named officer] to follow us to the police station.
>
> This is the vehicle I am requesting all the GPS data on, including where did it go after leaving [named] Street, and who was driving it.
>
> After the assault [named officer] walked me to a second police car parked on [named] St. This second car is the one in which I left a large DNA sample on the back seat…

It appears that a search was conducted for records relating to the car that [the named officer] drove the appellant to the police station, but it is not clear whether the same can be said for the car in which he alleges he was assaulted. Please confirm whether the searches that were undertaken pertained to the vehicles described by the appellant. If not, please indicate whether an additional search was undertaken.

[118] In response, the police provided another affidavit sworn by the analyst. She explains why the searches that were previously conducted focused on the named officer's vehicle. She then indicates that after receiving the Reply Notice of Inquiry, she contacted the named officer to clarify the parked location of the vehicle he was driving. She states that the officer confirmed that he parked his vehicle on the street.

[119] The analyst confirms that the searches that were undertaken did not pertain to a vehicle parked beside the apartment building. She indicates that she subsequently spoke to a named detective from the Professional Standards Bureau who confirmed in the Investigative Report he prepared that "none of the vehicles that attended the incident were parked in the driveway of the apartment building and all vehicles that attended were parked on [named] Street."

[120] The police indicate that the named detective provided this information to the appellant following the completion of his investigation.

[121] Based on my consideration of all of the information provided throughout this appeal from the appellant and the submissions made by the police, I find that the search conducted by the police was reasonable. It is apparent from the evidence that the appellant maintains a particular belief regarding the events that occurred on the date in question which is contradicted by all of the evidence gathered by the police in response to his complaints to the police and the allegations he has raised in this appeal. Although it appears that initially, there may have been some miscommunication, I am satisfied that, at the end of the day, the police have responded to the appellant's request and have searched for records in locations in which they would reasonably be expected to be found.

[122] Accordingly, I find that the search conducted by the police was reasonable and this part of the appeal is dismissed.

ORDER:

1. I uphold the decision of the police to withhold the personal information found on records 4, 5, 6, 7, 8 and 9.

2. I order the police to disclose to the appellant the information on records 1, 3, 4, 5, 7 and 8 that I have found to comprise professional information by providing him with copies of these records by **December 3, 2012** but not before **November 28, 2012**. (35/30). For greater certainty, I have highlighted in yellow on the copies of these records that I am providing to the police along with this order the portions that are to be disclosed. The police are not required to provide the records to the appellant until he pays the fee charged by the police for the time taken to search for the responsive records.

3. The search for responsive records was reasonable and this part of the appeal is dismissed.

4. In order to verify compliance with order provision 2, I reserve the right to require that the police provide me with a copy of the record provided to the appellant.

Original signed by: October 26, 2012
Laurel Cropley
Adjudicator