Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2950

Appeal MA12-331

Ottawa Police Services Board

September 24, 2013

Summary: The appellant submitted a request to the police for all records that refer to him. The police denied access to the requested records pursuant to the discretionary exemptions at section 38(a), in conjunction with sections 8(1)(a), (d), (g) and (i) (discretion to refuse requester's own information/law enforcement) and section 38(b) (personal privacy). In this order, the adjudicator upholds the exemptions at section 38(a), in conjunction with section 8(1)(a) (interfere with a law enforcement matter) and (g) (intelligence information), as well as section 38(b) with reference to the presumption at section 14(3)(b) (personal information compiled and identifiable as part of an investigation into a possible violation of law).

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)(a), 8(1)(g), 14(3)(b), 38(a), 38(b).

OVERVIEW:

[1] In 2011, the appellant sought employment with a federal agency, which required that he obtain a security clearance. During the verification process, the federal agency wrote to the appellant to advise him that information was made available to it that raised concerns about his suitability to obtain a clearance. In particular, the federal agency's letter to the appellant stated that "[y]our application will be reviewed…because of your association to known gang members and the following information."

[2] The federal agency then went on to describe the information it had received. The letter refers to six incidents involving the Ottawa Police Service (the police) in which the appellant was identified. The incidents pertain to information gathered during "street checks" and police surveillance of known drug dealers and gang members, as well as information that was obtained through direct interaction between the police and the appellant. In the federal agency's letter, it provides a summary of each incident with a focus on the appellant's "associations." The federal agency indicates to the appellant that he should provide additional information regarding these circumstances in order to have his application considered further.

[3] The appellant subsequently submitted a request to the police under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for a copy of all records referring to him. The request was subsequently clarified by providing a date range: from 2004 to the present. The appellant included a copy of the letter that he had received from the federal agency as support for his request.

[4] The police located responsive records and issued a decision granting partial access to them. The police denied access to the remaining portions of these records on the basis of the discretionary exemptions at section 38(a) (discretion to refuse requester's own information), in conjunction with section 8(1)(l) (facilitate unlawful act), and section 38(b), with reference to the presumption in section 14(3)(b) (personal privacy) of the *Act.* In addition, pursuant to section 8(3) of the *Act*, the police refused to confirm or deny the existence of any other records.

[5] The appellant appealed this decision.

[6] During the mediation stage of the appeal process, the appellant agreed to remove the severances under sections 38(a) and 8(1)(l) from the scope of the appeal. Accordingly, the section 8(1)(l) exemption and the parts of the records to which this section has been applied are no longer at issue. Further mediation could not be effected and the file was forwarded to the adjudication stage of the appeal process.

[7] I sought representations from the police, initially. Although the police appeared to rely on section 8(3) only, given the nature of the appellant's request, if any records existed, they would likely contain his personal information. Accordingly, I maintained section 38(a) as an issue in this appeal. The police provided representations in response.

[8] In their representations, the police withdrew their reliance on the discretionary exemption at section 8(3). Accordingly, I removed this exemption from the scope of the appeal. In addition, the police added some discretionary exemptions and withdrew some mandatory exemptions. In particular, the police withdrew their reliance on the presumption at section 14(3)(b) (information identifiable as part of an investigation into a possible violation of law) and section 38(b) and in their place claimed the factor at

section 14(2)(f) (highly sensitive) and the discretionary exemptions at sections 8(1)(a) (interfere with a law enforcement matter), 8(1)(d) (confidential source), 8(l)(i) (endanger security of building, vehicle, system or procedure) and 8(1)(g) (intelligence information). Because the records appear to contain the appellant's personal information, I decided to retain the section 38(b) exemption claim for all of the records.

[9] After reviewing the representations submitted by the police, I sought further representations on the issue of the late-raising of a discretionary exemption and the exercise of discretion. The police provided additional representations.

[10] I also sought representations from one affected party with respect to the records which had initially been identified by the police. The affected party did not respond to the Notice of Inquiry and attempts to contact this person were unsuccessful.

[11] I subsequently sought representations from the appellant on all of the issues, as amended. The representations of the police were shared with the appellant in accordance with section 7 of this office's *Code of Procedure* and *Practice Direction 7*.

[12] The appellant submitted representations in response. After reviewing these submissions, I sought representations in reply from the police with respect to the impact that the letter from the federal agency, which was provided to them by the appellant, has on the application of the section 8 exemptions generally, including whether it would be absurd to withhold information pertaining to the appellant in these circumstances. In addition, the police were asked to address their exercise of discretion in these circumstances. The appellant's representations were shared with the police in accordance with section 7 of this office's *Code of Procedure* and *Practice Direction 7*.

[13] The police provided brief representations in response.

[14] The appellant subsequently submitted additional representations to this office. I have reviewed them, and determined that it was not necessary to seek additional representations from the police based on these submissions.

[15] As I noted above, I asked the police to explain why certain exemptions were raised late in the appeal process. The police explained that the Access and Privacy Co-ordinator (the co-ordinator) was new to her job. After reviewing the decision that had been issued by the previous co-ordinator, she decided to prepare a new decision and was unaware at that time that she was required to do so within a specific time frame. The appellant did not object to the late raising, and was able to respond to the issues raised by the amended decision in his representations. In these circumstances, I will not address the late raising issue further in this order.

RECORDS:

[16] The records initially at issue consist of two occurrence reports (records 1 and 2), which have been withheld in their entirety. In addition, there are eight occurrence reports (records 3 to 10), to which the police had initially applied section 8(3). The police continue to withhold these reports in their entirety, as well.

ISSUES:

A: Does the record 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 sections 8(1)(a), (d), (g) and/or (i) apply to the information at issue in records 2 to 10?

C: Does the discretionary exemption at section 38(b) apply to record 1?

D: Did the institution exercise its discretion under sections 8(1), 38(a) and 38(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A: Does the record 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. Under section 2(1), "personal information" is defined, in part, to mean recorded information about an identifiable individual, including the individual's name where it appears with other personal information relating to the individual or where disclosure of the name would reveal other personal information about the individual.[1]

[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.[2]

[1] Paragraph (h) of the definition of personal information at section 2(1).
[2] Order 11.

[19] 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.

[20] 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]

[21] 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]

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

[23] The police submit that the records all contain the personal information of other identifiable individuals. The police appear to acknowledge, indirectly, that the records also contain the appellant's personal information.

[24] The appellant recognizes that the records likely contain information that would identify other individuals and indicates that he is not seeking this information. He submits that this identifying information is severable from the rest of the information that pertains to him. In this regard, the appellant states:

> While the Appellant does not oppose [the police's] refusal to disclose any personal information of individuals other than [the appellant] which may be included in the requested records, section 14 does not impose a blanket exemption over all records related to an occurrence simply because those records also happen to contain information concerning other individuals.

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[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.).

[25] All of the records pertain to matters in which the appellant has been identified in some way. Accordingly, I find that they all contain his personal information. The records also identify a number of other individuals by name and include other information about them. Much of this information can be easily severed from the records, and, in accordance with the appellant's submissions, I will remove these portions of the records from the scope of the appeal. After doing so, the question is whether any individual can be identified from the remaining portions of the records.

[26] I have reviewed each occurrence report, and have taken into account the context in which the investigation was conducted or the information was recorded. In my view, given the context in which the investigations were conducted and/or the information was recorded, I find that disclosure of the remaining portions of the records would still permit the identification of other individuals. Although the letter from the federal agency to the appellant provides a summary of each incident referred to in its letter, the actual records that also describe these incidents cannot be severed further because the appellant's personal information is intertwined with that of other identifiable individuals. I find this also to be the case in records that were not referred to by the federal agency in its letter to the appellant.

[27] Having found that the records all contain the appellant's personal information, my analysis of the issues will be conducted pursuant to sections 38(a) and (b).

B: Does the discretionary exemption at section 38(a) in conjunction with sections 8(1)(a), (d), (g) and/or (i) apply to the information at issue in records 2 to 10?

[28] The police claim that the discretionary exemptions at section 38(a) and 8(1) apply to records 2 through 10 (pages 9-19 and 46-100).

[29] 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.

[30] 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.

[31] 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.[6]

[32] 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.

[33] In this case, the police rely on section 38(a) in conjunction with sections 8(1)(a), (d), (g) and (i).

[34] Sections 8(1)(a), (d), (g) and (i) state:

> (1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;
>
> (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;
>
> (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;
>
> (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;

[35] 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

[6] Order M-352.

(c) the conduct of proceedings referred to in clause (b)

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

[37] 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]

[38] 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.[9]

[39] 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.[10]

Representations

[40] The police state that pages 9 through 19 (record 2), contain intelligence information and that their disclosure would reveal confidential and sensitive information. In addition, the police state that the record contains information obtained through a confidential source and through the Canadian Police Information Centre (CPIC). The police submit that:

> Disclosure of this information could be expected to disclose intelligence information furnished by a confidential source as per section 8(1)(d) and endanger the security of a system established for the protection of items for which protection is reasonably required as per section 8(1)(i) of the Act.

[41] The police assert further that disclosure of these records could interfere with the gathering of intelligence information "as per Section 8(1)(a) and (g)."

[42] The police confirm that they provided the information contained in the remaining records (pages 46 – 100) to another law enforcement agency, which then disclosed it to the federal agency, thus revealing the existence of these records to the appellant. The

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[7] Orders M-202 and PO-2085.
[8] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[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*.

police acknowledge that some of the content of these records was disclosed to the appellant by the federal agency. Nevertheless, the police take the position that the information contained in these pages is intelligence information "which relates to policing and to investigations conducted by police for law enforcement purposes (*Police Services Act*, section 4(2)2 and section 8(1) of [the *Act*]). The police submit that the information is confidential and sensitive, and its disclosure "could interfere with and reveal law enforcement intelligence information with respect to organizations and persons as per Section 8(1)(a) and (g)." The police state further:

> Disclosure of the information in its entirety collected during intelligence gathering could have a number of consequences. This could include identifying informants, infiltrators and/or individuals who are being monitored. This could result in individuals and/or groups taking steps to conceal their activities or their associates, affecting the way that the Police do their investigations and hamper the control of crime. Disclosure of the information in its entirety would also enable the individual to assist any other 'targets' who they may be associating that the Police have an interest in to avoid detection or apprehension.

[43] The appellant submits, generally, that the police have failed to provide "detailed and convincing evidence to establish a reasonable expectation of harm…" The appellant takes the position that the police have simply asserted these harms in their representations, without providing evidence to support them.

[44] Regarding section 8(1)(a), the appellant refers to previous orders of this office which have held that in order for this exemption to apply, the law enforcement matter must be ongoing and the onus is on the police to establish that disclosure could reasonably be expected to interfere with that matter.[11] The appellant points out further that previous orders of this office have held that the exemption does not apply where the matter is completed or where the "alleged interference is with 'potential' law enforcement matters."[12]

[45] The appellant notes that he has never been charged in any matter, and that the occurrences, as reported by the federal agency, date back to 2004, with the most recent being 2011. He concludes:

> [I]n the absence of any direct or convincing evidence that information concerning these past incidents remains relevant to any ongoing law enforcement matter, the exemption under paragraph 8(1)(a) cannot be applied to the requested information.

[11] Order MO-1561.
[12] Orders MO-2312 and MO-1561.

[46] In response to the assertion by the police that disclosure of the records could reasonably be expected to disclose the identity of a confidential source of information, the appellant takes the position that the police have "wholly failed to meet its onus to provide detailed and convincing evidence to establish a reasonable expectation of harm in this regard, having provided no evidence whatsoever in this regard beyond merely asserting the exemption."

[47] With respect to the exemption at section 8(1)(g), the appellant states:

> As under paragraph 8(1)(a), the use of the word 'interfere' contemplates that the particular investigation or law enforcement matter is still ongoing.
>
> …
>
> Moreover, we note that under the Act, 'intelligence information' is understood to mean information gathered by a law enforcement agency in a *covert* manner with respect to ongoing efforts devoted to the detection and prosecution of crime of the prevention of possible violation of law, and is distinct from information which is compiled and identifiable as part of the investigation or a specific occurrence. As noted by the Adjudicator in IPC Order MO-2424:
>
> > The failure of the Police to identify and specifically explain how disclosure of this information would interfere with the gathering or reveal law enforcement intelligence information amounts to insufficient evidence to support the application of the section 8(1)(g) exemption. In my view, neither the record itself nor the Police's representations establish a connection between the information and a reasonable expectation of harm resulting from its disclosure.
>
> As in that case, the Appellant submits that [the police] has failed to provide the requisite detailed and convincing evidence that disclosure of the requested information would result in interference with the gathering of law enforcement intelligence information as contemplated by paragraph 8(1)(g) of the *Act*. This is particularly so given what the [letter from the federal agency] disclosed about the nature of some of the occurrences described in the requested records. Indeed, it cannot be concluded that records relating to occurrences such as traffic stops or a street check can engage a provision dealing with covert information gathering as contemplated by paragraph 8(1)(g).

[48] Finally, the appellant submits that the police have failed to provide any evidence to support a conclusion that disclosure of the records would result in the harm contemplated by section 8(1)(i). Referring to the types of matters identified in the federal agency's letter, the appellant argues that they "simply do not engage the kinds of security concerns contemplated by the exemption in paragraph 8(1)(i)."

[49] The appellant also notes that the federal agency is not a law enforcement agency, and argues that the police waived any claim for exemption to the records "when it released the information to another law enforcement agency without first obtaining assurances to ensure that the information would not be passed on to other agencies or individuals."

[50] The appellant also notes that he is seeking the records at issue in order to correct inaccuracies in them. He points out further that the information contained in them has had a "serious and ongoing detrimental impact" on his career.

[51] The appellant has asked that I consider certain media articles regarding the practice of "carding", which one article describes as:

> Carding, also known as a street check, is when police collect information from citizens and store it in a database…

[52] The media articles provided by the appellant relate to the "misuse" of carding in certain cases. The articles refer to this type of police activity as "controversial" and subject to misuse, as described in these articles. In the specific case referred to in these articles, they note that the Office of the Independent Police Review Director found that an officer with the police engaged in "discreditable conduct" in the manner in which he used information obtained about an individual, who apparently had done nothing wrong, as a result of a street check.

[53] One of the issues raised by the incident is that, although innocent of any crime, the police obtained and stored information on him in its database for six years. Another issue raised by the article is the apparent arbitrary use of "carding" as quoted by a Carleton University professor:

> Intelligence gathering takes place when they are investigating crimes, they cannot gather intelligence for the sake of gathering intelligence, there has to be a purpose for it…There should be clearly set out objectives with respect to what they are doing.

[54] The articles also quote an acting deputy chief of the police regarding the incident in question, who stated:

> If people are innocent, then they are cleared. If there is wrongful information kept on them they can apply under the municipal freedom [of Information] and [protection] of privacy act and they can see what records the police have.

[55] The appellant concludes:

> [The police] recorded and shared inaccurate information concerning [the appellant] with other institutions, including prospective employers and regulatory bodies. [The appellant] has sought to identify and address these inaccuracies by exercising his rights under the [*Act*], in accordance with the process recognized and recommended by [the police] itself. Unfortunately, and to his significant and ongoing detriment, [the appellant] remains unable to access the [police] records he requested.

Analysis and findings

Impact of representations regarding "carding" on the application of exemptions claimed by the police

[56] As I noted above, some of the incidents referred to in the letter sent to the appellant by the federal agency relate to street checks. However, other incidents referred to in the letter pertain to specific surveillance activities conducted by the police of known drug dealers and gang members as well as interactions between the police and the appellant in connection with specific activities that the appellant was engaged in.

[57] I am not persuaded that one incident of misuse, as noted in the articles provided by the appellant, condemns the legitimacy of the collection of the appellant's personal information in the records at issue. Other than to assert that the records contain inaccurate information, the appellant has provided insufficient evidence that he is a victim of arbitrary actions on the part of the police in the manner in which the information was obtained or that this information has been misused. In making this finding, I note that the information about the appellant that is contained in the police files was exchanged as a result of the appellant's application for a security clearance, and that the appellant has been provided with significant information by the federal agency about the nature of the information held by the police.

[58] With respect to the appellant's expectations that the information about him should be disclosed in accordance with police practices, it would appear that the comments made by the acting deputy chief reflect a somewhat simplistic approach to

the issue of access to police records. I am not persuaded that these comments refer to police policy or practice regarding access to information requests generally, or that they would apply to the specific circumstances of this appeal.

[59] There may well be situations where the police will review a record and make a decision that no exemptions apply to it. Further, the law enforcement exemptions are discretionary, and the police may exercise their discretion to disclose, despite a decision that the exemption applies. In either case, the record may be disclosed to a requester, who would then have an opportunity to submit a request that a correction be made pursuant to section 36(2)(a). The access and correction provisions of the *Act* do not create a guaranteed right of access and/or correction; rather access will be granted to an individual's own personal information unless one of the exemptions cited in the *Act* applies to it. The right to request correction of a record can only be made if the individual to whom the information relates is given access to the record.

[60] Accordingly, I find that the example set out in the articles provided by the appellant and the criticisms contained in them of certain police practices do not provide sufficient evidence that brings the methods used by the police in collecting the appellant's personal information into question in the circumstances of this appeal.

Section 8(1)(a): law enforcement matter

[61] As noted by the appellant, in order for section 8(1)(a) to apply, the matter described in a record must be on-going or in existence.[13] Moreover, the exemption does not apply where the matter is completed, or where the alleged interference is with "potential" law enforcement matters.[14]

[62] However, a "matter" may extend beyond a specific investigation or proceeding.[15] In Order PO-2455, Adjudicator Steven Faughnan applied a long-held approach of this office that interpreted the term "law enforcement matter" as pertaining to a "*specific* on-going law enforcement matter." He subsequently held that, although the record at issue in that appeal[16] related generally to law enforcement, it did not relate to "any specific law enforcement 'matter'." In rejecting this approach in the circumstances of that case, the Divisional Court stated:

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[13] Order PO-2657.
[14] Orders PO-2085, MO-1578.
[15] *Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 4233 (Div. Ct.).
[16] The record at issue in the section 14(1)(a) discussion in Order PO2455 consisted of a SOURCE database, which is a firearms registry database, established under section 134(8) of the *Police Services Act*.

> The plain and ordinary meaning of the word 'matter' is very broad. We find that 'matter' does not necessarily always have to apply to some specific on-going investigation or proceeding. The Adjudicator, in our view, erred in taking too narrow a view of the word 'matter' in this particular case. (In any event, the information which goes into SOURCE database is both specific and on-going. It relates to 'policing', as already noted. It is 'specific' because s. 134(8) of the *Police Services Act* prescribes precisely the information to be kept. It is 'on-going' because the records must be regularly, if not constantly, updated.)
>
> Section 14(1)(b) specifically addresses interference with 'investigations' and 'proceedings'. The meaning of a 'law enforcement matter' must, therefore, be broader, or it would be redundant. Furthermore, if 'law enforcement' includes 'policing', then 'a law enforcement matter' should include a 'policing matter'. The SOURCE database is not only created, maintained and used by the PWEU as part of its policing mandate, it is required to be maintained, in part, to 'police the police' under s. 134(8) of the *Police Services Act*.
>
> Finally, the Adjudicator apparently failed to consider that legally registered weapons (only found in SOURCE not FATE[17]) can become crime guns. SOURCE database allows for tracing of information across different police jurisdictions, information that could clearly assist police and the PWEU in executing their responsibilities.

[63] The records at issue in the current appeal pertain to police monitoring of criminal activities and associations. Although it does not appear that they relate to a "specific" law enforcement matter, I am satisfied that they relate to the on-going police activity regarding a specific type of serious criminal activity. In addition, I find that the information contained in them is recorded for the purpose or assisting the police (and other police forces who obtain the information) in executing their law enforcement and crime prevention responsibilities by identifying associations with and the activities of known or suspected criminals.

[64] In my view, these activities relate to the broader policing activity undertaken by the police in fulfilling their mandate under the *Police Services Act*. Accordingly, I find that these activities meet the definition of a "law enforcement matter." I find further that the disclosure of information about police interest in certain individuals, their associations and their activities could reasonably be expected to interfere with this law enforcement matter, and section 8(1)(a), therefore, applies to records 2 to 10.

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[17] FATE database traces firearms that are not registered in Canada.

[65] Although it is not necessary for me to do so, I have decided to consider the application of the other section 8(1) exemptions claimed by the police.

Section 8(1)(d): confidential source

[66] The institution must establish a reasonable expectation that the identity of the source or the information given by the source would remain confidential in the circumstances in order for this exemption to apply to a record. [18]

[67] As I noted above, the appellant has agreed to remove identifying information of other individuals from the scope of the appeal. Accordingly, I find that the source of the information could not be identified by the disclosure of the records. However, I also found that disclosure of the remaining portions of the records could reveal the identity of other individuals due to the context in which the information was obtained. I have, therefore, considered the content of the records in question.

[68] I agree with the appellant that the police have provided no information to identify who the confidential source in each case is or how this individual could reasonably be expected to be identified. That being said, the records themselves form part of the evidence which I must evaluate. Based on my review of the records that remain at issue once specific identifying information is removed, I find that disclosure of the context of the incident could not identify a particular source of information. Accordingly, I find that section 8(1)(d) does not apply in the circumstances.

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

[69] The police claim that record 2 and the eight records (records 3-10), for which they initially claimed section 8(3), contain law enforcement intelligence information and that they are exempt under section 8(1)(g).

[70] 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.[19]

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[18] Order MO-1416.

[19] 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.).

[71] In Order PO-2455, Adjudicator Faughnan discussed some of the background to the interpretation and requirements of this section as follows:

> In Order PO-2330, I agreed with the definition of "intelligence information" that Inquiry Officer Asfaw Seife adopted in Order M-202, where he stated with respect to 8(1)(g) of the *Municipal Freedom of Information and Protection of Privacy Act* (*MFFIPA*), which is the equivalent in that statute of section 14(1)(g) of the *Act*:
>
> > In my view, in order for a record to qualify for exemption under section 8(1)(g) of the *Act*, the Police must establish that disclosure of the record could reasonably be expected to:
> >
> > (a) interfere with the gathering of law enforcement intelligence information respecting organizations or persons, or
> >
> > (b) reveal law enforcement intelligence information respecting organizations or persons.
> >
> > The term "intelligence" is not defined in the *Act*. The *Concise Oxford Dictionary*, eighth edition, defines "intelligence" as "the collection of information, [especially] of military or political value", and "intelligence department" as "a [usually] government department engaged in collecting [especially] secret information".
> >
> > The Williams Commission in its report entitled *Public Government for Private People, the Report of the Commission on Freedom of Information and Protection of Privacy/1980*, Volume II, (the Williams' Commission Report) at pages 298-99, states:
> >
> > > Speaking very broadly, intelligence information may be distinguished from investigatory information by virtue of the fact that the former is generally unrelated to the investigation of the occurrence of specific offences. *For example, authorities may engage in surveillance of the activities of persons whom they suspect may be involved in criminal activity in the expectation that the information gathered will be useful in future*

> *investigations. In this sense, intelligence information may be derived from investigations of previous incidents which may or may not have resulted in trial and conviction of the individual under surveillance. Such information may be gathered through observation of the conduct of associates of known criminals or through similar surveillance activities.* [20]

[72] In concluding that section 14(1)(g) applied to the FATE database, Adjudicator Faughnan stated:

> I am satisfied that this information falls within the definition of "intelligence information" set out in Order M-202 above. I am satisfied that the information in the FATE database is assembled in a covert manner, kept confidential, and shared only in the law enforcement community on a "need to know" basis. I am also satisfied that this database was created and developed in the context of an ongoing effort devoted to the detection and prosecution of crime or the prevention of a possible violation of law.

[73] I agree with the analyses and discussions referred to above. In the circumstances of this appeal, I have considered the submissions made by both parties and have reviewed the records at issue. I am satisfied that the records contain intelligence information which has been gathered in a covert manner for a particular purpose in the expectation that the information gathered will be useful in future investigations.

[74] I am satisfied that the information was shared within the law enforcement community in a manner that is consistent with the policing role of the police with respect to ongoing efforts devoted to the detection and prosecution of crime or the prevention of possible violations of law. I have no evidence before me that the police did or did not seek assurances that the information contained in the records would not be shared with other parties. However, I am not persuaded that the principle of "waiver," which is typically applied in the context of solicitor-client privilege, applies in the circumstances of this appeal as a counter to the application of a section 14(1) exemption.

[75] On this basis, I find that section 14(1)(g) applies to records 2 to 10.

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[20] My emphasis.

Section 8(1)(i): security of a building, vehicle, system or procedure

[76] Although this provision is found in a section of the *Act* dealing specifically with law enforcement matters, its application is not restricted to law enforcement situations but can be extended to any building, vehicle or system which reasonably requires protection.[21]

[77] Other than asserting that the harm identified in this section could reasonably be expected to occur, the police do not identify any building, vehicle, system or procedure that requires protection. Nor do the police explain how the security of any of them could reasonably be expected to be endangered by disclosure. I agree with the appellant that the police have failed to provide the necessary "detailed and convincing" evidence to establish a "reasonable expectation of harm". Accordingly, I find that section 8(1)(i) does not apply in the circumstances.

Absurd Result

[78] As I indicated above, the appellant received a letter from the federal agency which outlined the information it had received about the appellant and referred to specific incidents involving the appellant and other individuals. This raises the question whether it would be absurd, in the circumstances, to withhold the information at issue from the appellant.

[79] Although asked to respond to this issue, the police did not provide representations that specifically addressed it. However, the police noted the following:

> Though the police may have indirectly confirmed the existence of these records by way of the letter sent to the applicant from [the federal agency] a summation of the records was initially released by a former member of this Police Service, during the course of the member's duties, to another law enforcement agency as per section 32(f)(ii) of the *Act*. It is under the assumption that this other law enforcement agency released the information to [the federal agency] thereby indirectly revealing intelligence information to the appellant.

[80] Returning to the issue of "waiver," the appellant submits that:

> [T]he well-established principle that non-disclosure of information of which a requester is already clearly aware stands in contradiction of one of the *Act's* primary purposes, namely to allow individuals to access records containing their own personal information unless there is a compelling reasons for non-disclosure. In the present case, the Appellant

[21] Orders P-900, PO-2461.

> has already been made aware of at least some of the information contained in the requested records by receipt of the December 1, 2011 letter from [the federal agency]. It is the Appellant's submission that it would be absurd to apply the discretionary exemption in section 38, where he is clearly aware of at least some of the information at issue, and where [the police] has already effectively waived its claim to the exemptions under the *Act* by having released the information to another law enforcement agency without first obtaining assurances to ensure that the information would not be passed on to other agencies or individuals.

Analysis and findings

[81] In Order MO-1323, I discussed the rationale for the application of the absurd result:

> As noted above, one of the primary purposes of the *Act* is to allow individuals to have access to records containing their own personal information unless there is a compelling reason for non-disclosure [section 1(b)). Section 1(b) also establishes a competing purpose which is to protect the privacy of individuals with respect to personal information about themselves. Section 38(b) was introduced into the *Act* in recognition of these competing interests.
>
> In most cases, the "absurd result" has been applied in circumstances where the institution has claimed the application of the personal privacy exemption in section 38(b) (or section 49(b) of the provincial *Act*). The reasoning in Order M-444 has also been applied, however, in circumstances where other exemptions (for example, section 9(1)(d) of the *Act* and section 14(2)(a) of the provincial *Act*) have been claimed for records which contain the appellant's personal information (Orders PO-1708 and MO-1288).
>
> In my view, it is the "higher" right of an individual to obtain his or her own personal information that underlies the reasoning in Order M-444 which related to information actually supplied by the requester. Subsequent orders have expanded on the circumstances in which an absurdity may be found, for example, in a case where a requester was present while a statement was given by another individual to the Police (Order P-1414) or where information on a record would **clearly** be known to the individual, such as where the requester already had a copy of the record (Order PO-1679) or where the requester was an intended recipient of the record (PO-1708).

[82] I stated further in that order:

> In Order M-444, former Adjudicator Higgins also noted that it is possible that, in some cases, the circumstances would dictate that the "absurd result" principle should not be applied even where the information was supplied by the requester to a government organization. I agree and find that all of the circumstances of a particular case must be considered before concluding that withholding information to which an exemption would otherwise apply would lead to an absurd result.

[83] As I noted above, the absurd result principle has been applied primarily in the context of a section 38(b) analysis, which takes into account the competing interests at stake in this type of situation, as I noted in Order MO-1449:

> The privacy rights of individuals other than the appellant are without question of fundamental importance. However, the withholding of personal information of others in certain circumstances, particularly where it is intertwined with that of the requesting party, would also be contrary to another of the fundamental principles of the *Act*: the right of access to information about oneself. Each case must be considered on its own facts and all of the circumstances carefully weighed in order to arrive at a conclusion that, in these circumstances, withholding the personal information would result in an absurdity.

[84] Given the importance of the personal privacy exemptions, it is reasonable to expect that similar considerations would apply in the context of a section 38(a) analysis in conjunction with the exemptions referred to in that section, including section 8(1).

[85] In Order MO-1288, Adjudicator Holly Big Canoe applied the absurd result principle in a case where she found that sections 38(a) and 14(1) had been claimed. She discussed this issue and its application to certain records as follows:

> Records 16, 17, 20, 21, 22, 23, 27, 59, 61, 62, 205, 207, 208, 209, 219 and 221 consist of interim reports headed "Public Complaint Form 4 -Police Services Act, 1990" and Records 36, 75, 89 are titled "Form 17 - Notice of Intention to Conduct a Review". The distribution notation at the bottom of the form indicates that the "Complainant" (the appellant) was given a copy. It would appear that these reports are the type of documents that must be sent to a complainant by the Police under section 87 of the Police Services Act.
>
> Records 90, 91 and 109 are letters addressed to the appellant. Records 198 and 228 are the appellant's Recognizance of Bail.

> In Order M-444, former Inquiry Officer John Higgins found that the refusal of access to information which the appellant originally provided to the Police would be contrary to one of the purposes of the Act, which is to allow individuals to have access to records containing their own personal information unless there is a compelling reason for non-disclosure and would, applying the rules of statutory interpretation, lead to an "absurd result."
>
> In Order PO-1708, Assistant Commissioner Tom Mitchinson applied the same principles to find that any records provided to the appellant in that case approximately six years earlier during the course of an investigation under the Police Services Act into that appellant's complaint would also lead to an absurd result.
>
> Records 16, 17, 20-23, 27, 36, 59, 61, 62, 75, 89-91, 109, 198, 205, 207-209, 219, 221 and 228 were provided to the appellant three years ago during the investigation of his complaint, for valid public policy reasons. Applying section 9(1)(d), 14(1) or 38(b) to them when the appellant requests access to them in this scheme would, in my view, be contrary to one of the purposes of the Act, which is to allow individuals to have access to records containing their own personal information, and therefore lead to an absurd result, despite the passage of time. Accordingly, I find that these sections cannot apply to these records and their application will not be considered further in this order.

[86] In the current appeal, the appellant has received some information from the federal agency in the letter that it sent to him that is similar to certain portions of the information contained in police records about him. The information in the letter was provided in summary form. The federal agency is not connected to the police and, as I noted above, it received the information about the appellant from a different police force. In my view, these circumstances are distinguishable from the circumstances in Orders PO-1708 and MO-1288, which dealt with records that had previously been provided to the requester in each case.

[87] In the context of a section 38(b) and 14(1) analysis, I have previously determined that having indirect knowledge about the contents of a record is very different from having first-hand knowledge.[22] In my view, the circumstances of the current appeal appear to fall within this caveat. I accept that the appellant has some knowledge of the information that the police have on record about him as a result of the summaries provided by the federal agency, the accuracy of which is not disputed by the police. However, the information contained in the records is in different format, contains different and, at times more or less detailed discussion of the incidents. As I

[22] Orders MO-1323 and MO-1449.

indicated above, although the appellant is not seeking the personal information of other identified individuals, disclosure of the remaining portions of the records would permit the identification of other individuals. I am also mindful that the records relate to the gathering of intelligence information and by their nature comprise a significant part of the police's effectiveness in combatting and/or preventing crime.

[88] For these reasons, I am not persuaded that the absurd result principle should be applied in the circumstances of this appeal.

[89] Accordingly, I find that records 2 to 10 qualify for exemption pursuant to sections 38(a) and 8(1)(a) and (g) of the *Act*.

C: Does the discretionary exemption at section 38(b) apply to record 1?

[90] As I noted above, although 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.

[91] 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.

[92] 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.

[93] Sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met.

[94] If the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under sections 14 or 38(b). Similarly, 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). The appellant does not claim that either of these two sections applies and after reviewing the records at issue I find that they do not.

[95] If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 38(b). In *Grant v. Cropley* [2001] O.J. 749, the Divisional Court said the Commissioner could:

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

[96] 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.[23]

[97] The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2).[24]

[98] The police rely on the presumption at paragraph 14(3)(b). This section provides:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where 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.

[99] 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.[25] The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.[26]

[100] Section 14(3)(b) does not apply if the records were created after the completion of an investigation into a possible violation of law.[27]

[101] The presumption can apply to a variety of investigations, including those relating to by-law enforcement.[28]

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[23] Order P-239.
[24] Order P-99.
[25] Orders P-242 and MO-2235.
[26] Orders MO-2213, PO-1849 and PO-2608.
[27] Orders M-734, M-841, M-1086, PO-1819 and PO-2019.
[28] Order MO-2147.

[102] The police state:

> The records contain the personal information of identifiable individuals, other than the appellant, and include their contact information that was obtained by the police during the investigation of allegations made by these individuals. The records were compiled by police and formed part of its investigation into the allegations made against the appellant by the identified individuals. The appellant was not present upon police arrival and was never spoken to in regards to the allegations. Consent was not requested or obtained by the individuals as the information was supplied reluctantly by the involved individuals, therefore disclosure of these records would constitute an unjustified invasion of privacy…

[103] The appellant does not appear to take issue with the characterization of the personal information in the records. His representations focus on whether they can be severed and the exercise of discretion, which I will address below.

[104] Record 1 is of a different nature than the other records at issue in this appeal as it pertains to an incident involving the appellant in which the police responded to a call. Having reviewed the representations and the record, I am satisfied that the personal information of individuals other than the appellant was compiled and is identifiable as part of an investigation into a possible violation of law.

[105] As I noted above, portions of the records containing personal information of other identified individuals can be severed from the records, and are not at issue in this appeal according to the appellant's representations mentioned above. However, the remaining personal information of other identifiable individuals is intertwined with that of the appellant in the portions of the records that he seeks, and is, therefore, not severable.

[106] Consequently, I find that disclosure of the personal information of other individuals identified in the records is presumed to constitute an unjustified invasion of personal privacy under section 14(3)(b), and thus qualifies for exemption under section 38(b).

[107] I have considered whether it would be absurd to withhold the personal information in records 1-8 in the circumstances of this appeal. As the police note, the appellant was not present nor was he spoken to as a result of this police investigation. Accordingly, I find that the conditions for the application of the absurd result principle are not present with respect to these records.

Issue D: Did the institution exercise its discretion under sections 8(1), 38(a) and 38(b)? If so, should this office uphold the exercise of discretion?

[108] The section 8(1), 38(a) and 38(b) exemptions are discretionary, and permit 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.

[109] 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.

[110] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[29] This office may not, however, substitute its own discretion for that of the institution.[30]

Relevant considerations

[111] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[31]

- 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

[29] Order MO-1573.
[30] section 43(2).
[31] Orders P-344, MO-1573.

- 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
- 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.

[112] In exercising its discretion to refuse access to the requested records, the police indicate that they took a number of factors into consideration, including:

- the possibility of severing, which the police determined was not possible because the personal information of the appellant was intertwined with that of other identifiable individuals;
- the fact that the information in the records was compiled as part of an investigation into a possible violation of law and the importance of protecting the personal privacy of other individuals;
- the appellant's right to access balanced against any other person's right to privacy;
- the nature of the information contained in the record as being highly sensitive;
- the fact that those providing information would have done so with an expectation of confidentiality; and
- the possible damage to the reputations of individuals referred to in the records.

[113] In addition, in reviewing the submissions made by the police overall, it is apparent that a significant consideration in the decisions made by the police to withhold the records was their view that most of the records contain intelligence information. The police express concern that disclosure of these records could result in the identification of individuals who are being monitored by the police, which could result in these individuals taking steps to conceal their activities or their associates, which could hamper the control of crime and assist individuals or "targets" in avoiding detection or apprehension.

[114] The appellant refers to the comments made by Assistant Commissioner Tom Mitchinson in Order P-344. Although not necessary to the final determination of that appeal, the Assistant Commissioner spoke to the proper considerations to take into account in the exercise of discretion under sections 14(3) and 49(b) of the provincial *Act*:[32]

> In my view, taking a "blanket" approach to the application of section 14(3) in all cases involving a particular type of record would represent an improper exercise of discretion. Although it may be proper for a decision maker to adopt a policy under which decisions are made, it is not proper to apply this policy inflexibly to all cases. In order to preserve the discretionary aspect of a decision under sections 14(3) and 49(a), the head must take into consideration factors personal to the requester, and must ensure that the decision conforms to the policies, objects and provisions of the Act.
>
> In considering whether or not to apply sections 14(3) and 49(a), a head must be governed by the principles that information should be available to the public; that individuals should have access to their own personal information; and that exemptions to access should be limited and specific. Further, the head must consider the individual circumstances of the request. These considerations would include whether an investigation exists or is reasonably contemplated, and if there is an investigation, whether disclosure of the existence of records would interfere with the investigation. If no investigation exists or is contemplated, the head must be satisfied that some other provision of sections 14(1) or (2) applies to the record, and must still consider whether disclosure would harm the interests protected under the specific provision of section 14.

[115] The appellant indicates that the police should have taken into account that he has a sympathetic or compelling need to receive the information as they should know that the requested information has "serious consequences of a highly prejudicial nature

[32] Sections 14(3) (refuse to confirm or deny the existence of a record) and 49(b) (personal privacy) are the provincial *Act* equivalents to sections 8(3) and 38(b) of the *Act*.

to his career." Moreover, the appellant submits that the police should have taken into account that he seeks to challenge the accuracy of some of the incidents described in the letter sent to him from the federal agency.

[116] Referring back to his position regarding waiver, the appellant takes the position that the police should have considered:

> [N]ot only the significance and importance of the requested information to [the appellant], but also the fact that [the police] had already effectively waived its claim under sections 8, 14(1), 14(3)(b), and 38 when it released the information to another law enforcement agency without first obtaining assurances to ensure that the information would not be passed on to other agencies or individuals.

[117] Accordingly, the appellant submits that the police failed to properly exercise their discretion as they failed to take into consideration all of the relevant circumstances identified by him.

Analysis and findings

[118] I have taken into consideration all of the interests at stake in this appeal, including those of the appellant, which are significant, the integrity of police intelligence-gathering activities and the impact disclosure of the covertly obtained information about individuals and criminal activity could reasonably be expected to have on their policing function and the privacy interests of other identifiable individuals. I am satisfied that the police were aware of the appellant's interests and took them into consideration when the decision was made to deny access to the records. I am not persuaded that the failure of the police to specifically refer to the appellant's unique situation undermines the validity of their exercise of discretion.

[119] It is apparent that the police are very concerned that the disclosure of information relating to serious criminal activity, which has been gathered over time, and which could assist them in the monitoring and detection of criminal activities, could be used to undermine this policing role. Moreover, it is clear that the police are concerned that disclosure of the requested information would identify individuals who do not wish to be identified or who would benefit from being apprised of the information that the police have about them on file with respect to specific types of criminal activity.

[120] After reviewing all of the submissions made in this appeal, I am satisfied that the police weighed the importance of the appellant's access to his own personal information against the competing interests identified by them, which I have analyzed above.

[121] Accordingly, I am satisfied that the police took proper considerations into account in exercising their discretion to withhold the requested information from the appellant in the circumstances of this appeal.

[122] As a result, I find that the records at issue are properly exempt under sections 38(a) and (b) of the *Act*.

ORDER:

I uphold the decision of the police.

Original Signed by: September 24, 2013
Laurel Cropley
Adjudicator