

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2871

Appeal MA12-193

Peel Regional Police Services Board

April 22, 2013

Summary: The requester sought copies of records related to him concerning a specific criminal charge. The police denied access, citing the law enforcement exemption at section 38(a) read in conjunction with section 8(1), the personal privacy exemptions in sections 38(b) or 14(1), and the solicitor-client privilege exemption in section 12. This order partially upholds the police's decision and also upholds their search for a "Probable Grounds Arrest" report.

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"), 38(a), 8(1)(c), 8(1)(g), 8(1)(l), 38(b), 14(1), 14(2)(f), 14(3)(b), 12.

Orders and Investigation Reports Considered: Orders MO-2112, PO-2633, PO-3129

OVERVIEW:

[1] The Peel Regional Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for access to records about a specific criminal charge laid against the requester. The request specifically stated:

I am seeking probable cause report of my ...charge. Please include correspondence with crown attorney's office, Halton Police and [named] nursing home.

[2] The police located a number of responsive records and issued a decision letter providing access to the records in part. Access to portions of the records was denied in accordance with section 38(b) (personal privacy) of the *Act*.

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

[4] During mediation, the appellant advised that the police are withholding a document titled "Probable Grounds for Arrest" report. The mediator then contacted the police. The police stated that they do not have any reports titled "Probable Grounds for Arrest" report.

[5] The appellant was not satisfied with the explanation of the police. He still believes that a "Probable Grounds for Arrest" report exists. As a result, the issue as to whether the police conducted a reasonable search for this record was added to this appeal.

[6] In a supplementary decision, the police advised the appellant that they also rely on additional discretionary exemptions to deny access to portions of the records, namely section 38(a) in conjunction with section 8(1) (law enforcement) and section 12 (solicitor-client privilege) of the *Act*.

[7] As mediation did not resolve the issues in this appeal, the file was referred to the adjudication stage of the inquiry process where an adjudicator conducts an inquiry. I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the police and the individuals whose current contact information was available. These individuals' (the affected persons') personal information may be contained in the records.

[8] I received representations from the police, which I sent to the appellant along with a Notice of Inquiry. I also received a letter from an affected person objecting to disclosure of their personal information. Portions of the police's representations and all of the affected person's representations were withheld due to confidentiality concerns. The appellant provided representations in response to the police's representations.

[9] Attached to the appellant's representations were copies of pages 13-15 and 66-76 of Record 2. Therefore, these pages are no longer at issue in this appeal.

[10] In this order, I uphold the police's decision that the information at issue in the records is exempt, except for the information at pages 1 to 3 and 65 of Record 2. I also uphold the police's search for a "Probable Grounds for Arrest" report.

RECORDS:

[11] The records remaining at issue consist of various police documents including occurrence reports and officer's notes, as described in the index of records provided by the police.¹

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the discretionary exemption at section 38(a), in conjunction with the law enforcement exemptions in sections 8(1)(c), (g) and (l), apply to the information at issue?
- C. Does the discretionary exemption at section 38(a) in conjunction with the section 12 solicitor-client privilege exemption apply to pages 31 to 32 of Record 2?
- D. Does the mandatory personal privacy exemption at section 14(1) or the discretionary personal privacy exemption at section 38(b) apply to the information at issue?
- E. Did the police exercise their discretion under sections 38(a) and (b)? If so, should this office uphold the exercise of discretion?
- F. Did the police conduct a reasonable search for a "Probable Grounds for Arrest" report?

DISCUSSION:

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

[12] 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,

¹ See Appendix to order. Record 1 is an eight page occurrence report. Record 2 is a copy of the Crown Brief and includes police officers' notes, occurrence reports and medical reports. Record 3 is a copy of another police officer's notes.

- (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 if 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;

[13] 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.²

² Order 11.

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

(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.

[15] 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.³

[16] 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.⁴

[17] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁵

[18] The police state that the records contain the addresses, ages, dates of birth, telephone numbers and employment details of third parties. They state that the records also contain the third parties' views and opinions of what transpired between the appellant and the victim. They submit that this information reveals something of a personal nature about these individuals even though it relates to them in their professional capacity.

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

Analysis/Findings

[20] Based on my review of the records I find that, other than the cover sheet at page 65 of Record 2, the records contain the personal information of the appellant and the other individuals identified in the records. This information includes these individuals' addresses, ages, dates of birth, telephone numbers and employment

³ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁴ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁵ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

history, as claimed by the police. It also includes medical history and names that appear with other personal information relating to these individuals. Although there is information that relates to certain individuals in a professional, official or business capacity, it still qualifies as personal information as it reveals something of a personal nature about these individuals.

[21] Therefore, as the records, other than page 65 of Record 2, contain the personal

[22] information of the appellant and other individuals, I will consider the application of sections 38(a) and 38(b) or 14(1) to the information at issue in the records.

[23] Since I have found that the cover page at page 65 of Record 2, which only contains two words, does not contain personal information,⁶ I will consider the application of sections 8(1)(c) and (g) to this information. As it does not contain personal information, sections 38(a) and 38(b) or 14(1) cannot apply to this information.

B. Does the discretionary exemption at section 38(a), in conjunction with the law enforcement exemptions in sections 8(1)(c), (g) and (l), apply to the information at issue?

[24] 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.

[25] 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.

[26] 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 [Order M-352].

[27] 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.

⁶ Order PO-2874.

[28] In this case, the police rely on section 38(a) in conjunction with sections 8(1)(c), (g) and (l). Section 8(1) states in part:

- (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;
 - (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.

[29] 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)

[30] The term "law enforcement" has been found to apply in a police investigation into a possible violation of the *Criminal Code*.⁷

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

[32] Except in the case of section 8(1)(e), where section 8 uses the words "could reasonably be expected to", the institution must provide "detailed and convincing"

⁷ Orders M-202 and PO-2085.

⁸ *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

evidence to establish a “reasonable expectation of harm”. Evidence amounting to speculation of possible harm is not sufficient.⁹

[33] 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.¹⁰

Section 8(1)(c): investigative techniques and procedures
Section 8(1)(l): commission of an unlawful act or control of crime

[34] Concerning section 8(1)(c), the police state that the techniques or procedures in the records are generally not known to the public and disclosure could reasonably be expected to hinder or compromise their effective utilization. The police state that the technique or procedure consist of cautions, FPS numbers, case management files and other police documents, as follows:

- Cautions and FPS numbers are used in an investigative manner to assist the officers while dealing with an individual. The cautions speak directly to the previous demeanour and/or health issues of the individual.
- Case management files and the other police documents were obtained while the officers were conducting the investigation in relation to the appellant.

[35] The appellant’s only submission about the application of the law enforcement exemption is that:

Police are welcome to protect sources, means and methods.

[36] Concerning section 8(1)(l), the police state that all 10 Codes have been removed from the records as they are specific codes used while sending transmissions, either verbally or in writing and are not generally known to the public. The police further state that disclosure could contribute to an unlawful act if disclosed.

Analysis/Findings re: sections 8(1)(c) and (l)

[37] In order to meet the “investigative technique or procedure” test, the institution must show that disclosure of the technique or procedure to the public could reasonably

⁹ 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.).

¹⁰ Order PO-2040; *Ontario (Attorney General) v. Fineberg*, (cited above).

be expected to hinder or compromise its effective utilization. The exemption normally will not apply where the technique or procedure is generally known to the public.¹¹

[38] The techniques or procedures must be “investigative”. The exemption will not apply to “enforcement” techniques or procedures.¹²

[39] In Order MO-2112, Adjudicator Colin Bhattacharjee considered the application of section 8(1)(c) to similar records to those in this appeal. The records in Order MO-2112 consisted of police occurrence reports and a “Contact with Emotionally Disturbed Person (EDP) Report” regarding the appellant in that appeal’s interaction with the police. In that order, Adjudicator Bhattacharjee reproduced the police’s representations on the application of section 8, as follows:

Section 8 is a discretionary law enforcement exemption. The affected individuals furnished the investigating officers with information in confidence, and now this Police Service has an obligation to maintain the confidentiality or else the police could not reasonably expect people to come forward with information.

We need to maintain the integrity of investigative information and evidence compiled during an investigation. If this information can be released without consent, then it will affect the abilities of the police to conduct such investigations. The Police Service did not receive consent from the affected parties.

[40] Adjudicator Bhattacharjee then stated that:

These representations bear little connection to the specific section 8 exemptions claimed by the Police. In short, I find that the Police have failed to provide sufficiently detailed and convincing evidence to establish that disclosure of the withheld portions of the records could reasonably be expected to:

- reveal investigative techniques and procedures currently in use or likely to be used in law enforcement [section 8(1)(c)];
or
- facilitate the commission of an unlawful act or hamper the control of crime [section 8(1)(l)].

...

¹¹ Orders P-170, P-1487, MO-2347-I and PO-2751.

¹² Orders PO-2034 and P-1340.

In short, I have virtually no evidence before me, other than the brief passages from the Police's representations cited above, that would support the Police's decision to deny access to portions of the records pursuant to the discretionary exemption in section 38(a) in conjunction with sections 8(1)(c), 8(1)(e), 8(1)(l), 8(2)(a) and 8(2)(c) of the *Act*.

I would note, however, that the Police have withheld "police codes" from the records at issue. This office has issued numerous orders with respect to the disclosure of police codes and has consistently found that section 8(1)(l) applies to "10 codes" (see Orders M-93, M-757, MO-1715 and PO-1665), as well as other coded information such as "900 codes" (see Order MO-2014). These orders adopted the reasoning of Adjudicator Laurel Cropley in Order PO-1665:

In my view, disclosure of the "ten-codes" would leave OPP officers more vulnerable and compromise their ability to provide effective policing services as it would be easier for individuals engaged in illegal activities to carry them out and would jeopardize the safety of OPP officers who communicate with each other on publicly accessible radio transmission space.

Although the Police have not provided any representations as to why they severed police codes in the records at issue, I accept that this information may be withheld pursuant to section 8(1)(l) of the *Act*. Consequently, I find that the police codes in the records at issue qualify for exemption under section 38(a) in conjunction with section 8(1)(l) of the *Act*.

However, I find that the Police have failed to discharge the burden of demonstrating that the balance of the withheld portions of the records falls within the discretionary exemption in 38(a) in conjunction with the sections 8(1)(c), 8(1)(e), 8(1)(l), 8(2)(a) and 8(2)(c) of the *Act*. Consequently, I will now determine whether this remaining information qualifies for exemption pursuant to the discretionary exemption in section 38(b) of the *Act*.

[41] I agree with and adopt this analysis of Adjudicator Bhattacharjee in Order MO-2112. With respect to section 8(1)(c), the police have failed to provide sufficiently detailed and convincing evidence to establish that disclosure of the investigative techniques and procedures could reasonably be expected to hinder or compromise their effective utilization. In particular, the police did not provide details of how disclosure

could hinder or compromise their effective utilization of each technique and procedure. Nor is this information apparent from a review of the records.

[42] Accordingly, I find that section 38(a) in conjunction with section 8(1)(c) does not apply in this appeal. This information is found at pages 2 and 3 of Record 1, pages 1 to 3, 65, and 77 to 79 of Record 2. I will order the information at pages 1 to 3 and 65 of Record 2 disclosed as no other exemption has been claimed for this information. I will consider below whether the remaining exemptions claimed for the information at pages 2 and 3 of Record 1 and pages 77 to 79 of Record 2 apply.

[43] Concerning section 8(1)(l), I also agree with Adjudicator Bhattacharjee in Order MO-2112 that this office has issued numerous orders with respect to the disclosure of police codes and has consistently found that section 8(1)(l) applies to "10 codes". Adopting this reasoning, I find that disclosure of the 10 codes in the records could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime and that section 38(a) read in conjunction with section 8(1)(l) applies to this information. I will consider below whether the police exercised their discretion under section 38(a) in a proper manner concerning this information.

Section 8(1)(g): law enforcement intelligence information

[44] Concerning section 8(1)(g), the police state that the law enforcement intelligence information in the records consists of a specific nursing home's correspondence with the crown attorney, Halton Health Services and the police. They state that disclosure of this information could reasonably be expected to reveal law enforcement intelligence information gathering between organizations.

Analysis/Findings

[45] The term "intelligence information" means:

Information gathered by a law enforcement agency in a covert manner with respect to ongoing efforts devoted to the detection and prosecution of crime or the prevention of possible violations of law. It is distinct from information compiled and identifiable as part of the investigation of a specific occurrence.¹³

[46] The incident referred to in the records took place at a nursing home. The police have applied the section 38(a) in conjunction with section 8(1)(g) exemption to medical reports and emails from a hospital and nursing home related to the incident and to

¹³ Orders M-202, MO-1261, MO-1583, PO-2751; see also Order PO-2455, confirmed in *Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 4233 (Div. Ct.).

information received from the Crown. This information is found at pages 16 to 28, 31 to 35, 65, and 77 to 79 of Record 2.

[47] I find that this information was compiled and is identifiable as part of the investigation of a specific occurrence and was not compiled in a covert manner with respect to ongoing efforts devoted to the detection and prosecution of a crime.

[48] Furthermore, the police's representations do not provide details of how disclosure of the information at issue could reasonably be expected to interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons.

[49] Based on my review of the records and the police's representations, I find that the information at issue is not exempt by reason of section 38(a) read in conjunction with section 8(1)(g). However, as the police have claimed the application of the personal privacy exemption in sections 14(1) or 38(b) to this information, as well as section 12 to pages 31 to 32 of Record 2, I will consider below the application of these exemptions to this information.

C. Does the discretionary exemption at section 38(a) in conjunction with the section 12 solicitor-client privilege exemption apply to pages 31 to 32 of Record 2?

[50] In this case, the police rely on section 38(a) in conjunction with section 12. Section 12 states as follows:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

[51] Section 12 contains two branches. Branch 1 arises from the common law and branch 2 is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

[52] I will begin by considering whether the emails on pages 31 and 32 of Record 2 are subject to the common law solicitor-client communication privilege in branch 1.

[53] Branch 1 of the section 12 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 12 to apply, the institution must

establish that one or the other, or both, of these heads of privilege apply to the records at issue.¹⁴

[54] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.¹⁵

[55] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.¹⁶

[56] The privilege applies to “a continuum of communications” between a solicitor and client:

. . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach.¹⁷

[57] The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice.¹⁸

[58] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.¹⁹

[59] The police state that they have claimed the application of section 38(a) in conjunction with section 12 to the emails on pages 31 and 32 of Record 2 as they were provided to the police by the crown attorney while the investigation into criminal charges was ongoing. Therefore, they state that these communications are privileged.

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

Analysis/Findings

[61] In Order PO-2633, I found that branch 1 communication privilege applied to similar records. In that order, the record was a letter from the police to the Crown. I

¹⁴ Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).

¹⁵ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

¹⁶ Orders PO-2441, MO-2166 and MO-1925.

¹⁷ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

¹⁸ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

¹⁹ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

found that the police and Crown were in a solicitor-client relationship. I also found that the letter in that appeal was privileged. I stated that:

...The question of whether a communication between Crown counsel and a member of a police force can be protected by solicitor-client communication privilege has been addressed in several previous orders. In Order MO-1663-F, Adjudicator Sherry Liang summarized these decisions, stating:

In *R. v. Campbell* [reported at [1999] 1 S.C.R. 565 (S.C.C.)], the Supreme Court of Canada adopted what it described as the "functional" definition of solicitor-client privilege set out in *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860 at p. 872:

Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.

The Court found that the consultation by an officer of the Royal Canadian Mounted Police (the RCMP) with a Department of Justice lawyer over the legality of a proposed "reverse sting" operation by the RCMP fell squarely within the functional definition. The Court emphasized that it is not everything done by a government (or other) lawyer that attracts solicitor-client privilege, providing some examples of different responsibilities that may be undertaken by government lawyers in the course of their work. The Court stated that:

[w]hether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered.

R. v. Campbell has been applied in orders of this office, such as in PO-1779, PO-1931 and MO-1241. In each of these orders, a solicitor-client privilege was found on the basis that the police (a municipal police service or the Ontario Provincial Police) sought legal advice from Crown counsel. All

communications within the framework of this relationship were found to qualify for solicitor-client privilege under either section 12 of the [municipal] *Act*, or section 19 of the provincial *Act*.

...Record 41²⁰ contains direct communications of a confidential nature between a Crown counsel as the solicitor and the SIU as the client made for the purpose of obtaining or giving professional legal advice concerning the *YCJA*²¹ litigation. I, therefore, find that Record 41 is subject to the common law solicitor-client privilege under branch 1. This privilege has not been waived. Therefore, subject to my discussion below concerning the Ministry's exercise of discretion, Record 41 is exempt by reason of section 19.²²

[62] Similarly, in this appeal, the emails at issue are direct communications between the Crown and the police for the purpose of obtaining or giving professional legal advice concerning the police's investigation into a criminal charge laid against the appellant. I find that the emails at pages 31 and 32 of Record 2 are subject to the common law solicitor-client privilege under branch 1. This privilege has not been waived. Therefore, subject to my discussion below concerning the police's exercise of discretion, pages 31 and 32 are exempt by reason of section 38(a) read in conjunction with section 12 of the *Act*.

[63] As I have found the information at pages 31 and 32 of Record 2 are subject to solicitor-client privilege at branch 1 of section 12, it is not necessary for me to also consider whether it is subject to branch 1 litigation privilege or subject to branch 2.

D. Does the mandatory personal privacy exemption at section 14(1) or the discretionary personal privacy exemption at section 38(b) apply to the information at issue?

[64] 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.

[65] 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.

²⁰ The record at issue.

²¹ *Youth Criminal Justice Act*.

²² Section 19 of the *Freedom of Information and Protection of Privacy Act*, the provincial equivalent to section 12 of the *Act*.

[66] 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.

[67] 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".

[68] In both these situations, sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met. The information does not fit within any of paragraphs (a) to (e) of section 14(1).

[69] The factors and presumptions in sections 14(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 14(1)(f). This section reads:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

[70] If any of paragraphs (a) to (c) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under sections 14 or 38(b). In this case, paragraphs (a) to (c) of section 14(4) do not apply.

[71] 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 either sections 38(b) or 14. In this appeal, the police have claimed the application of section 14(3)(b) to certain information in the records. This section reads:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation.

[72] With respect to records claimed to be exempt under section 38(b), in *Grant v. Cropley*,²³ the Divisional Court said that the Commissioner could:

. . . consider the criteria mentioned in s.21(3)(b) [the provincial equivalent to section 14(3)(b)] in determining, under s.49(b) [the equivalent to section 38(b)], whether disclosure . . . would constitute an unjustified invasion of personal privacy.

[73] 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.²⁴ The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.²⁵

[74] The police submit that all the information compiled by them was done so as part of the investigation into an offence under the *Criminal Code of Canada* and that none of the records were created after the completion of the investigation.

[75] The appellant did not provide direct representations on this issue, but does confirm that there was a criminal investigation related to the records.

Analysis/Findings

[76] The police have claimed the application of the presumption in section 14(3)(b) to:

- pages 1, 4, 5 and 7 of Record 1,
- pages 5 to 12, 29-30, 34-35, 43, 45, 49, 51, and 77-79 of Record 2, and
- pages 3-4 of Record 3.

[77] The police have claimed that section 38(b) applies to all of the information at issue, except for page 51 of Record 2, as they contain the personal information of the appellant and other identifiable individuals. I do not agree with the police that section 38(b) does not apply to page 51 of Record 2. The correct approach is to review the entire record to determine if section 38(b) applies. In this case, pages 51 to 52 of Record 2 consist of the notes of a particular police officer investigating an alleged violation of law. Reviewing these pages, I note that they contain the personal information of the appellant and other identifiable individuals.

²³ [2001] O.J. 749.

²⁴ Orders P-242 and MO-2235.

²⁵ Orders MO-2213, PO-1849 and PO-2608.

[78] As stated by Assistant Commissioner Brian Beamish in Order PO-3129:

With regard to the appellant's personal information, previous orders have established that where a record contains both the personal information of the requester and another individual, the request falls under Part II of the *Act* and the relevant personal privacy exemption is the exemption at section 49(b) [of the *Freedom of Information and Protection of Privacy Act (FIPPA)*, the equivalent to section 38(b) of the *Act*].²⁶ Some exemptions, including the invasion of personal privacy exemption at section 21(1) [of *FIPPA*, the equivalent to section 14(1) of the *Act*], are mandatory under Part I but discretionary under Part II, and thus in the latter case an institution may disclose information that it would not disclose if Part I is applied.²⁷

The correct approach is to review the entire record, not only those portions remaining at issue, to determine whether it contains the requester's personal information. This record-by-record analysis is significant because it determines whether the record as a whole (rather than only certain portions of it) must be reviewed under Part I or Part II of [*FIPPA*].²⁸

[79] Pages 1, 4, 5 and 7 of Record 1 and pages 77 to 79 of Record 2 are occurrence reports and were prepared by the police as part of their investigation into violations of the law and, therefore, are subject to section 14(3)(b).

[80] Pages 5 to 12, 43, 45, 49 and 51 of Record 2 and pages 3 and 4 of Record 3 are notes of police officers investigating an alleged violation of law and, therefore, are subject to section 14(3)(b).

[81] Pages 29 to 30 and 34 to 35 of Record 2 contain emails. Page 34 is identical to page 35. These emails contain information concerning the investigation into an alleged violation of law and. I find, therefore, that these pages are subject to section 14(3)(b).

[82] Therefore, I find that the following records are subject to the presumption in section 14(3)(b):

- pages 1, 4, 5 and 7 of Record 1,
- pages 5 to 12, 29-30, 34-35, 43, 45, 49, 51, and 77-79 of Record 2, and

²⁶ Order M-352.

²⁷ Orders MO-1757-I and MO-2237.

²⁸ Order M-352.

- pages 3-4 of Record 3,

[83] This information was compiled and is identifiable as part of an investigation into a possible violation of law. Disclosure of this information is presumed to be an unjustified invasion of personal privacy under section 38(b).

[84] Concerning the remaining information for which the personal privacy exemptions in sections 14(1) or 38(b) have been claimed and no section 14(3) presumption applies, section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.²⁹

[85] The police submit that the factor in section 14(2)(f) which weighs against disclosure of the personal information applies to pages 2 to 3 of Record 1 and pages 16 to 28 of Record 2. Section 14(2)(f) reads:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

the personal information is highly sensitive

[86] The appellant has not raised the application of any factors favouring disclosure in section 14(2) to the information at issue.

[87] The police did not claim that section 38(b) applies to pages 2 to 3 of Record 1 and pages 16 to 28 and 53 to 58 of Record 2. Record 1 is an eight page occurrence report containing details about an alleged violation of law concerning the appellant. Relying on the analysis set out above from Order PO-3129, I find that section 38(b) applies to all of Record 1, including the information at issue in pages 2 to 3 of Record 1. In addition, the appellant's personal information is contained in each of the reports that comprise pages 16 to 28 and 53 to 58 of Record 2. Again, relying on Order PO-3129, I find that section 38(b) applies to these pages.

[88] The police have also claimed the application of section 14(1)³⁰ to pages 4, 40, 42, 44, 47 and 50 of Record 2 and page 1 of Record 3. All of these pages are cover sheets to the police officers' notes of the alleged violation of law concerning the appellant. I also find that section 38(b) applies to this information as the appellant's personal information is included both in the cover sheets and in the notes attached to each cover sheet.

²⁹ Order P-239.

³⁰ The police did not claim that the discretionary personal privacy exemption in section 38(b) applies to this information.

[89] Based on my review of the records, I find that the factor in section 14(2)(f) does not apply to the information at issue on pages 2 to 3 of Record 1. This information is the personal information of the appellant and describes certain attributes about him only as recorded by the police. This information is not about any other identifiable individual.

[90] However, I find that the factor in section 14(2)(f) applies to the information at pages 16 to 28 and 53 to 58 of Record 2. This information consists of the medical records of another individual and is highly sensitive. There is a reasonable expectation of significant personal distress to this other individual if this information is disclosed.³¹ I also find that none of the factors favouring disclosure in section 14(2) apply to the information at pages 16 to 28 of Record 2.

[91] The remaining information at issue at pages 4, 40, 42, 44, 47 and 50 of Record 2 and page 1 of Record 3, consists of details of the length of time each police officer who wrote the notes have been employed in the policing field. I find that no factors in favour of disclosure apply to the employment history of the police officers identified in the records.

[92] I find that none of the factors favouring disclosure of the personal information in the records apply. Therefore, subject to my review of the police's exercise of discretion, I find that disclosure of the personal information in the records would constitute an unjustified invasion of personal privacy under section 38(b).

Conclusion

[93] I will consider below whether the police exercised their discretion in a proper manner concerning the following information that I have found to be subject to the discretionary personal privacy exemption in section 38(b):

- pages 1, 2, 3, 4, 5 and 7 of Record 1,
- pages 5 to 12, 16 to 30, 34-35, 40, 42 to 45, 47, 49, 50, 51, 53 to 58, and 77-79 of Record 2, and
- pages 1, 3 and 4 of Record 3.

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

[94] The sections 38(a) and (b) exemptions are discretionary and permit an institution to disclose information, despite the fact that it could withhold it. An institution must

³¹ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[95] 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.

[96] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.³² This office may not, however, substitute its own discretion for that of the institution.³³

[97] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:³⁴

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization

³² Order MO-1573.

³³ Section 43(2) of the *Act*.

³⁴ Orders P-344, MO-1573.

- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

[98] The police state that they took into account the above-mentioned relevant factors and discounted any irrelevant factors. They submit that their discretion was not exercised in bad faith or for an improper purpose.

[99] The appellant did not provide representations on this issue. Instead his representations focus on obtaining access to other records that are not subject to this appeal, for example, records dated from 2005 to 2009. The request in this appeal was merely for records related to a particular charge laid by the police. If the appellant seeks access to other records, he will have to file another request seeking access to those specific records.

Analysis/Findings

[100] Based upon my review of the information at issue and the police's representations in their entirety, I find that the police exercised their discretion in a proper manner, taking into account relevant factors and not taking into account irrelevant factors.

[101] Therefore, I am upholding the police's exercise of discretion and find that the information that I have found subject to sections 38(a) and 38(b) is exempt under those discretionary exemptions.

F. Did the police conduct a reasonable search for a "Probable Grounds for Arrest" report?

[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 17.³⁵ 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.

³⁵ Orders P-85, P-221 and PO-1954-I.

[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.³⁶ To be responsive, a record must be "reasonably related" to the request.³⁷

[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.³⁸

[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.³⁹

[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.⁴⁰

[107] The police were asked in the Notice of Inquiry to provide a written summary of all steps taken in response to the request. In response, the police state that in response to the request, a query was done of the police database that holds all occurrences and incidents. This query located responsive records related to the investigation that was the subject matter of the request. In addition, the police state that the police officers that were involved in the investigation were asked to provide copies of their notes, statements and any correspondence they had, particularly with the Crown's office, the police and the named nursing home.

[108] The police asked their RIMS (Records Information Management System) supervisor, to inquire if the police generate a Probable Grounds for Arrest report, perhaps under a different title. The RIMS supervisor advised that the police do not generate such a report and also that in matters involving the type of offence that was the subject matter of the records, the police's retention schedule is 50 years after completion of the investigation. Therefore, the police state that no responsive records were destroyed.

[109] The appellant did not provide representations on this issue other than stating that there exists a probable grounds report that a named police officer passed on to another officer or division.

³⁶ Orders P-624 and PO-2559.

³⁷ Order PO-2554.

³⁸ Orders M-909, PO-2469, PO-2592.

³⁹ Order MO-2185.

⁴⁰ Order MO-2246.

Analysis/Findings

[110] Based on my review of the police representations, I find that they conducted a reasonable search for responsive records. The appellant claims that a probable grounds report was passed on by a named police officer to another named police officer. Both officers were asked by the police to produce all responsive records, including any probable grounds reports. Both officers' records are included in this appeal, and do not include probable grounds reports.

[111] I find that the appellant has not provided a reasonable basis for concluding that a "Probable Grounds for Arrest" report exists. I find that the police have provided sufficient evidence to demonstrate that they have made a reasonable effort to identify and locate this report within their custody or control and I uphold the police's search for this record.

ORDER:

1. I order the police to disclose to the appellant by **May 28, 2013** but not before **May 23, 2013** the information that I have found not to be exempt under section 38(a) read in conjunction with section 8(1)(c). For clarity, the police must disclose pages 1 to 3 and 65 of Record 2.
2. I uphold the police's decision that the remaining information in the records is exempt.
3. In order to verify compliance with order provision 1, I reserve the right to require that the police provide me with a copy of the pages of Record 2 sent to the appellant.
4. I uphold the police's search for a responsive "Probable Grounds for Arrest" report.

Original Signed by: _____
Diane Smith
Adjudicator

_____ April 22, 2013

APPENDIX
INDEX OF RECORDS

POLICE'S PAGE NUMBER	EXEMPTED ALL PART		EXEMPTIONS APPLIED AND POLICE'S DESCRIPTION	
			<u>RECORD 1</u>	
DEC 15 FOI 0001		X	14(1)(f) 14(3)(b) 38(b)	Occurrence [#1]. Contains the personal information of third parties that cannot be released without their consent.
DEC 15 FOI 0002-0003		X	8(1)(c) 38(a) 14(2)(f)	Occurrence [#1]. Information removed as it relates to law enforcement investigative techniques and procedures and the personal information is highly sensitive.
DEC 15 FOI 0004-0005		X	14(1)(f) 14(3)(b) 38(b)	Occurrence [#1]. Contains the personal information of third parties that cannot be released without their consent.
DEC 15 FOI 0007		X	14(1)(f) 14(3)(b) 38(b)	Occurrence [#1]. Contains the personal information of third parties that cannot be released without their consent.
			<u>RECORD 2</u>	
DEC 20 FOI 0001-0003	X		8(1)(c) 38(a)	Crown Brief Index Form. Page denied as it relates to law enforcement investigative techniques and procedures.
DEC 20 FOI 0004		X	14(1)(f)	Notes from Cst. [#A]. Other personal information of the officer removed.
DEC 20 FOI 0005		X	14(1)(f) 14(3)(b) 38(b)	Notes from Cst. [#A]. Contains the personal information of third parties that cannot be released without their consent.
DEC 20 FOI 0006-0007		X	8(1)(l) 38(a)	Notes from Cst. [#A]. 10 code information removed.
DEC 20 FOI 0009-0010		X	8(1)(l) 38(a)	Notes from Cst. [#A]. 10 code information removed.
DEC 20 FOI 0011-0012		X	8(1)(l) 38(a) 14(1)(f)	Notes from Cst. [#A]. 10 code information removed. Contains the personal information of third parties that cannot be

			14(3)(b) 38(b)	released without their consent.
DEC 20 FOI 0016-0028	X		8(1)(g) 38(a) 14(2)(f)	Nursing Home documents. Pages denied as it relates to gathering of law enforcement intelligence information.
DEC 20 FOI 0029-0030	X		14(1)(f) 14(3)(b) 38(b)	Email. Contains the personal information of third parties that cannot be released without their consent.
DEC 20 FOI 0031-0032	X		12 8(1)(g) 38(a) 14(1)(f) 14(3)(b) 38(b)	Email. Pages denied as it relates to solicitor/client privilege, intelligence gathering information and contains the personal information of third parties that cannot be released without their consent.
DEC 20 FOI 0033	X		8(1)(g) 38(a)	Email. Pages denied as it relates to gathering of law enforcement intelligence information.
DEC 20 FOI 0034-0035	X		8(1)(g) 38(a) 14(1)(f) 14(3)(b) 38(b)	Pages denied as it relates to intelligence gathering information contains the personal information of third parties that cannot be released without their consent.
DEC 20 FOI 0036		X	14(1)(f)	Notes of Cst. [#B]. Other personal information of the officer removed.
DEC 20 FOI 0037-0039		X	8(1)(l) 38(a)	Notes of Cst. [#B]. The top portion of the highlighted area is non-responsive as they refer to non-related incidents. 10 code information removed.
DEC 20 FOI 0040		X	14(1)(f)	Notes of Cst. [#C]. Other personal information of the officer removed.
DEC 20 FOI 0042		X	14(1)(f)	Notes of Cst. [#D]. Other personal information of the officer removed.
DEC 20 FOI 0043		X	8(1)(l) 38(a) 14(1)(f) 14 (3)(b) 38(b)	Notes of Cst. [#D]. 10 code information removed. Contains the personal information of third parties that cannot be released without their consent.
DEC 20 FOI 0044		X	14(1)(f)	Notes of Cst. [#E]. Other personal information of the officer removed.

DEC 20 FOI 0045		X	14(1)(f) 14(3)(b) 38(b) 8(1)(l) 38(a)	Notes of Cst. [#E]. 10 code information removed. Contains the personal information of third parties that cannot be released without their consent.
DEC 20 FOI 0046		X	8(1)(l) 38(a)	Notes of Cst. [#E]. 10 code information removed.
DEC 20 FOI 0047		X	14(1)(f)	Notes of Cst. [#F]. Other personal information of the officer removed.
DEC 20 FOI 0048		X	8(1)(l) 38(a)	Notes of Cst. [#F]. 10 code information removed.
DEC 20 FOI 0049		X	14(1)(f) 14(3)(b)	Notes of Cst. [#F]. Contains the personal information of third parties that cannot be released without their consent.
DEC 20 FOI 0050		X	14(1)(f)	Notes of Cst. [#G]. Other personal information of the officer removed.
DEC 20 FOI 0051		X	14(1)(f) 14(3)(b)	Notes of Cst. [#G]. Contains the personal information of third parties that cannot be released without their consent.
DEC 20 FOI 0053-0058	X		8(1)(g) 38(a) 14(2)(f)	Hospital Documentation. Pages denied as it relates to intelligence gathering information and the information is highly sensitive.
DEC 20 FOI 0065, 0077-0079	X		8(1)(c) 8(1)(g) 38(a) 14(1)(f) 14(3)(b) 38(b)	Similar Fact. Pages denied as they relate to intelligence gathering information, law enforcement techniques and procedures. Contains the personal information of third parties that cannot be released without their consent.
			<u>RECORD 3</u>	
JAN 10 FOI 0001		X	14(1)(f)	Notes of A/Sgt [#]. Other personal information of the officer removed.
JAN 10 FOI 0002		X	8(1)(l) 38(a)	Notes of A/Sgt [#]. 10 code information removed. The top portion is not related to this occurrence and is not responsive.
JAN 10 FOI 0003		X	14(1)(f) 14(3)(b) 38(b)	Notes of A/Sgt [#]. Contains the personal information of third parties that cannot be released without their consent.

JAN 10 FOI 0004		X	8(1)(l) 38(a) 14(1)(f) 14(3)(b) 38(b)	Notes of A/Sgt [#]. 10 code information removed. Contains the personal information of third parties that cannot be released without their consent.
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