

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-2851**

Appeal MA12-4

The Greater Sudbury Police Services Board

February 27, 2013

**Summary:** The appellant submitted a request to the police regarding “caution flags” associated with his name. The police refused to confirm or deny the existence of a record pursuant to section 8(3) of the *Act*. Because a record, if it exists, would pertain to the appellant, the discretionary exemption at section 38(a) (refusal to disclose appellant’s own information) was added as an issue during mediation. In this decision, the adjudicator finds that the records, if they exist, would contain only the appellant’s personal information. She also finds that the police are entitled to refuse to confirm or deny the existence of a record as such records, if they exist, would qualify for exemption under sections 8(1)(e) and (l). Moreover, she finds that disclosure of the fact of the existence of a record would itself convey information that could reasonably be expected to compromise the effectiveness of an existing or reasonably contemplated law enforcement activity. She finds further that the police properly exercised their discretion to refuse to confirm or deny the existence of the requested information.

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

## OVERVIEW:

[1] The appellant submitted a request to the Greater Sudbury Police Services Board (the police) pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

This is a request for information that is in your data bank, as it pertains to myself.

1. What caution flags does your service associate with my name?
2. When were there flags assigned to me?
3. Who in your services assigned those flags to my name?

[2] The police issued a decision refusing to confirm or deny the existence of any records in accordance with section 8(3) of the *Act*. The police rely on sections 8(1)(c) (investigative techniques) and (g) (intelligence information) of the *Act* "for records of this type" as the basis for claiming the discretionary exemption at section 8(3).

[3] The appellant appealed the police's decision.

[4] During mediation, the police advised that in addition to sections 8(1)(c) and (g), the police also raised sections 8(1)(e) (endanger life or physical safety) and (l) (facilitate commission of unlawful act) of the *Act* as a basis for claiming section 8(3). Further, as the appellant is seeking information about himself, the police also raised section 38(a) (refusal to disclose appellant's own information) of the *Act*.

[5] No further mediation was possible, and the file was forwarded to the adjudication stage of the appeals process.

[6] I sought and received representations from the police and the appellant. The representations were shared in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*. I note that the police requested that large portions of their representations not be shared with the appellant or otherwise made public. In addition, the appellant did not wish to have any of his submissions made public. It is difficult to explain the reasons upon which a decision is made when very little information can be discussed. Therefore, given the nature of the information requested and the sensitivity of the appellant's situation, it is simply not possible to provide extensive discussion of the reasons for my decisions in this order.

[7] In this order, I find that the records, if they exist, would contain only the appellant's personal information. I find further that the police have properly exercised their discretion to refuse to confirm or deny the existence of records responsive to the appellant's request.

## **ISSUES:**

- A: If records exist (for which section 8(3) has been claimed), would they contain "personal information" as defined in section 2(1) and, if so, to whom would it relate?
- B: Does the discretionary exemption at section 38(a) in conjunction with the section 8(3) exemption apply to the information requested by the appellant?
- C: Did the institution exercise its discretion under sections 38(a) and 8(3)? If so, should this office uphold the exercise of discretion?

## **DISCUSSION:**

**A: If records exist (for which section 8(3) has been claimed), would they contain "personal information" as defined in section 2(1) and, if so, to whom would it relate?**

[8] 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, whether or not that record exists. 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,
- (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;

[9] 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.<sup>1</sup>

[10] 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.

[11] 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.<sup>2</sup>

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<sup>1</sup> Order 11.

<sup>2</sup> Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

[12] 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.<sup>3</sup>

[13] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.<sup>4</sup>

[14] The police acknowledge that, if a record exists, it would contain the appellant's personal information only. I agree. The appellant has asked for information about caution flags attached to his name and this information, if it exists, would be about him in a personal context.

[15] He has also asked for the identities of the individuals who assigned the flags. If this information exists, it would constitute only the appellant's personal information as any information about the source of caution flag assignments would refer to an individual in their professional capacity.

**B: Does the discretionary exemption at section 38(a) in conjunction with the section 8(3) exemption apply to the information requested by the appellant?**

## **Introduction**

[16] 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.

[17] 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.

[18] 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.<sup>5</sup>

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<sup>3</sup> Orders P-1409, R-980015, PO-2225 and MO-2344.

<sup>4</sup> Order PO-1880, upheld on judicial review in Ontario (Attorney General) v. Pascoe, [2002] O.J. No. 4300 (C.A.).

<sup>5</sup> Order M-352.

[19] 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.

[20] In this case, the institution relies on section 38(a) in conjunction with section 8(3).

**Section 8(3): refusal to confirm or deny the existence of a record**

[21] Section 8(3) states:

A head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) applies.

[22] This section acknowledges the fact that in order to carry out their mandates, in certain circumstances, law enforcement agencies must have the ability to be less than totally responsive in answering requests for access to information. However, it would be the rare case where disclosure of the existence of a record would communicate information to the requester that would frustrate an ongoing investigation or intelligence-gathering activity.<sup>6</sup>

[23] For this provision to apply, an institution must provide detailed and convincing evidence to establish that disclosure of the mere existence of records would convey information that could compromise the effectiveness of a law enforcement activity.<sup>7</sup>

[24] For section 8(3) to apply, the police must demonstrate that:

1. the records (if they exist) would qualify for exemption under sections 8(1) or (2), and
2. disclosure of the fact that records exist (or do not exist) would itself convey information that could reasonably be expected to compromise the effectiveness of an existing or reasonably contemplated law enforcement activity.

[Order P-1656]

***If the records exist, would they qualify for exemption under sections 8(1) or (2)?***

[25] The police submit that records (if they exist) would qualify for exemption under sections 8(1)(c), (e), (g) and/or (l) of the *Act*.

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<sup>6</sup> Orders P-255, P-1656.

<sup>7</sup>[P-344.

[26] Sections 8(1)(c), (e), (g) and (l) state:

(1) 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;
- (e) endanger the life or physical safety of a law enforcement officer or any other person;
- (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;
- (l) facilitate the commission of an unlawful act or hamper the control of crime.

[27] I will begin with sections 8(1)(e) and (l).

*Sections 8(1)(e): endanger life or safety and 8(1)(l): commission of an unlawful act or control of crime*

[28] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.<sup>8</sup>

[29] With respect to section 8(1)(l), 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.<sup>9</sup>

[30] In the case of section 8(1)(e), the institution must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the institution must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated.<sup>10</sup>

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<sup>8</sup> Ontario (Attorney General) v. Fineberg (1994), 19 O.R. (3d) 197 (Div. Ct.).

<sup>9</sup> 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.).

<sup>10</sup> 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.).

[31] Moreover, 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* fulfillment of the requirements of the exemption.<sup>11</sup>

### Representations

[32] As I indicated above, most of the representations of the police have been withheld for confidentiality reasons. However, the police describe the nature of “caution flags,” which provides relevant and significant background for their decision to refuse to confirm or deny the existence of records responsive to the appellant’s request. They state:

A “Caution Flag” is added to a person who has had involvement with police and it is appended to the individual when they have exhibited behaviour that could be a threat to officers and the public at large.

[33] The confidential representations submitted by the police provide additional detail regarding the nature and use of caution flags, as well as the harms that could reasonably be expected to occur should this type of information be disclosed.

[34] The appellant has also asked that his representations not be disclosed as they contain extensive details about him and his involvement with the police. While I agree that the details of his submissions should be withheld, it is essential to identify the position he takes regarding the requested records. In this regard, the appellant disputes the position of the police that disclosure of the records, if they exist, could reasonably be expected to result in the harm set out in section 8(1)(l). His reasons for taking this position pertain to his own personal circumstances.

[35] The appellant also questions the ability of the police to refuse to confirm or deny the existence of responsive records because it has, in the past, disclosed this very information to him. I will address this issue under the second part of the discussion.

### Analysis and findings

[36] Previous orders of this office have addressed the application of sections 8(1)(e) and (l) to specific types of law enforcement information, including “cautions.” Other orders provide some insight into the nature of the information at issue.

[37] In Order MO-1515, Adjudicator Donald Hale addressed the issue in the context of a request for correction of records. In that case, the police had disclosed the information to the appellant; however, the order does not address the circumstances

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<sup>11</sup> Order PO-2040; Ontario (Attorney General) v. Fineberg.



under which the appellant in that case obtained the information. Nevertheless, the description provided by the police of the nature of "caution flags" is consistent with that provided by the police in the current appeal, and is thus relevant to this discussion:

. . . the decision of the London Police to deny deleting the "caution flag" of ***Mentally Unstable*** is evident by the supporting records. The "caution flag" (a term used for lack of a better one) is based on police officers' observations, including notes and occurrence reports submitted, relating to the appellant during legitimate police involvement/investigations.

. . .

Such "caution flags" are not only used for the protection/safety of police officers, other citizens and the subject individual him/herself, but can provide the officer with some quick insight, which may assist and, at times, afford the officer a better understanding of the individual when dealing with him or her. The alternative is the officer reads each individual report on the subject before approaching the individual, an alternative that is in most cases not practicable.

. . .

The Police must be able to maintain legitimate records based, not only on fact, but also opinion that is based on common sense. The Police cannot be restrained when it comes to police and public safety issues. The Police must be afforded latitude in these issues.

[38] After considering all of the submissions made by both the appellant and the police in that case, Adjudicator Hale found in the context of the correction request:

The evidence tendered by the Police demonstrates a lengthy history of obsessive, controlling, harassing behaviours by the appellant, particularly with regard to certain matrimonial proceedings in which he has been involved. I find especially compelling certain evidence of improper and inappropriate communications originating with the appellant and directed towards a member of the judiciary. The Police also relied upon the opinions of various mental health professionals who provided assessments of the appellant during the course of his matrimonial proceedings. In my view, the Police have provided me with ample evidence to substantiate its view that the "caution flag" attached to the appellant's personal information in its database is warranted and entirely appropriate.

[39] In my view, Adjudicator Hale's observations underscore the importance of attaching caution flags to the personal information the police have on file about specific

individuals, and indirectly identifies the sensitive nature of this type of information in the law enforcement context.

[40] In Order PO-3075, Adjudicator Colin Bhattacharjee addressed “cautions” as well as other similar types of information described by the institution in that case as follows:

The ministry has also applied section 14(1)(l) to withhold information that if disclosed would facilitate the commission of an unlawful act or hamper the control of crime by undermining the ability of the OPP to safely and effectively respond to any future incidents involving the appellant. Such information includes cautions and similar law enforcement information communicated to ensure the safety of individuals.

[41] In that case, the adjudicator stated:

I agree with previous IPC orders that have consistently found that the disclosure of such information could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime.<sup>12</sup>

[42] In a slightly different context, Order MO-2347-I dealt with procedures contained in a policy and procedure manual that the officers are required to follow when responding to domestic violence incidents, which the police withheld under section 8(1)(e). In the section 8(1)(e) discussion, Adjudicator Bhattacharjee identified the portions of the records at issue as those “that require their officers to employ a specific technique to protect themselves when responding to domestic violence incidents...” He went on to find:

With respect to section 8(1)(e), the Police assert that disclosure of the withheld information in this appeal “could put the police in harm’s way and also endanger the victims of domestic abuse or violence.” I am satisfied that disclosure of the specific safety technique that officers must employ to protect themselves (pages 4-5), coupled with two related references to an internal police system (pages 8 and 12), could reasonably be expected to endanger the physical safety or life of a police officer. In my view, there are safety reasons for withholding this information that are not frivolous or exaggerated. Consequently, I find that this information is exempt under section 8(1)(e) of the *Act*.

[43] Although the contexts in the above-cited orders are different from that of the current appeal, there is a consistent theme that emerges from them. It is apparent

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<sup>12</sup> See, for example, Orders MO-2175, M-757 and PO-2970. See other orders that have found “cautions” to qualify for exemption under section 8(1)(l) or 14(1)(l), the provincial equivalent to section 8(1)(l): Orders MO-2797-I and PO-3075. The decisions in these orders refer to and are based on a long-line of IPC orders on the issue.

that the police have a number of tools, such as caution flags, available to them to assist in law enforcement generally. Added to that function, these tools help to protect officers and the public at large, by providing officers engaged in law enforcement functions with information about the types of situations and individuals they may come into contact with so that they may be better prepared to deal with them. Not only could disclosure of some of this information reasonably be expected to result in the harms identified in section 8(1)(e), it is also reasonable to expect that disclosure could interfere with the ability of the police to perform their duties or could serve to facilitate the commission of crimes under section 8(1)(l).

[44] Applying the description and use of caution flags in Order MO-1515, which is consistent with the confidential representations submitted by the police in the current appeal, and the reasoning and findings in other orders of this office, I find that disclosure of caution flags could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime, and the records, therefore, qualify for exemption pursuant to section 8(1)(l). Similar to the findings in Order MO-2347-I, I also find that their disclosure could reasonably be expected to endanger the physical safety or life of a police officer pursuant to section 8(1)(e), and that these safety concerns are not frivolous or exaggerated.

***Would disclosure of the fact that records exist (or do not exist) itself convey information that could reasonably be expected to compromise the effectiveness of an existing or reasonably contemplated law enforcement activity?***

[45] As I indicated above, that appellant questions the ability of the police to refuse to confirm or deny the existence of responsive records because it has, in the past, disclosed this very information to him. The appellant provides a copy of a letter written to him in 2002, which refers to a caution flag about him. He also suggests that in October, 2011 a police officer alluded to the fact that there were caution flags about him "in the system."

[46] The appellant has also submitted a number of documents that pertain to him, with which he seeks to demonstrate that there should be no caution flags concerning him. The totality of his evidence suggests that he seeks to determine what caution flags are in existence so that he can attempt to have them removed.

[47] The police have asked that all of their submissions on this issue be held in confidence, relying on the nature of the information requested and the application of section 8(1)(l) and (e). In my view, as clearly noted by the appellant in his submissions, it is sufficient to say that the appellant is known to the police, and has been for a considerable period of time.

[48] Regarding the appellant's arguments, I note that it has been over ten years since the appellant was apprised of a caution that was connected to his name. It is apparent that he is seeking confirmation of more recent additions to the information he already has. I am not persuaded that a vague reference to information obtained from a police officer provides sufficient evidence that would confirm, to my satisfaction, the existence or non-existence of caution flags attached to the appellant's name.

[49] Having considered all of the evidence, I am satisfied that disclosure of the fact that a record exists or not would convey information that could reasonably be expected to compromise the effectiveness of an existing or reasonably contemplated law enforcement activity. Accordingly, subject to my findings below on the exercise of discretion, I find that the police may rely on sections 38(a) and 8(3) to refuse to confirm or deny the existence of responsive records.

**C: Did the institution exercise its discretion under sections 38(a) and 8(3)? If so, should this office uphold the exercise of discretion?**

### **General principles**

[50] The section 8(3) and 38(a) exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it (or refuse to confirm or deny its existence). An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[51] 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.

[52] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>13</sup> This office may not, however, substitute its own discretion for that of the institution.<sup>14</sup>

[53] The police acknowledge that, if a record were to exist, the following considerations would be relevant, and it would take them into account in determining whether access should be granted it under sections 38(a) and 8(1):

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<sup>13</sup> Order MO-1573.

<sup>14</sup> section 43(2).

- information should be available to the public as long as its disclosure does not place an officer or the public in harm;
- individuals should have a right of access to their own information, as long as its disclosure would not harm others;
- exemptions from the right of access should be limited and specific;
- the wording of the exemption and the interest it seeks to protect, which is of significant weight in the current appeal;
- whether the requester is seeking his own information, as in this case;
- whether the requester has a sympathetic or compelling need to receive the information; and
- whether disclosure will increase public confidence in the operation of the institution – in this case the actions of the police have not been called into question.

[54] The police also provide confidential representations on other considerations that they took into account in making their decision to refuse to confirm or deny the existence of the requested information.

[55] The appellant submits that the police did not properly exercise their discretion, in that they took into account irrelevant considerations based on information obtained from unreliable sources to “assassinate my character.” The appellant submits further that the police have acted in bad faith and have not taken into account relevant factors.

[56] After considering the totality of the evidence and submissions made in this inquiry, I am satisfied that the police have taken into account relevant considerations; that they have not taken into account irrelevant considerations; and that they have acted in good faith in exercising their discretion to refuse to confirm or deny the requested information. Accordingly, I uphold the decision of the police to apply sections 38(a) and 8(3) in the circumstances of this appeal.

**ORDER:**

I uphold the decision of the police.

Original signed by: \_\_\_\_\_  
Laurel Cropley  
Adjudicator

\_\_\_\_\_ February 27, 2013