

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2769-R

Appeals MA10-481-3 and MA10-482-3

Toronto Police Services Board

July 25, 2012

Summary: This is a reconsideration of Orders MO-2730 and MO-2734-I concerning the application of section 8(1)(e) to certain information ordered disclosed in these orders about the training or instructions given to police in preparation for the June 2010 G20 summit weekend. This order reverses the previous finding that the police diagrams and the information that specifically describes the command words and signals are not exempt under section 8(1)(e).

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 8(1)(e).

Orders and Investigation Reports Considered: MO-1987, MO-2011, MO-2730, MO-2734-I, PO-3066-R, PO-3072-R.

OVERVIEW:

[1] This reconsideration order relates to a request by the Toronto Police Services Board (the police) asking that the decisions concerning the application of the law enforcement exemption in section 8(1)(e) to the records in Orders MO-2730 (appeal file MA10-481-3) and MO-2734-I (appeal file MA10-482-3) issued under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) be reconsidered. Both orders relate to requests made by the same appellant.

[2] In appeal file MA10-481-3, the appellant sought access to specific records relating to police conduct during the June 2010 G20 summit weekend. In file MA10-482-3, the appellant sought access to specific records relating to training or instructions given to police officers involved in the June 2010 G20 summit weekend.

[3] I determined that section 8(1)(e) did not apply to all of the records in Order MO-2730 and some of the records in Order MO-2734-I once the command words and signals were removed from the records.

[4] The police provided representations in support of their reconsideration request. I provided a copy of the police's reconsideration representations to the appellant who provided representations in response.

[5] In this reconsideration order, I reverse my previous findings in both orders that the police diagrams and the information that specifically describes the command words and signals in the records are not exempt by reason of section 8(1)(e) of the *Act*.

RECORDS:

[6] The records that are subject to the police's reconsideration request contain information about training or instructions given to police in preparation for the June 2010 G20 summit weekend.

[7] At issue in appeal file MA10-481-3 are pages 217, 220, 221, 228, 229, 231, 238, 241, 242, 244, 246, 248, 249, 250, 251, 252, 253, 254, 255, 256 and 257.

[8] At issue in appeal file MA10-482-3 are portions of pages 117, 132, 134, 140, 160, 165, 166, 184, 190, 191, 192, 193, 194, 195, 196, 197, 199, 202, 203, 205, 206, 208, 209, 211, 213, 214, 215, 216, 217, 218, 219, 222, 224 and all of page 133.

DISCUSSION:

[9] Section 18 of the IPC's *Code of Procedure* sets out the grounds upon which the Commissioner's office may reconsider an order. The police rely on paragraph (a) of section 18.01 of the *Code of Procedure* which states as follows:

The IPC may reconsider an order or other decision where it is established that there is:

a fundamental defect in the adjudication process;

[10] Section 18.02 of the IPC's *Code of Procedure* states:

The IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision.

[11] The police are seeking to have reconsidered my decision that section 8(1)(e) does not apply to all of the records at issue in Order MO-2730 and most of the records in Order MO-2734-I once the command words and signals are removed. Section 8(1)(e) states that:

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

endanger the life or physical safety of a law enforcement officer or any other person;

[12] The police submit that my findings removing titles and command words from the records while leaving the descriptions and the diagrams are inconsistent, contradictory and not based on the evidence before me. The police rely on Order MO-1987, which refers to an appeal of the Ottawa Police Services Board's decision regarding public order records. The police also point out that it seems that records containing police tactical formations have not been adjudicated in Ontario. In support of their position that the harm in section 8(1)(e) is reasonable, the police submit that the findings in Orders MO-1987 and MO-2011 are relevant. Concerning Order MO-1987, the police state that:

Adjudicator John Swaigen ...determined on page 18 of [Order] MO-1987 that records entitled "G8 Related Demonstrations in the National Capital Region - June 26-27, 2002" to be exempt under section 8(1) as within these pages "it sets out plans of a group of government agencies for policing demonstrations expected to take place in Ottawa ... providing security for officials and buildings, and responding to emergencies." He also found on page 19, "G20 - Operational Review, Thursday, January 3, 2002" which contained notes describe the purpose of the operational review as "to identify what worked, did not work (in policing, providing security and responding to emergencies at the G20 meeting)..." to be fully exempt under section 8(1).

[13] Concerning Order MO-2011, the police rely on the findings of Adjudicator Swaigen upholding the City of Ottawa's application of section 8(1)(e), where he stated that:

Because it is impossible to anticipate the myriad ways in which individuals with criminal intent can cause certain types of emergencies and take advantage of others, it is necessary to be cautious about what information is disclosed in the context of emergency planning processes.

...what must be protected to prevent the claimed section 8 harms is information that can be reasonably expected to either facilitate creation of risks or hazards, facilitate the commissions of crimes after an emergency has occurred, or impede the ability of law enforcement and other officials to respond to the emergency.

On the other hand, other information such as the ranking of hazards, specific facilities at risk, the specific manner in which a human-created event may be expected to happen, and weaknesses in the response capacity of public agencies, for example, could reasonably be expected to facilitate the harms contemplated by section 8(1)(e), (i) and (l) in some cases.

[14] The police state that similar to the records identified in Order MO-2011, the records in these two appeals are tactical, operational strategies used by police across the country and are not commonly known to the public. The police provided in their reconsideration representations, what they state are, a number of evidentiary and real-life potential examples of the harms to both police and the public should the records be disclosed.

[15] The police take issue with the statement in both orders that

Once the command words or signals are severed from this information in the records, disclosure could not reveal the tactical deployment of the police during crowd control, which is the police's concern in their representations.

[16] The police state that the records are the tactical deployment of police during crowd control and that removing the titles is insignificant to the greater issue of officer safety. The police provided detailed representations concerning the riots during the June 2010 G20 and state that there was careful planning and premeditation by the rioters to incite violence and destruction. The police state that:

Individuals that participate in such actions do not need our assistance to produce an encore performance.

... The removal of titles/signals in no way precludes intelligent, computer savvy individuals bent on wreaking havoc, from cracking a code of sorts and filling in the blanks.

[17] The police provided a letter from a staff inspector (the inspector) who has held the position of Unit Commander of the Public Safety and Emergency Management Unit with the police since March 2010. The inspector reiterates and expands on the police's submissions that knowledge of police formations and tactics will assist those engaged in criminal activity to engage in lengthier scenes of disorder and hinder the ability of police to restore order.

[18] In response, the appellant relies on her original submissions and submits that the police have not established that a fundamental defect in the adjudication process, or any other valid ground for a reconsideration. The appellant also states that the police have improperly raised new arguments and issues and have misconstrued the purpose of the request.

Analysis/Findings

[19] Based upon my review of the parties' representations and the records, I find that a fundamental defect in the adjudication process has occurred such that I will reconsider my findings on a portion of the records. I note that I failed to sever some command words and signals from the records. In addition, I failed to fully consider the impact of disclosure of the diagrams and the information that specifically describes the command words and signals in the records. I rely on the findings of Adjudicator Stephanie Haly in Order PO-3066-R, where she considered the reconsideration of an order concerning records claimed to be exempt under section 14(1)(e) of the *Freedom of Information and Protection of Privacy Act* (the equivalent to section 8(1)(e) of the *Act*). In that order, Adjudicator Haly stated that:

The ministry submits that there was a fundamental defect in the adjudication process and that it has established the necessary ground for reconsideration set out in paragraph (a) of section 18.01. I summarize the ministry's representations as follows:

- My finding that the information on page 86 of the record is either "generalized administrative information" or "generalized or administrative information" is unclear and incomprehensible, thus rendering the Order fundamentally defective.

- The ministry's incontrovertible evidence points to a reasonable expectation of harm from disclosure of the record.
- This office's jurisprudence indicates that OPP training manual information is the type of information that can be withheld under section 14(1)(e).

The ministry also provided an affidavit from a Superintendent of the OPP with its reconsideration request supporting its position that the information on page 86 is exempt from disclosure under section 14(1)(e).

I have reviewed the ministry's representations and my findings in Order PO-3010 on the application of the exemptions at sections 14(1)(e), (i) and (l) with respect to the information at issue on page 86. I find that my use of the terms "generalized administrative information" or "generalized or administrative information" without further elucidation rendered my reasoning unclear. By necessity, in order not to disclose the contents of the record, I used these terms to convey the type of information at issue on page 86. However, in using these terms and phrases without providing additional explanation, I agree with the ministry that the reasoning in Order PO-3010 with respect to the application of the section 14(1) exemptions is unclear. As a result, I agree that there was a fundamental defect in the adjudication process and the ministry has established sufficient grounds for a reconsideration of Order PO-3010.

[20] Similarly, in Order PO-3072-R, Assistant Commissioner Brian Beamish reconsidered an order on the basis that a fundamental defect in the adjudication process occurred when he failed to fully consider the exemption at issue in that appeal. He stated that:

After reviewing the affected party's reconsideration request, the representations of the appellant and Infrastructure Ontario concerning the reconsideration request, the representations of all parties made during the inquiry, and my findings in Order PO-3011, I find that I erred in failing to fully consider the inferred disclosure exception to the second part of the section 17(1) test. I find that this error constitutes a fundamental defect in the adjudication process, thereby meeting the ground for reconsideration outlined in section 18.01(a) of the IPC's Code of Procedure. Accordingly, I will reconsider my decision in Order PO-3011 on this basis and will now proceed to reconsider whether the inferred disclosure exception to the "supplied" part of the section 17(1) test applies to the records that I ordered disclosed.

[21] In Orders MO-2730 and MO-2734-I, I find that I failed to fully consider whether removal of the command words and signals could still result in the remaining information and diagrams endangering the life or physical safety of a law enforcement officer or any other person. I find that the decision in these orders on the removal of the command words and signals from the records without providing additional explanation, rendered my reasoning in these two orders with respect to the application of the section 8(1)(e) unclear. As a result, I agree that there was a fundamental defect in the adjudication process and find that the police have established sufficient grounds for a reconsideration of these two orders.

[22] I note the police's representations submitted during my inquiry into the appeals and the subject of Orders MO-2730 and MO-2734-I did describe the diagrams as indicating how officers should physically formulate based on the commands words and signals when faced with crime and disorder, including large crowds. I find that I failed to fully consider that disclosure of the diagrams on their own would reveal the command words and signals that I had ordered severed from the records. In Orders MO-2730 and MO-2734-I, I found that section 8(1)(e) did not apply to these portions of the records. In those orders, I stated that:

In my view, disclosure of the records without the command words or signals could not reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person. Once the command words or signals are severed from the records, disclosure could not reveal the tactical deployment of the police during crowd control.

[23] I now find in this reconsideration order that disclosure of the diagrams could reveal the tactical deployment of the police during crowd control. Accordingly, I am reconsidering the orders and ordering the additional severance of the diagrams from the records at issue in the police's reconsideration request, along with the command words and signals that I did not remove initially.

[24] In addition, I find that I failed to consider how some of the information in the records specifically describes the command words and signals, such that the exempt command words and signals are revealed by disclosure of this information. Disclosure of this information would also reveal the tactical deployment of the police during crowd control and disclosure could reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person.

[25] With respect to the remaining information which is also the subject of the reconsideration requests, I find that the police have not provided a reasonable basis for believing that endangerment will result under section 8(1)(e) from disclosure of this information. Therefore, I will order this information disclosed.¹

ORDER:

1. I reverse my findings in Orders MO-2730 and MO-2734-I that the diagrams and the information that specifically describes the command words and signals in the records are not exempt by reason of section 8(1)(e) and find that they are exempt by reason of this exemption.
2. I uphold my findings in Orders MO-2730 and MO-2734-I that the command words and signals are exempt by reason of section 8(1)(e).
3. I order the police to disclose the remaining information in the records under reconsideration in appeal files MA10-481-3 and MA10-482-3 by **August 16, 2012**.
4. For ease of reference, I am enclosing a copy of the records with the police's copy of this order highlighting the information to be withheld by them.
5. In order to verify compliance with the provisions of this order, I reserve the right to require the police to provide me with a copy of the records that I have ordered disclosed to the appellant.

Original Signed by: _____
Diane Smith
Adjudicator

July 25, 2012

Date

¹ *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.).