Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3051

Appeal MA10-280

Toronto Police Services Board

May 21, 2014

Summary: The appellant, his two sons and his daughter submitted an access request to the Toronto Police Services Board for various records relating to a police raid at their home. The police located responsive records, including occurrence reports, records of arrest, supplementary records of arrest, a witness list and police officers' memorandum book notes. They denied access to some information in these records under the discretionary exemption in section 38(a) (refusal to disclose an individual's own personal information), read in conjunction with sections 8(1)(c) (investigative techniques and procedures), 8(1)(l) (commission of an unlawful act or control of crime) and 9(1)(d) (relations with other governments), and under the discretionary exemption in section 38(b) (personal privacy). They also refused to confirm or deny the existence of a record under section 14(5), and claimed that some information in the records is not responsive to the access request. The appellant appealed the police's decisions to deny his family access to parts of the records and also claimed that the police had not conducted a reasonable search for responsive records.

In this order, the adjudicator finds that disclosing the personal information of other individuals to the appellant would constitute an unjustified invasion of their personal privacy under section 38(b). However, he finds that withholding information relating to a particular individual in a specific record gives rise to an absurd result and is inconsistent with the purpose of the section 38(b) exemption. In addition, he finds that although some of the remaining withheld information in the records qualifies for exemption under section 38(a), other information does not. He also finds that the police properly applied section 14(5), that some information in the records is not responsive to the access request, and that the police conducted a reasonable search for responsive records. He orders the police to disclose three pages of the records to the appellant.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 2(1) (definition of "personal information"), 14(3)(b), 14(5), 8(1)(c), 8(1)(l), 9(1)(d), 17, 38(a) and 38(b).

Orders and Investigation Reports Considered: Orders MO-1288 and PO-1665.

OVERVIEW:

[1] The appellant, his two sons and his daughter filed an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) with the Toronto Police Services Board (the police) for the following records:

> A) All Videos from the October 22nd, 2006 & October 23rd, 2006 Video Surveillance both interior and exterior of the Hallway of [the requesters' address].
>
> B) The Police Occurrence Report (as specified in aforementioned Nov. 6th, 2006 Letter) as per our request in aforementioned Nov. 6th, 2006 Letter.
>
> C) [A]ny and all other Records, information, materials, & Evidences with respect to and regarding the abovecaptioned Home-Invasion Incident, which is also specified within aforementioned Oct. 26th, 2006 Letter.

[2] On October 22, 2006, the police executed a search warrant at the appellant's home. The "Home-Invasion Incident" cited in the part C of his access request is a reference to this police raid. The appellant's two sons were subsequently arrested and charged with various offences under the *Criminal Code*.

[3] In response to the family's access request, the police located occurrence reports, records of arrest, supplementary records of arrest and a witness list, and a DVD of interviews. They then issued a decision letter to the family that granted them partial access to these records. They denied access to some information in the records under the following discretionary exemptions in the *Act*:

- section 38(a) (refusal to disclose an individual's own personal information), read in conjunction with sections 8(1)(c) (investigative techniques and procedures) and 9(1)(d) (relations with other governments); and
- section 38(b) (personal privacy), read in conjunction with the exception in section 14(1)(f) and the presumption in section 14(3)(b).

[4] The appellant (the father) appealed the police's access decision to the Information and Privacy Commissioner of Ontario (IPC) on behalf of the family. He claimed that the information in the records that was withheld by the police under various exemptions should be disclosed to them. The appeal was assigned to a mediator, who attempted to resolve the issues in dispute between the parties.

[5] The appellant advised the mediator that the police did not conduct a reasonable search for records and should have located the video identified in part A of his family's request, and the memorandum book notes of each of the police officers who participated in the raid. In response, the police advised the mediator that their officers did not seize any video surveillance footage from the cameras near the appellant's apartment. However, they agreed to conduct a further search for other records and located police officers' notes relating to the raid.

[6] The police then issued a supplementary decision letter that granted the family partial access to the officers' notes. They denied access to some information in these records under the following discretionary exemptions in the *Act*:

- section 38(a), read in conjunction with section 8(1)(l) (commission of an unlawful act or control of crime); and

- section 38(b), read in conjunction with section 14(1)(f) and section 14(3)(b).

[7] The police's supplementary decision letter also stated that some information in the officers' notes was being withheld because it is not responsive to the family's access request. In addition, they advised the appellant that one officer was not able to locate his notes. Finally, they refused to confirm or deny the existence of a specific individual's statement under section 14(5) of the *Act*. The appellant appealed the police's supplementary decision to the IPC.

[8] This appeal was not resolved during mediation and it was moved to adjudication for an inquiry. The adjudicator assigned to the appeal at that time issued a notice of inquiry, setting out the facts and issues in this appeal, to the police and received representations in response.

[9] She then issued a notice of inquiry to the appellant, along with a copy of the non-confidential parts of the police's representations, and invited the appellant to submit representations. In response, the appellant did not submit representations, but instead asked the adjudicator to put the appeal on hold. The adjudicator agreed to place the appeal on hold and then kept it on hold for a lengthy period of time in response to further requests from the appellant.

[10] This file was transferred to me to complete the adjudication process. On April 2, 2014, I sent a letter to the appellant that stated, in part:

> I have reviewed this file and have concluded that the adjudication process should proceed and be concluded. Although you have repeatedly asked that your appeal be put "on standby" pending the disposition of other matters, I am not convinced that these other matters preclude you from fully participating in this appeal.
>
> I have decided to close this appeal on **April 25, 2014** unless I receive one of the following responses, in writing from you, by that date:
>
> > (1) written representations in response to the Notice of Inquiry that [the previous adjudicator] issued to you on November 3, 2011; or
> >
> > (2) a letter from you that clearly states that you do not wish to submit representations but would like me to issue an order that disposes of the issues in this appeal.
>
> Please note that if you do not comply with the preceding instructions or if you send me a letter asking again that this file be put "on standby," I will close this appeal on the above specified date.

[11] In response, the appellant submitted representations, which consist of three pages of written submissions and four volumes of documents that constitute a leave to appeal application that the appellant and his family have either filed or are intending to file with the Supreme Court of Canada relating to a civil forfeiture matter. In 2009, the Attorney General of Ontario (AGO) and the police brought an application in the Ontario Superior Court of Justice under the *Civil Remedies Act*,[1] seeking the forfeiture of certain property as proceeds or instruments of crime. This property was seized by the police during raids that they conducted on October 22, 2006, including the one at the appellant's home.

[12] The appellant and his family then filed a counter-application with the Superior Court, seeking an order quashing the AGO's application and amongst other things, $4 billion in damages. The AGO and the police brought motions to have the counter-application stayed or dismissed on the grounds that it was frivolous, vexatious and an abuse of process. The facts underlying this matter are summarized in the Superior Court's decision:

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[1] S.O. 2001, c. 28.

> . . . The property in question is $229,345 in Canadian currency and a 2006 Lincoln LT Truck. According to the evidence filed on the AGO Application, the cash and truck were seized by the police on October 22, 2006 in connection with their investigation of an alleged illegal drug distribution operation involving [one of the appellant's sons]. The truck was seized from a hotel parking lot following police surveillance of a hotel room in which [the appellant's son] is alleged to have been engaged in drug trafficking. [The appellant's son] was arrested and prosecuted. The cash was found and seized during a subsequent search of the [appellant's] house, carried out pursuant to a search warrant.[2]

[13] The Superior Court granted the AGO's and the police's motions and permanently stayed the counter-application. The appellant and his family appealed this decision to the Ontario Court of Appeal, which dismissed their appeal.[3] It appears that they are now seeking leave to appeal from the Supreme Court of Canada.

[14] The appellant's representations do not address the specific issues in the appeal before me, which were set out in the notice of inquiry that the previous adjudicator sent to him.

RECORDS:

[15] The information at issue in this appeal is found in the withheld parts of the 154 pages of records, which include occurrence reports, records of arrest, supplementary records of arrest, a witness list and police officers' memorandum book notes.

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

C. Have the police properly applied section 14(5) in the circumstances of this appeal?

D. Does the discretionary exemption at section 38(a) in conjunction with the sections 8(1)(c), 8(1)(l) and 9(1)(d) exemptions apply to the information at issue?

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[2] *D. v. Attorney General of Ontario*, 2013 ONSC 5940 at para. 4
[3] *D. v. Ontario (Attorney General)*, 2014 ONCA 216.

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

F. Is some information in the records not responsive to the request?

G. Did the police conduct a reasonable search for records?

DISCUSSION:

PERSONAL INFORMATION

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

[16] The mandatory exemption in section 14(1) and the discretionary exemptions in sections 38(a) and (b) apply to records that contain "personal information." Consequently, it is necessary to determine whether the records at issue in this appeal contain "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or

> confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[17] 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.[4]

[18] The police submit that the records at issue contain the personal information of various individuals, including "the other accused individuals . . . that were involved in a criminal enterprise that included the appellant's sons . . ." The appellant's representations do not address whether the records contain the personal information of any individuals.

[19] The records at issue, which relate to the police raids that took place on October 22, 2006, contain information about the appellant, his two sons (who were both charged with criminal offences), his daughter, and other individuals. The information relating to these individuals includes their names, ages, addresses, telephone numbers, criminal history and other information. I find that all of this information qualifies as "personal information," because it falls within paragraphs (a), (b), (c), (d) and (h) of the definition in section 2(1). The police have disclosed the appellant and his family's own personal information to them in the records, but have withheld other individuals' personal information under section 38(b).

[20] Section 2(2.1) of the *Act* excludes certain information from the definition of personal information. It states:

> 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.

[21] The records at issue include the names, ranks and work contact information of various police officers who participated in the raids of October 22, 2006. In my view, this information identifies them in a professional, rather than a personal capacity. It

[4] Order 11.

clearly falls within section 2(2.1) of the *Act*, which excludes such information from the definition of personal information. Consequently, I find that this information does not qualify as the officers' personal information. The police have disclosed the names and other professional information of the officers identified in the records, except for the name and telephone number of one particular officer, which they have withheld under section 38(a), read in conjunction with section 8(1)(l).[5]

PERSONAL PRIVACY

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

[22] There are two personal privacy exemptions in the *Act*: sections 14(1) and 38(b).

[23] Section 14(1) is a mandatory exemption. Under section 14(1), where a record contains personal information of another individual but *not* the requester, the institution is prohibited from disclosing that information unless one of the exceptions in sections 14(1)(a) to (e) applies, or unless disclosure would not be an unjustified invasion of personal privacy [section 14(1)(f)].

[24] Section 38(b) is a discretionary exemption. Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

[25] Four requesters are seeking access to police records under the *Act*: the appellant, his two sons and his daughter. All of the records at issue contain the personal information of at least one of the four requesters and also the personal information of other individuals. Consequently, the discretionary exemption in section 38(b) is at issue in this appeal, not the mandatory exemption in section 14(1).

[26] Section 38(b) states:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if the disclosure would constitute an unjustified invasion of another individual's personal privacy.

[27] The police have generally disclosed those parts of the records that contain the personal information of the appellant and his family, but have withheld other

[5] Page 82 of the records.

individuals' personal information under section 38(b). Consequently, it must be determined whether disclosing the personal information of these other individuals to the appellant would constitute an unjustified invasion of their personal privacy under section 38(b).

[28] Sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold under section 38(b) is met.

[29] 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 section 38(b). I find that none of these exceptions apply to the withheld personal information in the records.

[30] In determining whether the withheld personal information in the records is exempt under section 38(b), I must also consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties in determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy.[6]

[31] Section 14(2) lists various factors that may be relevant in determining whether disclosure of the personal information of these other individuals to the appellant would be an unjustified invasion of their personal privacy. Some of these factors weigh in favour of disclosure, while others weigh in favour of privacy protection. Neither of the parties has cited any of the section 14(2) factors in their representations. In the absence of such evidence, I find that none of these factors apply to the withheld personal information in the records.

[32] Section 14(3) lists circumstances in which the disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy. If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the personal information is presumed to be an unjustified invasion of personal privacy. The police submit that the presumption in section 14(3)(b) applies to the withheld personal information in the records. This provision states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> > was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

[6] Order MO-2954.

[33] 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.[7] The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.[8]

[34] The records at issue relate to the police raids that took place on October 22, 2006. In my view, the personal information that appears in these records was compiled and is identifiable as part of a police investigation into possible violations of the *Criminal Code* by the appellant's sons and other individuals. Consequently, I find that the withheld personal information of these other individuals clearly falls within section 14(3)(b) and its disclosure to the appellant is presumed to constitute an unjustified invasion of their personal privacy.

[35] Section 14(4) lists circumstances in which the disclosure of personal information does not constitute an unjustified invasion of personal privacy, despite section 14(3). I find that none of the circumstances listed in section 14(4) applies to the withheld personal information in the records.

[36] In summary, I have found that disclosing other individuals' personal information to the appellant is presumed to constitute an unjustified invasion of their personal privacy under section 14(3)(b). In addition, the parties have not provided any evidence to show that any of the factors in section 14(2), including those favouring disclosure, apply to this personal information. In these circumstances, I conclude that the balance clearly weighs in favour of the other individuals' privacy rights rather than the appellant's access rights.

[37] Subject to my analysis below on the "absurd result" principle, I find that disclosing the personal information of these other individuals to the appellant would constitute an unjustified invasion of their personal privacy and this information is therefore exempt under section 38(b).

[38] However, the section 38(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. With respect to the records at issue in this appeal, the police could have exercised their discretion to disclose the personal information of other individuals to the appellant, even though it qualifies for exemption under section 38(b). Under Issue E below, I will determine whether the police exercised their discretion in withholding this information under section 38(b), and, if so, whether I should uphold their exercise of discretion.

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[7] Orders P-242 and MO-2235.
[8] Orders MO-2213, PO-1849 and PO-2608.

Absurd result

[39] Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may not be exempt under 38(b), because to withhold the information would be absurd and inconsistent with the purpose of the exemption.[9]

[40] The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement[10];
- the requester was present when the information was provided to the institution[11]; or
- the information is clearly within the requester's knowledge.[12]

[41] However, if disclosure is inconsistent with the purpose of the section 38(b) exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.[13]

[42] The police submit that it does not produce an absurd result to withhold other individuals' personal information from the appellant and his family. The appellant's representations do not address this issue.

[43] There is a supplementary record of arrest (pages 56 to 62) that relates to one of the appellant's sons. This record refers to two individuals who acted as his sureties for a recognizance of bail: his father (the appellant) and a second individual. The police have withheld references to this second individual (page 58), which identify him by family relationship rather than by name, under section 38(b) of the *Act*.

[44] In my view, both the appellant and his son are clearly aware of the identity of this second individual who acted as the son's surety, and I find that withholding this information gives rise to an absurd result and is inconsistent with the purpose of the section 38(b) exemption. Consequently, I will order the police to disclose this information to the appellant.

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[9] Orders M-444 and MO-1323.
[10] Orders M-444 and M-451.
[11] Orders M-444 and P-1414.
[12] Orders MO-1196, PO-1679 and MO-1755.
[13] Orders M-757, MO-1323 and MO-1378.

REFUSAL TO CONFIRM OR DENY THE EXISTENCE OF A RECORD

C. Have the police properly applied section 14(5) in the circumstances of this appeal?

[45] In their supplementary decision letter, the police refused to confirm or deny the existence of a specific individual's statement under section 14(5) of the *Act*. In essence, the police are refusing to confirm or deny whether a particular individual made a statement to the police.

[46] Section 14(5) reads:

> A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

[47] Section 14(5) gives an institution the discretion to refuse to confirm or deny the existence of a record in certain circumstances.

[48] A requester in a section 14(5) situation is in a very different position from other requesters who have been denied access under the *Act*. By invoking section 14(5), the institution is denying the requester the right to know whether a record exists, even when one does not. This section provides institutions with a significant discretionary power that should be exercised only in rare cases.[14]

[49] Before an institution may exercise its discretion to invoke section 14(5), it must provide sufficient evidence to establish both of the following requirements:

1. Disclosure of the record (if it exists) would constitute an unjustified invasion of personal privacy; and

2. Disclosure of the fact that the record exists (or does not exist) would in itself convey information to the requester, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

[50] The Ontario Court of Appeal has upheld this approach to the interpretation of section 21(5) of the *Freedom of Information and Protection of Privacy Act*, which is identical to section 14(5) of the *Act*, stating:

> The Commissioner's reading of s. 21(5) requires that in order to exercise his discretion to refuse to confirm or deny the report's existence the

[14] Order P-339.

> Minister must be able to show that disclosure of its mere existence would itself be an unjustified invasion of personal privacy.[15]

[51] The police submitted confidential representations on this issue that were not shared with the appellant. Based on my review of these representations, I am satisfied that if the individual's statement exists, disclosing it would constitute an unjustified invasion of that individual's personal privacy. In addition, I am also satisfied that disclosing the fact that such a statement exists or does not exist would, in itself, convey information to the appellant, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

[52] In short, I find that the police properly applied section 14(5) in the circumstances of this appeal.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/LAW ENFORCEMENT/ RELATIONS WITH OTHER GOVERNMENTS

D. Does the discretionary exemption at section 38(a) in conjunction with the sections 8(1)(c), 8(1)(l) and 9(1)(d) exemptions apply to the information at issue?

[53] 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.

[54] 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.[16]

[55] 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. This will be addressed under Issue E (exercise of discretion) below.

[56] In this case, the police rely on section 38(a) in conjunction with sections 8(1)(c), 8(1)(l) and 9(1)(d).

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[15] Orders PO-1809 and PO-1810, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 4813 (C.A.), leave to appeal to S.C.C. dismissed (May 19, 2005), S.C.C. 30802.

[16] Order M-352.

Law enforcement

[57] Sections 8(1)(c) and (l) are law enforcement exemptions. They state:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
>
> (l) facilitate the commission of an unlawful act or hamper the control of crime.

[58] 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.[17]

Section 8(1)(c): investigative techniques and procedures

[59] The police have withheld information on page 22 of the records under section 8(1)(c) of the *Act*. This withheld information refers, in part, to a database used by the police.

[60] In order to meet the "investigative technique or procedure" test, the institution must show that disclosure of the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. The exemption normally will not apply where the technique or procedure is generally known to the public.[18] The techniques or procedures must be "investigative." The exemption will not apply to "enforcement" techniques or procedures.[19]

[61] In the confidential portions of their representations on section 8(1)(c), the police provide further information about this database and claim that their officers' use of it is an investigative technique. They further submit that "release of this investigative technique will hinder its effective utilization as it is not generally known to the public."

[62] The appellant's representations do not address whether this information qualifies for exemption under section 8(1)(c).

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[17] Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), and *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[18] Orders P-170, P-1487, MO-2347-I and PO-2751.
[19] Orders PO-2034 and P-1340.

[63] It is generally known that the police use various computer databases when investigating crime. However, it appears that the investigative technique cited on page 22 of the records is not generally known to the public. A simple internet search reveals that unlike other law enforcement databases, such as the Canadian Police Information Centre (CPIC), there is limited information in the public domain about the database mentioned in the withheld part of page 22. In addition, it appears that the investigative technique that the police use with respect to this database is particularly useful in investigating and combatting drug trafficking.

[64] I am satisfied that the withheld information on page 22 qualifies as an "investigative technique" currently used by the police, and that disclosing it could reasonably be expected to hinder or compromise its effective utilization. Consequently, I find that this information qualifies for exemption under section 38(a), read in conjunction with section 8(1)(c) of the *Act*.

Section 8(1)(l): commission of an unlawful act or control of crime

[65] Section 8(1)(l) provides the police with the discretion to refuse disclosure of information that could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime.

[66] The police have withheld "10-codes," the name and telephone number of a police officer, and warrant information under section 8(1)(l).

10-codes

[67] The police have withheld "10-codes" from the following pages of various officers' notes under section 8(1)(l): 92, 98, 108, 113, 121, 127, 130, 132, 136, 137, 140 and 147. "10-codes" are codes used to represent common phrases, particularly in radio transmissions and other communications between individuals employed in law enforcement. Police officers also document their use of "10-codes" in their memorandum book notes of particular incidents.

[68] The police submit that disclosing these "10-codes," particularly to individuals with criminal intentions, could reasonably be expected to lead to the harms contemplated by section 8(1)(l). They state:

> By encoding a particular meaning within a ten-code, the police seek to reduce the usage of such knowledge to circumvent detection by police. This information could be used to counter the actions of police personnel responding to situations. This could result in risk of harm to either police personnel or members of the public with whom the police are involved; i.e., victims and witnesses.

> Should those engaged in criminal activity become aware of the meaning of certain ten-codes, this information could be used to determine the availability of police to respond to calls. Combining this information with the criminal intent of those individuals, they could cause a number of events to occur resulting in police attendance. By monitoring police radio transmissions, they could determine at what point the police no longer had any available officers and thus commit the criminal activity from which they seek to evade detection, thus hampering the control of crime.

[69] The appellant's representations do not address whether the withheld police "10-codes" in the records qualify for exemption under section 8(1)(l).

[70] The IPC has issued numerous orders with respect to the disclosure of police codes and has consistently found that section 8(1)(l) applies to "10 codes",[20] as well as other coded information such as "900 codes".[21] These orders adopted the reasoning of Adjudicator Laurel Cropley in Order PO-1665:

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

[71] I agree with previous IPC orders that have found that disclosing police "10-codes" could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. Consequently, I find that the "10-codes" on the following pages of the records qualify for exemption under section 38(a), read in conjunction with section 8(1)(l): 92, 98, 108, 113, 121, 127, 130, 132, 136, 137, 140 and 147.

Officer's name/telephone number and warrant information

[72] The police have also withheld the following information under section 8(1)(l): the name and phone number of a police officer (page 82) and information about a warrant (page 125). These pages are found in two officers' memorandum book notes. The police provided both confidential and non-confidential representations on why disclosing this information could reasonably be expected to lead to the harms contemplated by section 8(1)(l).

[73] With respect to the officer's name on page 125, transparent and accountable policing generally requires that an officer's name and other professional information relating to that individual be accessible to the public. In the circumstances of this

[20] E.g., Orders M-93, M-757 and MO-1715.
[21] E.g., Order MO-2014.

appeal, the police have disclosed the names of the police officers identified in the records, except for this particular officer, who is mentioned in another officer's memorandum book notes. The police's representations do not clearly address why his name qualifies for exemption under section 8(1)(l).

[74] There may be circumstances in which disclosing an officer's name could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime, but such circumstances would be rare. In my view, the police have not adduced the detailed and convincing evidence required to show why disclosing this officer's name could reasonably be expected to lead to the harms contemplated by section 8(1)(l). Consequently, I find that his name cannot be withheld under section 38(a), read in conjunction with section 8(1)(l), and I will order it disclosed to the appellant.

[75] However, I agree with the police that disclosing the telephone number of that particular officer, who was participating in a raid on October, 22, 2006, could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. The police often carry out drug raids simultaneously in a number of locations, and the participating officers may communicate with each using their cell phones. If the targets of these drug raids were aware of these officers' cell phone numbers, they could use this information to their benefit, which could reasonably be expected to hamper the control of crime. In short, I find that the officer's phone number on page 82 is exempt under section 38(a), read in conjunction with section 8(1)(l).

[76] The police have also withheld a sentence about the execution of a search warrant on page 125. In their confidential representations, the police suggest that disclosure of this information could reasonably be expected to lead to the harms contemplated by section 8(1)(l). The withheld sentence on page 125 is a simple factual statement. In my view, disclosing this information before the search warrant was executed could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. However, it is simply not plausible that disclosing this simple factual information could reasonably be expected to lead to these harms after the search warrant was executed, as is the case here. Consequently, I find that the withheld sentence on page 125 cannot be withheld under section 38(a), read in conjunction with section 8(1)(l), and I will order it disclosed to the appellant.

Relations with other governments

[77] The police have withheld parts of the records that contain information about a court-ordered prohibition that applied to one of the appellant's sons, in conjunction with the name and file number of another municipal police service. This information is found on pages 58 and 75 of the records, which are duplicates and come from the same

supplementary record of arrest. The police have withheld this information under the discretionary exemption in section 9(1)(d) of the *Act*.

[78] Section 9(1) states:

> A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,
>
> (a) the Government of Canada;
>
> (b) the Government of Ontario or the government of a province or territory in Canada;
>
> (c) the government of a foreign country or state;
>
> (d) an agency of a government referred to in clause (a), (b) or (c); or
>
> (e) an international organization of states or a body of such an organization.

[79] The purpose of this exemption is "to ensure that governments under the jurisdiction of the *Act* will continue to obtain access to records which other governments could otherwise be unwilling to supply without having this protection from disclosure".[22]

[80] For a record to qualify for this exemption, the institution must establish that:

1. disclosure of the record could reasonably be expected to reveal information which it received from one of the governments, agencies or organizations listed in the section; and

2. the information was received by the institution in confidence.[23]

[81] In their brief representations on section 9(1)(d), the police state that another municipal police service entered the prohibition relating to the appellant into CPIC and submit that they received this information in confidence from an agency of a government referred to in clauses (a), (b) or (c) of section 9(1)(d).

[82] The appellant's representations do not address whether the withheld information on pages 58 and 75 qualifies for exemption under section 9(1)(d).

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[22] Order M-912.
[23] Orders MO-1581, MO-1896 and MO-2314.

[83] It is clear from the wording of section 9(1) that this exemption does not apply to information that an institution has received from a municipality, including a municipal police service. Consequently, section 9(1)(d) cannot apply to the name and file number of the other municipal police service that the police have withheld on pages 58 and 75 of the records.

[84] The police appear to be arguing that they received the prohibition information about the appellant's son in confidence from the RCMP, which manages the CPIC database. The CPIC website contains the following information about this database:

> CPIC is a computerized information system providing all Canadian law enforcement agencies with information on crimes and criminals. [It is] electronically accessed by authorized agencies based on name and date of birth queries.[24]

[85] The IPC has consistently found in previous orders that CPIC records containing a requester's personal information do not qualify for exemption under section 9(1)(d) of the *Act*.[25] In Order MO-1288, former Adjudicator Holly Big Canoe rejected the police's argument that they had received CPIC information "in confidence" for the purposes of the section 9(1)(d) exemption:

> The CPIC computer system provides a central repository into which the various police jurisdictions within Canada enter electronic representations of information they collect and maintain. Not all information in the CPIC data banks is personal information. That which is, however, deserves to be protected from abuse. Hence, a reasonable expectation of confidentiality exists between authorized users of CPIC that the personal information therein will be collected, maintained and distributed in compliance with the spirit of fair information handling practices. However, the expectation that this information will be treated confidentially on this basis by a recipient is not reasonably held where a requester is seeking access to his own personal information.
>
> There may be specific instances where the agency which made the entry on the CPIC system may seek to protect information found on CPIC from the data subject. Reasons for this might include protecting law enforcement activities from being jeopardized. These concerns will not be present in every case, and will largely depend on the type of information being requested. The Police have not identified any particular concerns in this area in the circumstances of this appeal, and it is hard to conceive of a situation where an agency inputting suspended driver or criminal record information would require the Police to maintain its confidentiality from

[24] http://www.cpic-cipc.ca/English/crimrec.cfm
[25] Orders MO-1288, M-1055, MO-2508 and Order PO-2647.

> the data subject. In fact, although members of the public are not authorized to access the CPIC system itself, the CPIC Reference Manual contemplates disclosure of criminal record information held therein to the data subject, persons acting on behalf of the data subject, and disclosure at the request or with the consent of the data subject.
>
> Accordingly, I find that there is no reasonable expectation of confidentiality in the circumstances of this appeal, where the appellant is the requester and the information at issue relates to the suspension of the appellant's drivers licence and a history of his previous charges and convictions, the fact of which he must be aware. In my view, section 9(1)(d) does not apply to the [withheld records].

[86] I agree with former Adjudicator Big Canoe's reasoning and adopt it with respect to the personal information of the appellant's son on pages 58 and 75 of the records at issue, which the police claim is exempt under section 9(1)(d). There are certainly circumstances in which the police receive records in confidence from the RCMP. However, I find that there is no reasonable expectation of confidentiality with respect to the son's personal information in these particular records, which is a court-ordered prohibition. He clearly knows of the existence of this prohibition since he was required to comply with it.

[87] In short, I find that section 38(a), in conjunction with section 9(1)(d), does not apply to the son's personal information (the prohibition) and the other municipal police service's name and file number on pages 58 and 75 of the records. Consequently, I will order the police to disclose this information to the appellant. However, given that these pages are duplicates, I will order the police to disclose only page 58 to the appellant.

EXERCISE OF DISCRETION

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

[88] The sections 38(a) and (b) exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[89] In this order, I have found that most of the information in the records that was withheld by the police qualifies for exemption under sections 38(a) and (b). Consequently, I will assess whether the police exercised their discretion properly in applying these exemptions to this withheld information.

[90] The IPC may find that an 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; or
- it fails to take into account relevant considerations.

[91] The police submit that they exercised their discretion in deciding whether to apply to the sections 38(a) and (b) exemptions to the withheld information in the records, and did so in a proper manner. The appellant's representations do not address this issue.

[92] In my view, the police exercised their discretion properly in withholding some information in the records under sections 38(a) and (b). They conducted a review of the 154 pages of records and decided to disclose most of the requesters' own personal information to them, while exercising their discretion to withhold other information that falls within the purview of these exemptions. I am not persuaded that they failed to take relevant factors into account or that they considered irrelevant factors. Consequently, I uphold the police's exercise of discretion under sections 38(a) and (b) with respect to the information that I have found qualifies for exemption under those provisions.

RESPONSIVENESS OF RECORDS

F. Is some information in the records not responsive to the request?

[93] To be considered responsive to the request, records must "reasonably relate" to the request.[26]

[94] The police have marked parts of several pages of the records as "N/R", which means that it is not responsive to the access request submitted by the appellant and his family. These pages come from the police officers' memorandum book notes relating to the raids of October 22, 2006. The parts that the police marked as "N/R" generally appear at the beginning or end of an officer's notes. In the versions of these notes provided to the IPC, some of these parts are blank, while others show the information that the police consider to be non-responsive to the request.

[95] In general, the beginning and end of an officer's notes contain routine administrative information, such as when the officer started or ended a shift. During the mediation stage of the appeal process, the appellant insisted on seeking access to

[26] Orders P-880 and PO-2661.

these parts of the records, even though they have nothing to do with the police raids conducted on October 22, 2006. Consequently, the mediator's report identified "non-responsiveness of records" as an issue that remains to be resolved in this appeal.

[96] The adjudicator who originally carried this appeal did not include this issue in the notices of inquiry that she issued to the parties. As a result, the parties' representations do not address whether the parts of the police officers' notes marked as "N/R" are responsive to the access request. Nevertheless, I will consider this issue, because it was raised in the mediator's report.

[97] In ideal circumstances, the police would have provided the IPC with a copy of the records that shows the specific information in all parts of the officers' notes that they have marked as "non-responsive." However, based on my review of the records, and particularly the fact that the parts marked as "N/R" generally appear at the beginning or end of each officers' notes, I am satisfied that such information does not reasonably relate to the subject matter of the access request, and it is, therefore, non-responsive to it.

SEARCH FOR RESPONSIVE RECORDS

G. Did the police conduct a reasonable search for records?

[98] The appellant submits that the police did not conduct a reasonable search for all records that are responsive to his family's access request. In particular, he advised the mediator that the police should have located the video identified in part A of his family's request. In addition, he stated that the police's claim that one officer could not locate his memorandum book notes about the October 22, 2006 raids is "false."[27]

[99] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 of the *Act*.[28] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[100] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[29] To be responsive, a record must be "reasonably related" to the request.[30]

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[27] Appellant's appeal form, dated August 8, 2011.
[28] Orders P-85, P-221 and PO-1954-I.
[29] Orders P-624 and PO-2559.
[30] Order PO-2554.

[101] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[31]

[102] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[32]

[103] During mediation, the police stated that their officers did not seize any video surveillance footage from the cameras near the appellant's apartment. In their representations, they reiterate that no such video is in their custody or control. In addition, they point out that the appellant submitted a similar access request under the *Act* for this same video to Toronto Community Housing, which advised them that no such record exists.

[104] The police acknowledge that one officer was not able to locate his memorandum book notes about the October 22, 2006 raids, but submit that they conducted a "lengthy and exhaustive search" for responsive records and provided the appellant and his family with "related reports, the related memorandum book notes of 25 officers and an audio CD."

[105] In my view, the police have provided sufficient evidence to show that they made reasonable efforts to locate records that are responsive to the access request. The evidence before me shows that they located and disclosed a substantial amount of records to the appellant and provided reasonable explanations as to why they could not locate certain records.

[106] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[33]

[107] The appellant did not submit representations as to whether the police conducted a reasonable search for responsive records. He has not put any evidence before me to rebut the police's submissions or to support his claim that the video and one officer's missing notes must exist. In the absence of any representations from the appellant, I find that he has not provided a reasonable basis for concluding that additional responsive records exist.

[108] In short, I find that the police conducted a reasonable search for records, as required by section 17 of the *Act*.

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[31] Orders M-909, PO-2469, PO-2592.
[32] Order MO-2185.
[33] Order MO-2246.

ORDER:

1. I order the police to disclose pages 58 and 125 of the records in full to the appellant.

2. I order the police to disclose additional information on page 82 of the records to the appellant. I have provided the police with a copy of this page and have highlighted the exempt information in green. To be clear, the police must disclose the non-highlighted parts to the appellant but not the information highlighted in green.

3. The police must disclose these pages of the records to the appellant by **June 20, 2014**.

4. I uphold the police's decision to withhold parts of the remaining records from the appellant.

5. I find that the police conducted a reasonable search for records.

Original Signed By: May 21, 2014
Colin Bhattacharjee
Adjudicator