Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3064

Appeal MA12-179

Peterborough Lakefield Community Police Services Board

June 25, 2014

Summary: The appellant made a request for records relating to an occurrence dating from 1997 in which she initiated a police investigation. The police located responsive records and, after lengthy mediation, denied access to a single responsive record, a ViCLAS report under section 38(a), in conjunction with sections 8(1)(c), (l) and 8(2)(a). The appellant also took issue with certain limited aspects of the searches undertaken by the police for responsive records and argued that her right under the *Charter* had been violated. In this order, the adjudicator finds that the appellant's *Charter* arguments are without merit and upholds the police search for certain records as reasonable. With respect to the ViCLAS report, the adjudicator finds that it is exempt from disclosure under section 38(a), in conjunction with the mandatory exemption in section 9(1)(d) (relations with other governments). On that basis, the appeal is dismissed.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 9(1)(d) and 38(a). *Canadian Charter of Rights and Freedoms.*

Orders and Investigation Reports Considered: Order MO-2953-R.

OVERVIEW:

[1] The appellant submitted a detailed request to the Peterborough Lakefield Community Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) for records relating to a

specified 1997 occurrence in which the appellant alleged that she had been assaulted. In addition, the appellant sought access to other electronic records maintained as part of the CPIC database relating to the occurrence and the appellant generally. In a series of decisions dated March 2, 2012, May 3, 2012, June 4, 2012 and June 20, 2012, the police clarified the scope of the appellant's request and provided access to a number of responsive records, in whole or in part. Access to the undisclosed information was denied pursuant to the discretionary exemptions in section 38(b), taken in conjunction with section 14(1) (personal privacy), and section 38(a), taken in conjunction with the discretionary law enforcement exemptions in sections 8(1)(c) and (l) and 8(2)(c) of the *Act*.

[2] The appellant appealed the decision to deny access to the records and submitted that additional records responsive to portions of her request, outlined below, ought to exist.

[3] In addition, the appellant advised that she wants access to the ViCLAS submission that the police withheld in its entirety pursuant to sections 8(1)(c), 8(1)(l) and 8(2)(c). The police confirmed that they are not prepared to disclose this record to the appellant and added the application of section 38(a), in conjunction with the above noted sections to this record. Accordingly, access to this report remains at issue in this appeal.

[4] After further discussions with the mediator, the appellant stated that she is not pursuing access to the personal information of other individuals. Accordingly, all of the information which was withheld pursuant to sections 14 and 38(b) is no longer at issue in this appeal. The appellant also stated that she does not seek access to the information that was removed from the records because it is not responsive to her request. Accordingly, the information that was deemed to be not responsive is not at issue in this appeal. Finally, the appellant stated that she does not want access to the police codes, statistical codes and investigative tools, unless they describe her in any way. The police confirmed that the information which was withheld from the police officer's notes pursuant to sections 8(1)(c), 8(1)(e) and 8(1)(l) does not describe her. This information is, therefore, not at issue in this appeal as well.

[5] The appellant advised that she does not take issue with the other parts of the police's decision that state no other records exist. Accordingly, the parts of the decision relating to when her written statement was determined to be false (decision part A/2(b)), the "reasonable and probable cause" for determining her statement was false (decision part A/2(c)) and warrants/summons for medical records (decision part A/2(e)) are no longer at issue in this appeal.

[6] Further mediation could not be effected and this appeal was referred to the adjudication stage of the appeal process. The issues to be determined in this inquiry

are focused on access to the ViCLAS record and the reasonableness of the search conducted by the police relating to just three aspects of the request:

- the appellant's original witness statement,

- information about the NICHE, and in particular, the identity of the individual who entered the information about her and when it was entered.

- entries on the CPIC, which she believes were made by the police, not the Toronto Police Service.

[7] The adjudicator originally assigned to this appeal decided to seek representations from the police, initially. The police submitted representations and consented to sharing them with the appellant, who also submitted representations. Subsequent to the receipt of her representations, the appellant provided this office with a Notice of Constitutional Question raising the possible application of various provisions in the *Canadian Charter of Rights and Freedoms* in favour of a finding that her right of access to the sought after ViCLAS record is constitutionally protected. I will address these arguments below.

[8] The file was then assigned to me to complete the inquiry. Based on my review of the ViCLAS record, I determined that it may be subject to the mandatory exemption in section 9(1)(d) of the *Act.* I then solicited the representations of the appellant on the possible application of that section, referring to a recent decision of this office interpreting the exemption, Order MO-2953-R. I received representations from the appellant in response which do not directly address the application of section 9(1)(d) to the ViCLAS report, but instead reiterate her constitutional arguments in favour of a finding that the *Charter* requires that she be granted access to this record.

[9] In this order, I uphold the application of section 38(a), in conjunction with section 9(1)(b), to the ViCLAS report and find that the searches undertaken by the police were reasonable in the circumstances. On that basis, I dismiss the appeal.

RECORDS:

[10] The sole record at issue is the ViCLAS report. The police did not provide a copy of this record to this office, but have provided me with a description of its contents in its representations.

PRELIMINARY ISSUE:

Were the appellant's rights under sections 7, 10, 11, 12 and 15 of the *Canadian Charter of Rights and Freedoms* infringed upon?

[11] On May 13, 2013, the appellant delivered a document entitled Notice of Constitutional Question to this office in relation to this appeal. In this document, the appellant gives notice that she intends to challenge the "constitutional applicability (and/or validity) of sections 38(a), 8(1)(c) and (l) and 8(2)(a) of the *Act* and sections 14(1)(f), 14(2)(c) and 40(2) and (3) of the *Freedom of Information and Protection of Privacy Act (FIPPA)* and requests to claim a remedy under sections 24(1) and (2) and/or 32(1) of the *Canadian Charter of Rights and Freedoms (the Charter)*."

[12] The appellant's argument in favour of a finding that her *Charter* rights have been violated stems from the police using the exemptions in the *Act* to deny her access to the ViCLAS report in order to enable her to correct what she describes as false information in it. The challenge to these provisions is "in relation to an act or omission of the [police] and/or the RCMP" in not providing the appellant with a copy of the ViCLAS report which is the subject of this appeal. By refusing to provide this record, the appellant submits that the police breached sections 7, 10, 11, 12 and 15 of the *Charter*.

[13] The appellant believes that as a result of the recording of information about her in the ViCLAS report, she has been "convicted of being an 'offender' . . . without her knowledge or the opportunity to be presumed innocent until proven guilty, and given the opportunity to present evidence in her defense before a fair and impartial tribunal." However, she has not provided any evidence to substantiate her allegation that, as a result of information contained in the ViCLAS report being made available to law enforcement entities, she has been charged with or convicted of a crime. Her involvement in a suspected crime at the time the ViCLAS report was prepared was as a victim of that crime, not as an offender. The appellant is convinced, however, that the police have "labelled" her as an offender in the report and that by denying access to it, her *Charter* rights have been violated because she was not offered the opportunity to defend herself in a proper criminal court.

[14] In my view, the appellant's rights under sections 10 and 11 of the *Charter* were not violated because, as noted above, she was not charged with any offence as a result of her involvement in the circumstances that gave rise to the creation of the ViCLAS report. Based on the representations of the police and the appellant's own submissions, it is clear that this report was prepared in order to document the possible violation of law by the individual who the appellant alleged sexually assaulted her. The appellant's involvement in the allegations was strictly as a victim and a witness to the alleged crime, and not as an offender and this fact is described in the ViCLAS report.

[15] I note that the appellant's witness statement dated June 13, 1997, at least in a transcribed form, an occurrence report dated June 14, 1997 and a supplementary occurrence report dated June 20, 1997 that were prepared at the time of the police investigation of the appellant's allegations have been disclosed to her. These records clearly indicate that the police considered the appellant to be a victim and witness to the crime she is alleging took place. As a result, her rights under sections 10 and 11, which address situations where an individual is arrested or detained (section 10) or charged with an offence (section 11) were not infringed by the denial of access to the ViCLAS report by the police.

[16] In addition, the appellant has not provided me with evidence to substantiate her allegations that her rights under sections 7 (life, liberty and security of the person), 12 (not to be subjected to cruel or unusual treatment or punishment) or 15 (equality before the law) of the *Charter* were engaged and that a violation of those sections of the *Charter* occurred as a result of the non-disclosure of the information in the ViCLAS report. For these reasons, I dismiss the appellant's arguments of a violation of her rights under sections 7, 10, 11, 12 or 15 of the *Charter* and will address the other issues in the appeal.

ISSUES:

A. Does the ViCLAS report contain "personal information" as that term is defined in section 2(1) of the *Act* and, if so, to whom does the information relate?

B. Is the ViCLAS report exempt from disclosure under the discretionary exemption in section 38(a), taken in conjunction with the mandatory exemption in section 9(1)(b) of the *Act*?

C. Did the institution exercise its discretion under section 38(a), in conjunction with section 9(1)(d)? If so, should this office uphold the exercise of discretion?

D. Did the police conduct a reasonable search for all records responsive to the appellant's request?

DISCUSSION:

A. Does the ViCLAS report contain "personal information" as that term is defined in section 2(1) of the *Act* and, if so, to whom does the information relate?

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

"personal information" means recorded information about an identifiable individual, including,

(a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except if they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[18] The police submit that the ViCLAS report "contains the name, date of birth, gender, race, family status, physical descriptors, criminal history and address of both the appellant and the suspect." Accordingly, they argue that the record contains information that qualifies as "personal information" for the purposes of the definition of that term in section 2(1).

[19] Based on the information provided to me by the police, I am satisfied that it contains information that qualifies as "personal information" that relates to both the

appellant and the suspect within the meaning of paragraphs (a), (b), (d) and (h) of the definition in section 2(1).

B. Is the ViCLAS report exempt from disclosure under the discretionary exemption in section 38(a), taken in conjunction with the mandatory exemption in section 9(1)(b) of the *Act*?

[20] Section 36(1) gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right. 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. [emphasis added]

[21] 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] 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. In this case, the police provided representations on the application of section 38(a), in conjunction with section 8. I will, however, apply those representations in the context of the section 9(1)(d) exemption for the purposes of the present appeal.

Section 9(1)(d)

[22] 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,
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> (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;

[1] Order M-352.

> (d) an agency of a government referred to in clause (a), (b) or (c)

[23] 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".[2]

[24] For this exemption to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, 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.[3] If disclosure of a record would permit the drawing of accurate inferences with respect to information received from another government, it may be said to "reveal" the information received.[4]

[25] 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.[5]

[26] The focus of this exemption is to protect the interests of the supplier, and not the recipient. Therefore, the supplier's requirement of confidentiality is the one that must be met. Some orders refer to a mutual intention of confidentiality.[6] Generally, if the supplier indicates that it has no concerns about disclosure or vice versa, this can be a significant consideration in determining whether the information was received in confidence.[7]

[27] In their representations, the police describe the nature of the ViCLAS reporting system as follows:

> The Violent Crime Linkage Analysis System (ViCLAS) is a central repository to capture, collate and compare violent crimes. This repository is maintained by the Royal Canadian Mounted Police (RCMP).

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[2] Order M-912.
[3] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[4] Order P-1552.
[5] Orders MO-1581, MO-1896 and MO-2314.
[6] Order MO-1896.
[7] Orders M-844 and MO-2032-F.

> Investigating officers complete a questionnaire booklet containing 262 [later corrected to 263] questions, which cover details of all aspects of an incident including victimology, modus operendi, forensics and behavioural information. The content of the questions provides ViCLAS Specialists with the ability to link offences based on the offender's behaviour. The questionnaire booklets allow for standardized date collection and more efficient search and find capabilities.
>
> Each booklet has the following privacy statement at the beginning: 'For the purpose of the provisions of the [federal] Privacy Act and Access to Information legislation, all information provided to ViCLAS is done so 'In Confidence'.'

[28] In Order MO-2953-R, Adjudicator Colin Bhattacharjee applied the mandatory exemption in section 9(1)(d) of the *Act* to a ViCLAS report which was at issue in that appeal. At pages 8-10 of his decision, he found as follows:

> Page 1228 of Appeal MA-040099-1 comprises a 35-page Violent Crime Linkage Analysis System (VICLAS) booklet ("Crime Analysis Report") that was filled out by a police investigator and contains the appellant's personal information. VICLAS is a national crime database managed by the Royal Canadian Mounted Police (RCMP) but the Ontario Provincial Police (OPP) operates a provincial VICLAS centre.
>
> The OPP's VICLAS centre provides this booklet to police services in Ontario, including the Toronto police. The front page of this booklet, is marked "Confidential" and contains the following statement: "This record and the information contained therein is being provided in confidence and shall not be disclosed to any person without the express written consent of the Commissioner of the [OPP]."
>
> In my view, it is abundantly clear from this statement that the OPP provided this booklet to the Toronto police "in confidence." Consequently, I find this record falls squarely within the mandatory exemption in section 9(1)(d), because its disclosure could reasonably be expected to reveal information that the Toronto police have received in confidence from an agency of the Ontario government.

[29] In the present appeal, based on the representations of the police, I am satisfied that the questionnaire portion of the ViCLAS report was provided to the police by the RCMP with a clear expectation that it would be treated confidentially. Further, I find that it would not be possible to sever the information in the ViCLAS report which answers the questions posed in the questionnaire as to do so would result in the disclosure of unconnected snippets of information that would lack context or meaning.

[30] As a result, I find that the ViCLAS report satisfies the requirements of the mandatory section 9(1)(d) exemption as its disclosure could reasonably be expected to reveal information which the police received from one of the governments, agencies or organizations listed in the section, in this case the RCMP, an agency of the Government of Canada. In addition, I find that the information contained in the ViCLAS questionnaire was received by the police from the RCMP in confidence, thereby meeting both requirements of the test under section 9(1)(d).

[31] Because the ViCLAS report qualifies for exemption under section 9(1)(d), I find that it is exempt from disclosure under section 38(a), subject to my discussion of the exercise of discretion by the police.

C. Did the institution exercise its discretion under section 38(a), in conjunction with section 9(1)(d)? If so, should this office uphold the exercise of discretion?

General principles

[32] 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.

[33] 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.

[34] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[8] This office may not, however, substitute its own discretion for that of the institution.[9]

Relevant considerations

[35] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[10]

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[8] Order MO-1573.
[9] Section 43(2).
[10] Orders P-344 and MO-1573.

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

[36] In its representations with respect to the application of sections 38(a), the police submit that they exercised their discretion not to disclose the ViCLAS report to the appellant in good faith and for a proper purpose, taking into account all relevant factors.

[37] Based on the representations of the police and the appellant, I am satisfied that the police properly exercised their discretion not to disclose this information to the appellant. This decision was made for practical reasons and was made in good faith, taking into account all of the relevant circumstances present.

D. Did the police conduct a reasonable search for all records responsive to the appellant's request?

[38] 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.[11] 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. 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.[12] To be responsive, a record must be "reasonably related" to the request.[13]

[39] 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.[14] 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.[15]

[40] 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.[16]

[41] The appellant takes issue with the reasonableness of the search conducted by the police for records relating to:

- the whereabouts of the appellant's original witness statement,

- information about the NICHE, and in particular, the identity of the individual who entered the information about her and when it was entered.

- entries on the CPIC, which she believes were made by the police, not the Toronto Police Service.

[42] In response, the police have provided me with extensive evidence in the form of sworn affidavits from the officers and staff at the police Freedom of Information and

[11] Orders P-85, P-221 and PO-1954-I.
[12] Orders P-624 and PO-2559.
[13] Order PO-2554.
[14] Orders M-909, PO-2469 and PO-2592.
[15] Order MO-2185.
[16] Order MO-2246.

Protection of Privacy Office who conducted the searches for responsive records and provided various explanations for the existence or non-existence of the records responsive to the issues raised by the appellant.

[43] As described in the Overview section of this decision, a great deal of discussion took place between the parties and this office during the mediation and adjudication stages of the processing of this appeal. Following the extensive mediation that took place at that stage of the appeals process, as well as during the conduct of this inquiry, the issues relating to the reasonableness of the police search have been limited in scope and have been thoroughly responded to by both the appellant and the police. The parties have been informed of the positions taken by each other with respect to the three remaining aspects of the search. I will address each of these three issues individually, as follows.

The appellant's original witness statement

[44] The appellant was provided with a typed version of her original, handwritten June 13, 1997 witness statement which was printed from the police's NICHE database of "will state" documents. The police go on to note that because the incident about which the statement was made was later cleared as "unfounded", the statement was purged by the investigating officer from her "statement file in our Evidence department." There is no destruction log maintained when such statements are destroyed.

[45] The police provided me with two affidavits sworn by the original investigating officer and a staff sergeant with its Professional Standards and Planning branch. These affidavits describe the searches conducted by the officers for the original witness statement from 1997 and the fact that no such statement was located. Both individuals conducted searches of the investigating officer's "statement file located in the Evidence Department" of the police.

[46] The appellant questions why the NICHE version of her statement would exist but not the original copy and raises concerns about the lack of a record destruction log for statements of this sort.

[47] Based on the representations of the police, including the affidavits sworn by the two officers, I am satisfied that the police have conducted a reasonable search for the appellant's witness statement, which was taken in 1997 and involved an investigation which did not proceed because it was determined to be unfounded. In the circumstances, I am satisfied that the police have conducted reasonable searches of the location where such a record might be found.

The identity of the individual who made entries in the NICHE database

[48] The police advised the appellant in a telephone conversation on March 28, 2012 and again in their representations which were shared with her during this inquiry that the information entered into the NICHE database was originally entered into an earlier computer system operated by the police and known by the acronym OMPPAC in 1997. The police provided me with an affidavit from a Freedom of Information Analyst who deposed that information contained in the OMPPAC system was migrated into the NICHE system in April 2002 and "unfortunately, not all data fields migrated from OMPPAC to NICHE, including the 'Statement taker', 'Entered by' and the 'Entered time' fields". As a result, the police submit that this information is not available.

[49] The appellant raises her suspicions about the conversion problem and wonders if other documents were similarly compromised.

[50] Based on the explanation provided by the police, I am satisfied that they have made a reasonable effort to obtain access to the information sought by the appellant which would indicate the identity of the individual who entered the information into the OMPPAC database in 1997.

Entries on CPIC

[51] The appellant argues that information contained in the Canadian Police Information Centre (CPIC) relating to her was entered by the police and that she is entitled to any information that they might have in relation to those entries.

[52] The police submit that the entries referred to by the appellant were made by the Toronto Police Service and that they do not have any records relating to these CPIC entries.

[53] Based on the information provided to me by the police, I am satisfied that they have conducted a reasonable search for any such records relating to the entry of information about the appellant in the CPIC database.

[54] As all three components of the appeal respecting the reasonableness of the searches undertaken by the police have been addressed, I am satisfied that the police conducted a reasonable search for records responsive to the request and I dismiss this aspect of the appeal.

ORDER:

1. I uphold the decision of the police to deny access to the ViCLAS report on the basis that it is exempt from disclosure under section 38(a), taken in conjunction with section 9(1)(d).

2. I find that the police have conducted a reasonable search for records responsive to the three identified components of the request and I dismiss this aspect of the appeal.

Original signed by: June 25, 2014
Donald Hale
Adjudicator