

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2976

Appeal MA13-26

Toronto Police Services Board

November 13, 2013

Summary: The appellant sought access to records concerning a police attendance at his residence. The police provided access to all of the responsive information in their custody or control except for a police code and certain non-responsive information. This order upholds the police's decision concerning the non-responsive information in the records and also upholds the police's decision to deny access to the police code under section 38(a) read in conjunction with the law enforcement exemption in section 8(1)(l).

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

Orders and Investigation Reports Considered: Order MO-2871.

OVERVIEW:

[1] The Toronto Police Services Board (the police) received a request pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) as follows:

Please good enough to forward copy of the officer's report, and accuser statement and all documents relating Regarding my complaint of my

apartment. On particular Day 4 officer came and inquired me regarding my complaint including one nurse officer. I would appreciate to provide their Names and badge No.

[2] In their decision, the police granted partial access to the records. Access to some of the information was denied, pursuant to section 38(a), read in conjunction with the law enforcement exemption in section 8(1)(l) of the *Act*. Some information was removed from the records as it was non-responsive to the request.

[3] The police advised that memorandum notes for one named officer had not yet been received and upon receipt of them, these notes would be forwarded to the requester.

[4] The police advised the requester to contact the hospital directly regarding any nurse's report that may have been taken.

[5] The requester, now the appellant, appealed the decision.

[6] During the course of mediation, the appellant confirmed that he had received the memorandum notes that were not originally available when the decision was issued. He also advised the mediator that further records should exist and also confirmed that he took issue with the material deemed non-responsive in the decision issued by the police, as well as the exemptions claimed.

[7] As mediation did not resolve the issues in this appeal, the file was transferred to the adjudication stage where an adjudicator conducts an inquiry. Representations were received and exchanged between the parties in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[8] In this order, I uphold the police's decision to deny access to the non-responsive information and the police ten code in the records that were withheld under section 38(a), read in conjunction with section 8(1)(l).

RECORDS:

[9] The records remaining at issue consist of the undisclosed portions of two police officers' notes, one Field Information Report and one I/CAD Event Details Report.

ISSUES:

- A. What is the scope of the request? What records are responsive to the request?
- B. Do the records contain “personal information” as defined in section 2(1) and, if so, to whom does it relate?
- C. Does the discretionary exemption at section 38(a) in conjunction with the section 8(1)(l) law enforcement exemption apply to the information at issue?
- D. Did the institution exercise its discretion under section 38(a)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A. What is the scope of the request? What records are responsive to the request?

[10] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

- (1) A person seeking access to a record shall,
 - (a) make a request in writing to the institution that the person believes has custody or control of the record;
 - (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
 - ...
- (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[11] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester’s favour.¹

¹ Orders P-134 and P-880.

[12] To be considered responsive to the request, records must “reasonably relate” to the request.²

[13] The police state that the scope of the request encompasses records generated from the appellant’s interaction with the police on a specific date. The police state that the request was clear and did not require clarification and that the records that are responsive to this request include the Field Information Report (FIR), attending officers’ memorandum notebook notes and I/CAD report (911 call). The appellant also requests the badge numbers and names of the attending officers and access to a nurse’s report. The attending police officers’ badges and names are listed on the FIR. The police state that they do not have care or control of a nurse’s report, if in fact, it exists and the appellant was directed to contact the hospital that may be in possession of this document.

[14] The appellant did not provide representations on this issue, other than stating that he is still seeking access to the nurse’s report.

Analysis/Findings

[15] Although the appellant is seeking the report of a nurse that attended at his apartment with the police, this information was not included in the responsive records held by the police, and therefore, access could not be provided to this information. In the initial decision letter, the police provided the appellant with the contact information for this hospital and advised the appellant to make an access request to the hospital in order to ascertain whether a responsive nurse’s report exists. If the appellant wishes he could make a separate request to this hospital to ascertain if it has custody or control of a responsive nurse’s report. The nurse is not an employee of the police. I accept that the police do not have custody or control of any report prepared by the nurse who attended at the appellant’s home.

[16] The police have located eight pages of records in this appeal. They have identified non-responsive information on each page, except page 3 of the records. The police have not provided representations on the information it has decided is non-responsive in the records. Nevertheless, based on my review of the records, I find that the police have properly identified the non-responsive information. This information is not reasonably related to the request but concerns other matters. Accordingly, I will uphold the police’s decision to not disclose the non-responsive information in the records.

² Orders P-880 and PO-2661.

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

[17] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains “personal information” and, if so, to whom it relates. That term is defined in section 2(1) as follows:

“personal information” means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (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;

[18] 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.³

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

[20] The police state that the records contain the personal information of the appellant only.

[21] The appellant agrees that the records contain his personal information.

Analysis/Findings

[22] Other than the information deemed non-responsive by the police in the records, only one sentence on page 1 of the records is at issue in this appeal. I agree with the parties that page 1 of the records contains only the personal information of the appellant. I will now consider whether the information at issue on page 1 of the records is exempt by reason of the application of the discretionary exemption in section 38(a) read in conjunction with section 8(1)(l).

C. Does the discretionary exemption at section 38(a) in conjunction with the section 8(1)(l) exemption apply to the information at issue?

[23] 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.

[24] 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.

[25] 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.⁵

³ Order 11.

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

⁵ Order M-352.

[26] 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.

[27] In this case, the institution relies on section 38(a) in conjunction with section 8(1)(l), which states:

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

facilitate the commission of an unlawful act or hamper the 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.⁶

[29] 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" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.⁷

[30] 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.⁸

[31] The police state that "Ten Codes" have been removed from the record as they are specific codes used by them while sending transmissions that are not generally known to the public. They state that:

The use of ten codes by law enforcement is an effective and efficient means of conveying a specific message without publicly identifying its true meaning. In fact, the word 'code' implies the intention that the information not be widely disclosed. The ten-codes referred to in the records do not, in isolation, provide a specific meaning, however, when read in the context of the records at issue, the corresponding meaning would easily be revealed. Thus, the security of those codes would be compromised if they were released.

⁶ *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

⁷ 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.).

⁸ Order PO-2040; *Ontario (Attorney General) v. Fineberg*, cited above.

[32] The police rely on my findings in Order MO-2871, where I stated 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" (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...

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.

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

Analysis/Findings

[34] The information at issue is a police ten code on page 1 of the records. I adopt my previous findings in Order MO-2871, cited by the police, and find that this information is subject to the law enforcement exemption in section 8(1)(l) of the *Act*. Disclosure of this information in the records could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. Subject to my review of the police's exercise of discretion, this information is exempt under section 38(a), read in conjunction with section 8(1)(l).

D. Did the institution exercise its discretion under section 38(a)? If so, should this office uphold the exercise of discretion?

[35] The section 38(a) exemption is discretionary and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[36] 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.

[37] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.⁹ This office may not, however, substitute its own discretion for that of the institution.¹⁰

[38] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹¹

- 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

⁹ Order MO-1573.

¹⁰ Section 43(2).

¹¹ Orders P-344 and MO-1573.

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

[39] The police state that they exercised their discretion under section 38(a) and that the only information denied to the appellant was a 10 code used by police in the I/CAD report.

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

Analysis/Findings

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

[42] Accordingly, I am upholding the police's exercise of discretion and find that the ten code information on page 1 of the record is exempt by reason of section 38(a), read in conjunction with section 8(1)(l) of the *Act*.

ORDER:

I uphold the police's decision and dismiss the appeal.

Original Signed by: _____
Diane Smith
Adjudicator

_____ November 13, 2013