

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3055

Appeal MA12-399

London Police Services Board

May 30, 2014

Summary: The appellant sought access to all police records relating to him. The police located officers' notes, general occurrence reports and other police records that were responsive to the appellant's request, and granted partial access to them. The police relied on the discretionary exemptions in section 38(a) (discretion to refuse requester's own information), in conjunction with sections 7(1) (advice or recommendations) and 8(1)(c), (d), (g), (h) and (l) (law enforcement), and section 38(b) (personal privacy) to deny access to many of the records in whole or in part. The police also claimed that some records were excluded from the application of the *Act* in accordance with section 52(3)3 and determined that portions of other records were not responsive to the request. The appellant appealed the decision of the police and narrowed the scope of the appeal to include only the severances in the records that contain his personal information. The police's decision is upheld for the most part. The withheld information is found to be exempt under sections 38(a) and 8(1)(d), (g) and (h) of the *Act*, with the exception of five severances that do not qualify for exemption and are ordered disclosed.

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)(d), (g), and (h) and 38(a).

Cases Considered: *Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 4233 (Div. Ct.).

OVERVIEW:

[1] The appellant made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the London Police Services Board (the police) for access to his "complete record." Along with his request, the appellant included a signed form from his brother authorizing the police to release to him all of the information in the requested records that related to his brother.

[2] The police located 411 pages of responsive records and issued a decision granting partial access to them, and disclosing 67 pages of the records in their entirety. Denying access to the withheld records and information, the police relied on the discretionary exemptions in section 38(a) (discretion to refuse requester's own information), in conjunction with sections 7(1) (advice or recommendations), 8(1)(c), (d), (g), (h) and (l) (law enforcement); and in section 38(b) (personal privacy), with reference to the factor in section 14(2)(h) and the presumption in section 14(3)(b). The police also claimed that some portions of the records were excluded from the application of the *Act* in accordance with section 52(3)3 and determined that portions of other records were not responsive to the request.

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

[4] During mediation, the police advised that parts of the records which they originally considered non-responsive were in fact responsive and they rely on the discretionary exemption in section 38(b), with reference to sections 14(2)(h) and 14(3)(b), to withhold these parts of the records.

[5] Also during mediation, the appellant advised that he is not seeking access to:

- the remainder of the information that was identified as non-responsive to his access request. Accordingly, the portions of the records that the police have withheld as non-responsive on pages 1 to 5, 8 to 18, 21 to 23, 25 to 45, 48, 49, 53 to 57 and 59 to 67 are no longer at issue.
- the ten codes, patrol zone information and statistical codes that the police withheld under section 8(1)(l) of the *Act*. Accordingly, this information on pages 1, 2, 3, 5, 7, 9, 13, 18, 20, 22 to 25, 27, 30, 38, 40, 43, 44, 46 to 48, 51, 52, 55 to 58, 61, 63, 64, 66, 68 to 70, 78, 79, 81, 86, 87, 88, 98, 99, 114 to 116, 123, 124, 127, 131, 132, 137 to 139, 140, 152, 155, 159, 168 to 170, 180, 185, 186, 192, 209 to 213, 216, 218, 223, 224, 227, 232, 233, 238, 239, 244 to 246, 257, 260, 263, 266, 269, 272, 275, 278, 281, 284, 287, 290, 293, 296, 299, 302 to 306, 317, 318, 324 to 326, 329, 333, 334, 337, 340 to 342, 346, 348, 352, 355, 365, 369, 370, 371, 375, 385, 390, 394, 398, 400, 403 and 406 of the records, and this exemption, are no longer at issue.

- information that contains the name, the contact information and/or other personal identifiers of other individuals on pages 70, 79, 88, 90, 91, 99, 101, 124, 126, 141 to 143, 172, 213, 224 to 226, 234, 240, 246 to 248, 261, 306, 307, 386, 399 and 407 of the records. Therefore, this information is no longer at issue.

[6] Finally, during mediation, the police raised the application of two new discretionary exemptions; section 38(a), in conjunction with section 9(1)(d) (relations with other governments), which it claims applies to some of the withheld information on pages 401, 409 and 410; and section 38(a), in conjunction with section 8(2)(b) (law enforcement), which it claims applies to some of the withheld information on pages 41 and 42. Accordingly, the issue of the late raising of a discretionary exemption was added as an issue in appeal.

[7] A mediated resolution of the appeal was not possible, and it was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*.

[8] I began my inquiry by inviting the representations of the police on the issues set out in the Notice of Inquiry. In response, the police provided representations which they agreed to share, in part, with the appellant. The police asked that some information in their representations be withheld from the appellant as its disclosure would reveal the substance of the records they claimed were exempt. I decided that some information in the police's representations satisfies the criteria for withholding representations as set out in this office's *Code of Procedure* and *Practice Direction Number 7*. Accordingly, I only shared the non-confidential portions of the police's representations with the appellant.

[9] I then sought and received representations from the appellant. In his representations, the appellant specifies that he only seeks access to information in the records that relates to him. The appellant emphasizes that he does not seek access to information that identifies other individuals. He asks that the information pertaining to other individuals and their identities be withheld and that any information about him be disclosed. Based on the appellant's representations that he is only interested in pursuing the withheld portions of the records that contain his personal information, I will not address the withheld portions of the records that contain the personal information of other individuals as these portions are no longer at issue in this appeal. I will address the narrowed scope of this appeal further under Issue A below.

[10] In this order, I uphold the police's decision to withhold the information remaining at issue under section 38(a), in conjunction with sections 8(1)(d), (g) and (h), with the exception of five severances that I will order disclosed below on the basis that they do not qualify for exemption. As a result of my findings, it is not necessary for me to

address the application of the remaining exemptions and exclusions claimed by the police, or the issue of the late raising of a discretionary exemption.

RECORDS:

[11] The records remaining at issue consist of the withheld portions of the police officers' notes and various occurrence reports and other records maintained by the police that contain the personal information of the appellant, or the mixed personal information of the appellant and other individuals.

[12] I note that the information at pages 41 and 42 is not subject to the *Act* owing to the operation of the doctrine of federal paramountcy. Accordingly I will not address these records further in this order.

ISSUES:

- A. Which records contain withheld information that contains the appellant's "personal information" as that term is defined in section 2(1) of the *Act*?
- B. Does the discretionary exemption at section 38(a), in conjunction with the section 8(1)(d), (g) and (h) exemptions, apply to the withheld information at issue?
- C. Did the police exercise their discretion under section 38(a)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A. Which records contain withheld information that contains the appellant's "personal information" as that term is defined in section 2(1) of the *Act*?

[13] 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), in part, 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,
...
- (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,
...
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

Representations

[14] As noted above, the appellant confirms that he is only interested in the withheld portions of the records that contain his personal information. The appellant assumes that the withheld information in the records contains his personal information. He asserts that the police have withheld information contained in recurring parts of the records that describe him and list his height, weight, date of birth and ethnicity among other descriptors. He states that he sees no reason for the police to withhold these parts of the records because this information pertains to him alone. He argues that it is unreasonable for the police to withhold his personal information.

[15] The police acknowledge in their confidential and non-confidential representations that the records contain the personal information of the appellant. They also submit that many of the records contain the mixed personal information of the appellant and of other identifiable individuals.

Analysis and findings

[16] Having reviewed the records and the representations of the parties, I find that all of the records before me contain the personal information of the appellant as that term is defined in paragraphs (a), (b), (d), (e), (g) and (h) of the definition of personal information in section 2(1) of the *Act*. Considering the appellant's submission that he is

only interested in pursuing access to the withheld portions of the records that contain information relating to him, the scope of this appeal is narrowed to include only those withheld portions of the records that contain the appellant's personal information and that do not reveal the identity of other individuals whose personal information is also contained in the records. The records that are no longer at issue are those that contain withheld portions that in turn do not contain any personal information of the appellant. In accordance with the narrowed scope of the appeal directed by the appellant, I have reviewed the withheld portions of the records at issue in order to make the findings below.

[17] I find that the police officers' notes at pages 4, 15 to 17, 23, 24, 27, 33 and 44; and the various occurrence reports and other police records at pages 68, 75, 76, 78, 81, 92, 94, 120, 127, 150, 151, 173 to 182, 209, 252, 337, 338, 342 to 346, 348, 350, 352, 355 to 358, 360, 361, 363, 365 to 367, 369, 370 to 373, 375 to 377, 380, 381, 383, 385 to 388, 390, 394, 398 and 400 include withheld portions that contain the mixed personal information of the appellant and other identifiable individuals. Having reviewed these withheld portions, I further find that the personal information of the appellant is inextricably intertwined with that of other identifiable individuals, and it is not possible to sever the personal information of these other individuals in order to disclose to the appellant his personal information. Any severing that could be done to disclose the appellant's personal information only would result in disconnected and meaningless snippets of information being disclosed to him. On this basis, and on the basis of the appellant's submissions in his representations that he seeks access to his personal information alone, I find that these portions of the records are no longer at issue and I will not address them further in this order.

[18] The only records remaining at issue are the withheld portions of the records that contain the appellant's personal information only. These withheld portions are found in the police officers' notes and other police records at pages 46, 56, 71, 72, 80, 89, 93, 100, 117, 125, 133, 171, 188, 206, 257, 260, 263, 266, 269, 272, 275, 278, 281, 284, 287, 290, 293, 296, 299, 319, 320, 322, 324, 327, 329, 333, 335, 336, 353, 392, 396, 403, 404 and 406 to 409. Accordingly, I will consider the appellant's right of access to these portions of the records under the exemption in section 38(a) claimed by the police. I will not consider the possible application of the section 38(b) exemption to these records because the portions of the records that remain at issue do not contain the personal information of other identifiable individuals; they only contain the personal information of the appellant, and on this basis, their disclosure to him cannot be said to be an unjustified invasion of privacy under section 38(b). In this regard, I note that there are five severances contained in pages 46, 56 and 93 containing the appellant's personal information and the only exemption the police claim for these severances is section 38(b). I find that disclosure of these five severances cannot be an unjustified invasion of privacy under section 38(b), because they do not contain the personal information of other individuals. On this basis, I will order these five severances disclosed.

B. Does the discretionary exemption at section 38(a), in conjunction with the section 8(1)(d), (g) and (h) exemptions, apply to the withheld information at issue?

[19] Section 38 provides a number of exemptions from the general right of access individuals have under section 36(1) to their own personal information held by an institution. 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.¹ 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.

[20] 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.

[21] Sections 8(1) (d), (g) and (h) state:

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

...

(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;

(h) reveal a record which has been confiscated from a person by a peace officer in accordance with an Act or regulation;

...

¹ Order M-352.

[22] 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).

[23] The term “law enforcement” has been found to apply to police investigations into a possible violation of the *Criminal Code*.² Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.³ 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.⁴ 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.⁵

The police’s representations

[24] The police state that they investigated several incidents involving the appellant, including occurrences of criminal harassment, shoplifting, trouble with a man or woman and assisting the public. They continue that this list is non-exhaustive, and they provide confidential representations that further describe the types of incidents and investigations detailed in the records. The police submit that section 8(1)(d) applies to certain parts of the records because they contain information provided to them during the course of various investigations involving the appellant. The police submit that it is reasonable to assume that individuals who provide information and statements to them during investigations do so in confidence with the expectation that the information will be held in confidence by the police. The police also provide confidential representations on the way that the information at issue came to their attention and the nature of the

² Orders M-202 and PO-2085.

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

⁴ 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.).

⁵ Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

harm that would ensue if this information were disclosed. The police rely on the following excerpt from Order MO-1416 to support their submissions:

Under section 8(1)(d), an institution may refuse to disclose a record or a part of a record where disclosure could reasonably be expected to “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”. In order to establish that the particular harm in question “could reasonably be expected” to result from disclosure of a record, the party with the burden of proof must provide detailed and convincing evidence to establish a reasonable expectation of probable harm [see Order P-373, two court decisions on judicial review of that order in *Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998)*, 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

[25] Regarding their claim that section 8(1)(g) applies to portions of the records, the police assert that these records contain intelligence information and that disclosure of the information in them would reveal this intelligence information. They also argue that disclosure of the information contained in the records would interfere with their ability to gather intelligence information. The police provide confidential representations on how and why they obtained the intelligence information in the records, and how they use the information with respect to the appellant.

[26] On the application of section 8(1)(h), the police state that the records to which they have applied this exemption form part of their investigations in the performance of their duties. They state that these records were collected or seized during various investigations pursuant to the performance of their duties under the *Police Services Act*. The police provide confidential representations on the specific records to which they have applied this exemption and the incidents which gave rise to them obtaining these records.

The appellant’s representations

[27] In his representations, the appellant states that it is evident from the police’s representations that there is a police informant, or possibly multiple informants, whose identity the police do not want to reveal. He states that he accepts the fact that the police cannot reveal the identity of other individuals in the records to him, but he argues that any information pertaining to him should be revealed. He submits that it is unreasonable for the police to withhold information in the records that appears in parts of the records that contain a description of him including his height, weight and ethnicity. He continues that he sees no reason to withhold descriptive information about

him, as it relates to him alone. He also argues that disclosure of this withheld descriptive information about him is consistent with the access that he has been granted to a number of the responsive records. He denies that these withheld portions contained in the descriptive parts of the records reveal any sensitive information.

Analysis and findings

[28] As a result of the appellant's decision to pursue access only to the withheld parts of the records that contain his personal information, I am left to consider the withheld personal information remaining at issue in pages 46, 71, 72, 80, 89, 100, 117, 125, 133, 171, 188, 257, 260, 263, 266, 269, 272, 275, 278, 281, 284, 287, 290, 293, 296 and 299, as well as pages 206, 319, 320, 322, 324, 327, 329, 333, 335, 336, 353, 392, 396, 403, 404 and 406 to 409 which were withheld in their entirety. These records consist of various occurrence reports and other police records, as well as one page of a police officer's handwritten notes.

[29] Based on the representations of the police and my review of the records, I am satisfied that most of the information that remains at issue consists of information that falls within the definition of intelligence information as contemplated by the section 8(1)(g) exemption. The definition of the term "intelligence information" set out in previous orders of this office and confirmed by the Divisional Court is the following:

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.⁶

[30] Although I am not able to refer to the confidential representations of the police in this order, I am satisfied that the intelligence information exemption claimed by the police applies to the relevant records. In addition to the confidential representations of the police on this issue, I am persuaded by my independent review of the records that disclosure of the records to which the police have applied this exemption could reasonably be expected to reveal law enforcement intelligence information respecting organizations or persons. As a result, I find that the intelligence information exemption applies to the severances remaining at issue in the records at pages 71, 72, 80, 89, 100, 117, 125, 133, 171, 257, 260, 263, 266, 269, 272, 275, 278, 281, 284, 287, 290, 293, 296 and 299. These records have been partially disclosed by the police and most of the personal information of the appellant contained in these records has been released to him. These are also the records that the appellant addresses in his representations. He argues that it is unreasonable for the police to withhold information

⁶ 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.).

contained in the description part of the records because the withheld information relates to him. While the appellant is correct in stating that this withheld information relates to him, his assumption that it merely contains additional descriptive information about him and that it does not reveal any sensitive information is incorrect. I cannot elaborate further other than to confirm to the appellant that the withheld information in these pages relates to him and qualifies for exemption as intelligence information.

[31] There are also a number of records that have been withheld in their entirety on the basis of section 8(1)(g), specifically, pages 320, 327, 335, 336, 353, 392, 396, 403, 404 and 406 through 409. For the same reasons I referred to above, most of which rely on the police's confidential representations, I find that the intelligence information applies to these withheld records. I find that it is reasonable to expect that disclosure of these records could reveal law enforcement intelligence information about organizations or persons.

[32] With respect to the remaining withheld information, I find that section 8(1)(d) applies to pages 319, 322, 324, 329 and 333 which were withheld in their entirety, and to the severances in page 188, which was partially disclosed to the appellant. I am satisfied by the confidential representations of the police and from my review of the records themselves that disclosure of these records could reasonably be expected to reveal the identity of a confidential source of information in respect of a law enforcement matter. As I noted above, I am not able to provide further details in this order on the confidential information provided to me by the police or on the information contained in the records themselves. However, I accept that the sources of the information contained in these records had a reasonable expectation that their identity and the information they provided would remain confidential in the circumstances; these circumstances being investigations of alleged criminal activity involving the appellant.

[33] Finally, I find that section 8(1)(h) applies to page 206 which has been withheld in its entirety by the police. Page 206 is a page of an occurrence report that contains an image of a document obtained by the police during an investigation into a violation of a particular section of the *Criminal Code* relating to the offence of shoplifting. The confidential representations of the police include details about this record and the reason it was withheld under section 8(1)(h) and I am not able to refer to these in my order. Nonetheless, based on the police's confidential representations and my review of the record, I am satisfied that disclosure of page 206 could reasonably be expected to reveal the record depicted therein which was confiscated from a person by an officer in accordance with the officer's duties under the *Police Services Act* during an investigation of an offence under the *Criminal Code*.

[34] I further find that all of the remaining information at issue which I have found above falls within the law enforcement exemptions in sections 8(1)(d), (g) and (h), is exempt under section 38(a) of the *Act*.

C. Did the police exercise their 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. 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.

[36] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.⁷ This office may not, however, substitute its own discretion for that of the institution.⁸ Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:⁹

- 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 is an individual or an organization
- the relationship between the requester and any affected persons

⁷ Order MO-1573.

⁸ Section 43(2).

⁹ Orders P-344 and MO-1573.

- 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 historic practice of the institution with respect to similar information.

[37] In their representations, the police submit that they exercised their discretion under section 38(a) based on a number of considerations, including: that the records at issue contain the mixed personal information of the appellant and other individuals; that the information was clearly obtained in confidence; that the information contains procedures currently used by them, as well as advice and intelligence information; and that disclosure of the information could hinder police operations, techniques, procedures and the confidence of the public in assisting in police investigations. The police state that they weighed these considerations against the appellant's right of access under the *Act*, and determined that protecting the information that qualifies for exemption under section 38(a) and sections 8(1)(d),(g) and (h) was more important than disclosing the information to the appellant.

[38] The appellant does not directly address this issue in his representations however, his arguments that the withholding of his personal information is unreasonable suggest that he objects to the manner in which the police exercised their discretion.

[39] In making my decision on this issue, I am mindful of the fact that the police made their decision when the request before them was for access to all of the records relating to the appellant and not for access to the narrowed scope of records that the appellant sought during my inquiry. Based on the materials before me, I am satisfied that the police exercised their discretion in this appeal. I am further satisfied that the police considered the purpose of the *Act* in deciding to release to the appellant much of his personal information contained in the records to him. I accept that the police considered relevant factors in deciding to exercise their discretion to withhold the information which I have found is exempt under section 38(a) and sections 8(1)(d), (g) and (h). There is nothing before me to indicate that the police exercised their discretion in bad faith or for an improper purpose. For these reasons, I uphold the police's exercise of discretion in this appeal.

ORDER:

1. I order the police to disclose to the appellant the five severances in pages 46, 56 and 93 that contain his personal information which I have highlighted and provided to the police with this order. I order the police to disclose the appellant's personal information to him by **July 4, 2014**, but not before **June 30, 2014**.

2. I uphold the decision of the police not to disclose the remaining personal information of the appellant at issue in this appeal under the discretionary section 38(a) exemption.

Original signed by: _____
Stella Ball
Adjudicator

_____ May 30, 2014