

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3007

Appeal MA12-469-2

Halton Regional Police Services Board

January 31, 2014

Summary: The appellant sought access to information related to a complaint about him that was the basis for a specified police occurrence report. The police located 17 pages of police officers' handwritten notes and granted the appellant partial access to them, after notifying an affected party of the request. The police relied on the discretionary exemptions in section 38(a) (discretion to refuse requester's own information), in conjunction with sections 8(1)(c) (law enforcement), 8(1)(e) (endanger life or safety) and 8(1)(g) (law enforcement), and section 38(b) (personal privacy), with reference to the presumption in section 14(3)(b), to withhold portions of the records. The decision of the police to deny access to the affected party's personal information pursuant to sections 38(a) and 8(1)(e) is upheld, as is their decision to deny the appellant access to intelligence information that qualifies for exemption under sections 38(a) and 8(1)(g).

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

Cases Considered: *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.); *Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 4233 (Div. Ct.).

OVERVIEW:

[1] The Halton Regional Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following with respect to a specified police report:

- the statement from the complainant to the police
- all other information the complainant provided to the police
- all information to support the comments in the police report.

[2] The police located records responsive to the request. The police provided notice under section 21 of the *Act*, to an individual whose interests could be affected by disclosure of the records (the affected party). The affected party objected to disclosure of any information relating to it.¹ The police subsequently issued a decision granting partial access to the responsive records.

[3] The police relied on the discretionary exemptions in section 38(a) (discretion to refuse requester's own information), in conjunction with sections 8(1)(c) (law enforcement), 8(1)(e) (endanger life or safety), 8(1)(g) (law enforcement) and 8(1)(l) (facilitate commission of unlawful act), and section 38(b) (personal privacy), with reference to the presumption in section 14(3)(b), to withhold portions of the records. The police also denied access to portions of the records that were not responsive to the request.

[4] The requester, now the appellant, appealed the police's decision to this office.

[5] During mediation, the appellant confirmed that he was not pursuing access to the non-responsive portions of the records, or to the police codes withheld under section 38(a), in conjunction with section 8(1)(l). Accordingly, this withheld information and the discretionary exemption in section 38(a), in conjunction with section 8(1)(l), are no longer at issue in this appeal.

[6] Mediation did not resolve the remaining issues in the appeal and it was moved to the adjudication stage of the appeal process for an inquiry under the *Act*.

[7] During my inquiry, I sought and received representations from the police and the appellant. The police asked that several portions of their representations be kept confidential from the appellant. Having reviewed these portions, I concluded that they satisfy the criteria for withholding representations set out in this office's *Code of Procedure* and *Practice Direction Number 7*. As such, I only shared the non-confidential portions of the police's representations with the appellant.

¹ In order to protect the identity of the affected party, I will refer to this individual as "it" rather than by gender.

[8] I also invited the representations of the affected party, who did not submit written representations. The affected party contacted this office and verbally communicated its objection to the disclosure of any of its personal information.

[9] In this order, I uphold the decision of the police and dismiss the appeal.

RECORDS:

[10] The records remaining at issue are the withheld portions of 17 pages of police officers' notebook entries; specifically, the severances at pages 2, 4, 5, 6, 8, 9, and 12.

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the discretionary exemption at section 38(a) in conjunction with the section 8(1)(e) and (g) exemptions apply to the information at issue?
- C. Did the police exercise their discretion under sections 38(a), 8(1)(e) and 8(1)(g)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

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

[11] 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,

...

- (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;

[12] 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

[13] To qualify as personal information, the information must be about the individual in a personal capacity and it must be reasonable to expect that an individual may be identified if the information is disclosed.³

[14] I find that the records at issue all contain the personal information of the appellant, including his name, address, date of birth, telephone number and other information that qualifies as personal information as that term is defined in paragraphs (a), (b), (d) (g) and (h) of the definition in section 2(1) of the *Act*. I also find that the records contain the affected party's name, address, date of birth, telephone number and other information that, along with the affected party's name, would reveal personal information about it and would identify it. This qualifies as the personal information of this individual under paragraphs (a), (b), (d) (g) and (h) of the definition in section 2.

[15] Having found that the records contain the mixed personal information of the appellant and the affected party, I will now consider the application of the discretionary exemptions claimed by the police.

² Order 11.

³ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

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

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

[17] 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.⁴

[18] In this case, the police rely on section 38(a), in conjunction with, sections 8(1)(e), and (g) of the *Act* which state:

8(1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,

- (e) endanger the life or physical safety of a law enforcement officer or any other person;
- (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;

[19] 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)

⁴ Order M-352.

[20] The term “law enforcement” has been found to apply in a number of circumstances, most frequently to police investigations into a possible violation of the *Criminal Code*.⁵

[21] Except in the case of section 8(1)(e), where section 8 uses the words “could reasonably be expected to,” the institution must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm.” Evidence amounting to speculation of possible harm is not sufficient.⁶

[22] In the case of section 8(1)(e), the institution must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the institution must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated.⁷ A person’s subjective fear, while relevant, may not be sufficient to establish the application of the exemption.⁸ The term “person” is not necessarily confined to a particular identified individual, and may include any member of an identifiable group or organization.⁹

[23] It is not sufficient for an institution to take the position that the harms under section 8 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfilment of the requirements of the exemption.¹⁰

The representations of the police

[24] The police provide detailed representations on the application of sections 8(1)(e) and (g), the majority of which were not shared with the appellant due to confidentiality concerns. The police also provide confidential attachments to their representations which support their submissions. I am not able to reveal the contents of these confidential representations and attachments in this order.

[25] In their non-confidential representations, the police state that the appellant made a prior request for information which included a letter from his previous employer dated April 2008. The police rely on an excerpt from this letter of April 2008 which states that the appellant’s previous employer contacted them about him and warned the appellant that any further incident between him and his former colleagues would be reported by the employer to them. The police state that they relied on the information

⁵ Orders M-202 and PO-2085.

⁶ 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.).

⁷ *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.).

⁸ Order PO-2003.

⁹ Order PO-1817-R.

¹⁰ Order PO-2040; *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

in this letter along with other information they received from the affected party when they decided that portions of the records should be exempt under section 8(1)(e).

[26] Regarding their reliance on section 8(1)(g), the police assert that the withheld information was collected as intelligence for internal police use only and is not to be disclosed to anyone, including the appellant. The remaining police representations on the application of section 8(1)(g) and why the withheld information qualifies as "intelligence information" are confidential; I am not able to discuss these confidential representations further because discussing them would reveal the nature of the information gathered and the purposes for which the police gathered it.

The appellant's representations

[27] In his representations, the appellant refutes the police's contention that he is a threat in general or specifically to his former colleagues and his previous employer's property. He then provides a chronology of events starting with his dismissal from his employment on the grounds that he assaulted an individual. He claims that his previous employer and another institution fabricated the assault. He also asserts that his previous employer's investigation of the alleged assault predated the alleged assault by 18 days.

[28] The appellant also takes issue with the April 2008 letter relied on by the police and denies that he committed any unlawful act on his previous employer's property; he states that both his previous employer and the Toronto Police Services did not investigate these allegations, nor did they complete any reports relating to them. He further claims that the author of the April 2008 letter failed to show that "there was a presence of a danger to property, life and physical safety." The appellant states that false statements about his alleged misconduct were made about him, and there is no evidence as to who made these false statements.

[29] The appellant concludes by arguing that the police must disclose all of the information they obtained in their "unlawful and inadequate investigation" including statements from a number of individuals he identifies by name. He alleges that the police unlawfully collected his personal information during an unlawful investigation, and used "investigative techniques that were lacking" because they "failed to expose a fabricated crime, fictitious victims, false statements and the unlawful act" of the individual who authored the April 2008 letter.

Analysis and findings

[30] I have considered the representations of the appellant and I note that this is one of three appeals before me initiated by him, all of which relate to similar incidents and concerns, albeit with two different institutions. The appellant has expressed his displeasure with the decision of the police and has alleged that the police conducted an

unlawful investigation of him based on a “fabricated crime.” I have no authority or ability to address the appellant’s allegations about the conduct of the police. My jurisdiction is limited to dealing with his request for access to the records at issue and his appeal of the police’s access decision under the provisions of the *Act*.

[31] I have also considered the confidential representations of the police, as well as the records themselves. The records at issue relate to investigations carried out by three police officers with respect to an incident relating to the appellant. These policing activities documented in the police officers’ notes fall within the law enforcement definition described above for the purposes of sections 8(1)(e) and (g).

[32] In reaching my decision based on the evidence before me, I am mindful of the difficulty of predicting future events in a law enforcement context. As such, I adopt the established approach of this office, approved by the Divisional Court, that the law enforcement exemption must be approached in a sensitive manner.¹¹

[33] Based on my review of all of the evidence before me, I find that both the confidential representations and the severed portions of the records that contain the personal information of the affected party, establish a reasonable basis to believe that endangerment to an individual will result from disclosure of the withheld records. I am satisfied by the evidence that disclosure of the withheld portions of pages 4, 5 and 6, could reasonably be expected to endanger the affected party’s life or physical safety, as set out in section 8(1)(e). The police’s concerns in this regard are based on documented concerns and information provided by the appellant’s previous employer, among other sources, and I find that these concerns are neither frivolous nor exaggerated. I further find that these withheld portions satisfy the test for the application of the discretionary exemption in section 8(1)(e).

[34] Accordingly, I find that the withheld portions of pages 4, 5 and 6 are exempt under section 38(a), in conjunction with section 8(1)(e).

[35] With respect to the remaining severances in pages 2, 8, 9 and 12, I find that these contain information that qualifies as law enforcement intelligence information for the purpose of section 8(1)(g).

[36] 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

¹¹ *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

information compiled and identifiable as part of the investigation of a specific occurrence.¹²

[37] Although I am not able to describe in any detail the nature of the information gathered and the reason for its collection, I am satisfied from my review of this information in the records that it qualifies as "intelligence information." I find that disclosure of the remaining withheld portions of the records could reasonably be expected to reveal law enforcement intelligence information respecting organizations or persons, as required for the application of section 8(1)(g).

[38] I find that the withheld portions of pages 2, 8, 9 and 12 qualify for exemption under section 38(a), in conjunction with section 8(1)(g).

[39] As I have found above that all of the withheld information is exempt under section 38(a), subject to my review of the police's exercise of discretion below, I need not consider the possible application of section 38(b).

C. Did the police exercise their discretion under sections 38(a), 8(1)(e) and 8(1)(g)? If so, should this office uphold the exercise of discretion?

[40] The section 38(a), 8(1)(e) and 8(1)(g) 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.

[41] 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.

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

¹² 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.).

¹³ Order MO-1573.

¹⁴ Section 43(2).

Relevant considerations

[43] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹⁵

- 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
- 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.

Representations

[44] The police state that they exercised their discretion under sections 38(a) and 8(1)(e) and (g) in denying access to the withheld portions of the records. Their confidential representations set out some of the considerations involved in their exercise of discretion that directly speak to the exemptions relied on. In their non-confidential representations, the police state that they considered whether or not the records could be severed in a way that would allow the disclosure of the appellant's information without disclosing another individual's personal information or breaching anyone's privacy. The police assert this was not possible because of how intertwined some of the mixed personal information in the records is. The police add that they considered the representations they received from the affected party, as well as other confidential information they received, prior to making their decision. They continue

¹⁵ Orders P-344 and MO-1573.

that the affected party's refusal to consent to disclosure of the records also factored into their decision to provide partial access. The police conclude by stating that they considered all of the applicable exemptions, and when they weighed the appellant's right to access to his personal information against the affected party's right to privacy protection, they deemed that privacy protection prevailed, due to the nature of the personal information in the records and the context in which it was obtained. The police note that they disclosed as much of the appellant's personal information in the records as possible, without breaching the privacy of the affected party.

[45] The appellant does not directly address this issue in his representations. However, he asserts that the criteria for denying access to the records under the *Act* were not met. The reasons he provides for his assertion are the allegations of inadequate and unlawful investigation by the police, and the consideration of "fabricated" evidence.

Analysis and findings

[46] Having reviewed the records and all of the representations before me, including the confidential representations from the police, I find that the police exercised their discretion under sections 38(a) and 8(1)(e) and (g) to deny the appellant access to portions of the records. I also find that the police considered relevant factors in exercising their discretion. They disclosed the appellant's personal information in the records, except for that which is inextricably intertwined with that of the affected party. I find that the police considered the appellant's right to access to his personal information, as well as the principle that individuals' personal privacy should be protected.

[47] I further find that the police appropriately considered the nature of the withheld information and its sensitivity and significance for all involved parties, as well as, the wording of the exemptions claimed. The exemptions applied to limit the appellant's right to access in this appeal were limited and specific and I have found above that the severances made by the police contain information that qualifies for exemption under section 38(a), in conjunction with sections 8(1)(e) and (g). For all of these reasons, I uphold the police's exercise of discretion in this appeal.

ORDER:

I uphold the decision of the police and I dismiss this appeal.

Original Signed By: _____
Stella Ball
Adjudicator

January 31, 2014