Information and Privacy Commissioner,
Ontario, Canada

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

# ORDER MO-3221

Appeal MA13-589

Kingston Police Services Board

July 10, 2015

**Summary:** The appellant requested records pertaining to him from the Kingston Police Services Board (the police). The police initially provided the appellant with a letter extending the time to respond to the request on the basis that the responsive records were being "gathered", but would be delayed. The police then issued a decision letter refusing to confirm or deny the existence of any responsive records. At adjudication, the police confirmed that they were relying on section 38(a) (discretion to refuse requester's own information), in conjunction with section 8(3) (refuse to confirm or deny on the basis of law enforcement), with particular reference to sections 8(1)(e) (endanger life or physical safety) and 8(2)(b) (disclosure constitutes offence). This order does not uphold the application of section 38(a) in conjunction with section 8(3) and orders the police to issue a decision letter.

**Statute Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 2(1), 8(1)(e), 8(2)(b), 8(3) and 38(a).

**Case considered**: *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII).

## BACKGROUND:

[1] The Kingston Police Services Board (the police) received the following request for access to information under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*):

> For access/correction purposes I'm requesting all records and police reports (including officer's own notes) pertaining to myself, [name of requester]. Date of birth: [requester's date of birth].

[2] The police then sent a letter to the requester extending the time to provide a decision under sections 19 (notice by head) and 20 (extension of time) of the *Act*. The author of the letter provided the following explanation for the time extension:

> I am in the process of gathering the requested materials. Because your request includes copies of officers' notes, your request for access will be delayed. Individual officers have personally retrieved their notes and these are not immediately accessible to me. Until the officers retrieve their notes and forward them to me, I cannot move forward with your request. The retrieval of officers' notes is further complicated by officers' schedules (officers may be on leave or on training). … I am extending the time limit for an additional sixty days from the date of this letter. I would anticipate that the officers will have forwarded their notes well in advance of the sixty day timeline in which case I would be able to issue a decision letter in advance of that time.

[3] The police then issued an access decision letter in which they changed their position and refused to confirm or deny the existence of records that were responsive to the request. The decision letter explained:

> I am aware that [named Superior Court Justice] signed a Final Order (general) on [an identified date] … . At that time, [named Superior Court Justice] ordered that:
>
> > Once provided notice of this order, any schools, physicians and other professionals, organizations, or individuals with information relating to the child [named individual, individual's date of birth], due to involvement with the child in a professional or business capacity, are not to provide any information regarding the child (including but not limited to his phone number, address, province or municipality of residence, or whereabouts) to the respondent [name of the requester].
>
> On the basis of [named Superior Court Justice's] Order, the Kingston Police refuse to confirm or deny the existence of any responsive records.

[4] The requester (now the appellant) appealed the police's decision. In his appeal letter, he writes that he lives a distance away from Kingston, Ontario:

> … and I've never resided in Kingston nor stayed there beyond one night for court appearances. My only business in Kingston has been to go directly to Montreal St. Family Court for proceedings and leave immediately afterwards, harassed by police along the way. I feel that I've the right to examine Kingston Police records in order to defend myself against any falsehoods they may contain. …

[5] The appellant further states that, "because I often work in the related field of security, I feel the probable lies the records contain are a direct attack on my means of earning a living." The appellant closes his letter by stating that he is requesting:

> … access to any information held by Kingston Police pertaining to myself only ... .

[6] Mediation did not resolve the appeal and it was moved to the adjudication stage of the inquiry process where an adjudicator conducts an inquiry under the *Act*.

[7] I commenced my inquiry by sending a Notice of Inquiry to the police. The Notice of Inquiry was based on the Mediator's Report which set out that the application of section 14(5) (refuse to confirm or deny on the basis of personal privacy) of the *Act* was at issue in the appeal. Once the police received the Notice of Inquiry, they contacted this office to advise that they had intended to rely on section 8(3) (refuse to confirm or deny on the basis of law enforcement) of the *Act*, rather than section 14(5).

[8] I then sent a revised Notice of Inquiry to the police seeking representations on the issues in this appeal. Based on the scope of the appellant's request, any responsive records, if they existed, would likely contain the appellant's personal information. Accordingly, I added the possible application of the exemption at section 38(a), in conjunction with section 8(3), as an issue in the appeal. The police provided representations, but asked that they not be shared with the appellant due to confidentiality concerns. I then sent a Notice of Inquiry to the appellant, who provided responding representations.

## OVERVIEW:

[9] In this order, I do not uphold the refusal of the police to confirm or deny the existence of responsive records because, in my view, disclosure of the existence of records would not in itself convey information to the appellant which could harm a section 8(1) or (2) (law enforcement) interest. Accordingly, section 8(3) of the *Act* does not apply, as outlined below.

[10] As a result, I confirm that responsive records exist. In keeping with the usual practice of this office in such cases, I am disclosing this order to the police prior to disclosing it to the appellant, in order to preserve their ability to bring an application for

judicial review or seek other relief if they deem it appropriate to do so before the order is disclosed to the appellant.

[11] In addition, I am also ordering the police to make an access decision concerning the responsive records.

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

[12] 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;

[13] 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.[1]

[14] Sections 2(2.1) and (2.2) also relate to the definition of personal information. These sections state:

> (2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[15] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[2]

[16] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[3]

[17] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[4]

[18] As set out in the background above, the request is for the appellant's personal information only. I find that the responsive records contain the personal information of the appellant under the definition of that term in section 2(1) of the *Act*. In addition, although not sought by the appellant, the responsive records contain the personal information of other identifiable individuals.

---

[1] Order 11.
[2] Orders P-257, P-427, P-1412, P-1621, R-980015 and PO-2225.
[3] Orders P-1409, R-980015, PO-2225 and MO-2344.
[4] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

**Issue B: Have the police properly applied section 38(a) in conjunction with 8(3), in the circumstances of this appeal?**

[19] 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.

[20] 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.

[21] In this appeal the police rely on section 38(a), in conjunction with section 8(3) of the *Act*, as the basis for their decision to refuse to confirm or deny the existence of a responsive record. Section 8(3) of the *Act* reads as follows:

> A head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) [of section 8] applies.

[22] This section acknowledges the fact that in order to carry out their mandate, law enforcement agencies must sometimes have the ability to withhold information in answering requests under the *Act*. However, it is the rare case where disclosure of the mere existence of a record would frustrate an ongoing investigation or intelligence-gathering activity.[5]

### *Representations*

[23] The police provide confidential representations in support of their position that section 8(3) applies in the circumstances of this appeal. Without revealing confidential information, the police submit that disclosing a responsive record, if it exists, would result in the harm described in sections 8(1)(e) and 8(2)(b) of the *Act*. The police also refer to section 13[6] in their representations but section 13 is not mentioned in section 8(3). In any event, the tests for the application of the section 8(1)(e) and 13 exemptions are similar.

---

[5] Order P-255.

[6] Section 13 reads: A head my refuse to disclose a record whose disclosure could reasonably be expected to seriously threaten the health or safety of an individual.

[24] The appellant submits that in the initial decision letter:

> … [the police's Records and Systems manager] stalls off on providing me with a part of what [the police's Records and Systems manager] previously acknowledged by phone was extensive records on myself …

[25] The appellant also refers in his appeal letter and submissions to interactions he has had with the Kingston police, including his interactions with the police during his attendances in Kingston.

**Part One: Would a record (if it exists) qualify for exemption under sections 8(1)(e) or 8(2)(b)?**

[26] In light of my determination with respect to the second part of the test below, it is not necessary for me to address Part One.

**Part Two: Would disclosure of the fact that a record exists (or does not exist) in itself convey information to the appellant and this could harm a section 8(1) or (2) interest?**

[27] Under part two of the test, the police must demonstrate that disclosure of the mere fact that a record exists (or does not exist) would in itself convey information to the requester, and disclosure of that information could reasonably be expected to harm one of the interests sought to be protected by sections 8(1) or (2). As set out above, the police refer to sections 8(1)(e) and 8(2)(b) in support of their reliance on section 8(3).

[28] Section 8(1)(e) states:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > endanger the life or physical safety of a law enforcement officer or any other person;

[29] Section 8(2)(b) reads:

> A head may refuse to disclose a record,
>
> > That is a law enforcement record if the disclosure would constitute an offence under an Act of Parliament;

[30] The term "law enforcement" 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)

[31] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[7]

[32] It is not enough for an institution to take the position that the harms under section 8 are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter.[8] The institution must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[9]

### *Analysis and findings*

[33] I am able to make a finding with respect to this part of the test having considered:

1. the confidential representations of the police,
2. the circumstances of this appeal, and
3. the information that has already been disclosed to the appellant, including the content of the initial decision letter.

[34] Based on these factors, and considering that the appellant seeks only information pertaining to himself, I am not satisfied that the disclosure of the fact that a responsive record exists or does not exist would in itself convey information to the

---

[7] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[8] Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.
[9].*Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

appellant and disclosure of this information could reasonably be expected to harm one of the interests sought to be protected by sections 8(1) or (2), and in particular, the interests protected by sections 8(1)(e) or 8(2)(b).

[35] In light of the information conveyed to the appellant in the initial decision letter, his recounting of interactions with the police during his attendances in Kingston Ontario, which include being stopped by the police and other contact with the police, as well as the evidentiary threshold set out in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*[10], I am not satisfied that simply revealing that records exist would result in the harms set out in section 8(1)(e). In my view, it is reasonable for the appellant to assume that based on the circumstances that brought the appellant to Kingston, some records would have been produced by virtue of his involvement with the police. I am not satisfied that confirming the existence of responsive records would result in the section 8(1)(e) harms alleged.

[36] With respect to section 8(2)(b), the police point to the provisions of the Court Order referred to in their decision letter in support of the application of this exemption. Without commenting on whether or not disclosure of records contrary to the provisions of the Court Order, would constitute an "offence" under section 8(2)(b), I am not satisfied that confirming the existence of records responsive to the request would breach the provisions of the referenced Court Order. In that regard, simply revealing the existence of responsive records would not, in my view, provide any information regarding the appellant's son (including but not limited to his phone number, address, province or municipality of residence, or whereabouts) to the appellant. It would simply confirm that records responsive to the appellant's request for his own personal information exist.

[37] In my view, and considering the evidentiary threshold set out in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*[11], I find that the police have failed to provide sufficiently detailed and convincing evidence to establish that section 8(2)(b) applies if the existence of responsive records is confirmed.

[38] I am unable to elaborate on these findings any further in this order owing to the confidential nature of the police representations.

[39] Accordingly, I find that the police have failed to establish the application of section 38(a) in conjunction with section 8(3).

[10] 2014 SCC 31 (CanLII) at paras. 52-4.
[11] 2014 SCC 31 (CanLII) at paras. 52-4.

***Conclusion***

[40] In the circumstances, I conclude that the second requirement under section 8(3) is not met, and the existence of the records should be revealed to the appellant.

[41] I will, therefore, order the police to issue an access decision with respect to the appellant's request for information.

## ORDER:

1. I do not uphold the decision of the police to refuse to confirm or deny the existence of a responsive record in this appeal. If I do not receive an application for judicial review from the police on or before **July 31, 2015** in relation to my decision that section 8(3) does not apply, I will send a copy of this order to the appellant on or after **July 31, 2015**.

2. I order the police to make an access decision under the *Act* with respect to the responsive records, in accordance with sections 19, 21 and 22 of the *Act*, treating the date of this order as the date of the request, and to provide their decision letter to the appellant.

3. In order to verify compliance with order provision 2, I reserve the right to require the police to provide me with a copy of the access decision sent to the appellant.

Original Signed By: July 10, 2015
Steven Faughnan
Adjudicator