Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3199

Appeal MA13-351

Halton Regional Police Services Board

May 15, 2015

Summary: The appellant requested records pertaining to what he described as a "false accusation" made against him by a named individual. The Halton Regional Police Services Board identified an occurrence report and two police officer's notes as being responsive to the request. Relying on the discretionary exemptions at section 38(a) (discretion to refuse requester's own information) and 38(b) (personal privacy) of the *Act*, the police denied access to the responsive records, in their entirety. At mediation, the appellant took the position that the police failed to conduct a reasonable search for responsive records. This order upholds the reasonableness of the police's search for responsive records and the decision of the police to deny access to the responsive records.

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), 17 and 38(a).

Order Considered: PO-2642.

Cases Considered: *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 3.

BACKGROUND:

[1] The Halton Regional Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*)

for access to records pertaining to what the requester described as a "false accusation" made by a named individual against him. The request provided that:

> The Halton Regional Police informed the Peel Regional and Hamilton Regional Police [about the accusation]. I am requesting the badge numbers and names of the officers involved and all the reports and handwritten notes.

[2] Attached to the request was an excerpt of what the requester described as a statement made by the named individual.

[3] After notifying a party whose interests may be affected by disclosure of the requested information (the affected party) the police issued a decision. Relying on sections 38(a) (discretion to refuse requester's own information), in conjunction with sections 8(1)(e) (endanger life or safety), 8(1)(l) (facilitate commission of an unlawful act) and 8(2)(a) (law enforcement report), as well as section 38(b) (personal privacy), the police denied access to all of the records that they identified as being responsive to the request. The police did, however, provide the requester with the names and badge numbers of the investigating officers.

[4] The requester, now the appellant, appealed the police's access decision.

[5] At mediation, the police advised that some of the information in the records was withheld on the basis that it was deemed to be not responsive to the request.

[6] In turn, the appellant advised that he is not pursuing access to the non-responsive information. The appellant also advised that he was not seeking access to any police codes or to the complainant's name, address, phone number or other contact information. Accordingly, all this information was no longer at issue in the appeal. However, in addition to maintaining his request for access to the remaining information in the records at issue, the appellant also took the position that other responsive records ought to exist. The appellant identified those records as being related to communications between the two investigating officers, and the Peel and Hamilton Police Services, with respect to the matter set out in his request. As a result, the reasonableness of the police's search for responsive records was added as an issue in the appeal.

[7] The mediator advised the police of the appellant's position with respect to the reasonableness of their search for responsive records. The police then conducted a further search for responsive records relating to the matter set out in the request and subsequently issued a supplementary decision letter to the appellant advising that none were found.

[8] As mediation did not resolve the matter, it was moved to the adjudication stage of the appeal process where an adjudicator conducts an inquiry under the *Act*.

[9] I commenced my inquiry by sending a Notice of Inquiry to the police and the affected party, on the facts and issues set out in this Notice of Inquiry. Both the police and the affected party provided responding representations. The police asked that portions of their representations be withheld due to confidentiality concerns. The affected party asked that their representations be withheld in full. I then sent a Notice of Inquiry to the appellant along with the police's non-confidential representations. In the appellant's Notice of Inquiry I wrote:

> Representations are now sought from the appellant on the facts and issues set out in this Notice of Inquiry as well as the non-confidential representations of the police. In their confidential representations, both the police and the affected party assert that disclosing the information will endanger the life or physical safety of an individual and they provide evidence and submissions in support of that assertion. In their confidential representations, the police also set out grounds for their assertion that disclosing the information will facilitate the commission of an unlawful act or hamper the control of crime.

[10] The appellant provided representations in response. I determined that the appellant's representations raised issues to which the police should be given an opportunity to reply. Accordingly, I sent a copy of the appellant's representations to the police and invited their reply representations. The police provided representations in reply.

RECORDS REMAINING AT ISSUE:

[11] The records remaining at issue consist of an Occurrence Report (Record 5) and the notes of two police officers (Records 6 and 7).

DISCUSSION:

Issue A: Did the police conduct a reasonable search for responsive records?

[12] 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.[1] 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.

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[1] Orders P-85, P-221 and PO-1954-I.

[13] 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.[2] To be responsive, a record must be "reasonably related" to the request.[3]

[14] 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.[4]

[15] 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.[5]

[16] 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.[6]

[17] In the course of mediation the appellant took the position that the police did not conduct a reasonable search for additional records relating to the incident that gave rise to the request. As set out in the Mediator's Report:

> … he believes more records should exist relating to communications about this incident, between the two investigating officers and the Peel and Hamilton police services.

[18] The police take the position that they conducted a reasonable search for responsive records. The police provided affidavits of the two police officers and an Inspector in support, describing their efforts in identifying responsive records.

[19] In their representations, the police state:

> The issue with respect to the police sharing information with outside institutions arose at mediation. The Information Privacy Officer/FOI Coordinator contacted the two police officers involved in this incident. One officer was adamant that he did not contact anyone about this incident …

[2] Orders P-624 and PO-2559.
[3] Order PO-2554.
[4] Orders M-909, PO-2469 and PO-2592.
[5] Order MO-2185.
[6] Order MO-2246.

[20] With respect to the second officer, the police attempted to determine if she sent any records. The police submit that her notebooks were reviewed and there is no mention of notifying the Peel Regional or Hamilton Regional Police. The police submit that it is possible that sharing took place, but this sharing is not recorded in any format.

[21] The second police officer deposed in her affidavit:

> I believe that on the day that the report that I authored was submitted I did send a copy to Hamilton and Peel police services out of concern for the victim. However I do not recall doing it and I do not recall the method I used to do so.

[22] The police submit:

> The Information Privacy Officer/FOI Coordinator … contacted the Inspector in charge of the Oakville station to determine whether a fax log existed which could prove a fax to either the Hamilton Police or Peel Regional Police Service around the time of this incident was sent. After having consulted a number of individuals in the station, the Inspector determined that a fax log did not exist [that could establish if a fax was sent].

[23] The police submit that the "Information Privacy Officer/FOI Coordinator exhausted all means to search for any written records that could prove the sharing of information took place; therefore the appellant was advised that no further written records exist with respect to his request."

[24] The appellant submits that all the second police officer has to do is to "call the freedom of information office in Hamilton and Peel to get this clarified". The appellant did not provide any further grounds for his belief that additional records ought to exist.

Analysis and finding

[25] The issue before me is whether the search carried out by the police for records responsive to the appellant's request was reasonable in the circumstances.

[26] As set out above, the *Act* does not require the police to prove with absolute certainty that the records do not exist, but only to provide sufficient evidence to establish that it made a reasonable effort to locate any responsive records. 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. In my view, the employee who conducted the search for responsive records is an experienced employee, who is knowledgeable in the subject matter of the request. Based on the evidence before me, I am also satisfied that under

her direction a reasonable search was made for any responsive record pertaining to the appellant's request.

[27] Accordingly, I find that the police have provided me with sufficient evidence to demonstrate that they have made a reasonable effort to identify and locate responsive records within their custody and control. However, no additional responsive records were found.

[28] Accordingly, I am satisfied that the police's search for records that are responsive to the appellant's request is in compliance with its obligations under the *Act*.

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

[29] In order to determine which sections of the *Act* may apply, it is necessary to decide whether a 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 where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[30] 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.[7]

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

> 2(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(2.2) For greater certainty, subsection (3) 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.

[32] 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.[8]

[33] 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.[9]

[34] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[10]

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

[35] The police submit that the records at issue contain the personal information of the appellant, as well as the personal information of other identifiable individuals. In that regard, although the appellant does not seek personal identifiers, I find that the information in the records pertaining to the affected party, a social worker, has crossed over from the professional to the personal sphere. In all the circumstances, I find that the information is of such a nature that it qualifies as her personal information. Therefore, I find that the information remaining at issue contains both the personal information of the appellant, the affected party and other identifiable individuals under section 2(1) of the *Act*.

Issue C: Does the discretionary exemption at section 38(a) in conjunction with section 8(1)(d) apply to the information at issue?

[36] 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.

[37] 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.

[38] 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.[11]

[39] 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.

[40] In this appeal, the police claim that sections 8(1)(e), 8(1)(l) and 8(2)(a) apply to the information at issue.

[41] Sections 8(1)(e) and (l) state:

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

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[11] Order M-352.

> (e) endanger the life or physical safety of a law enforcement officer or any other person;
>
> (l) facilitate the commission of an unlawful act or hamper the control of crime.

[42] Section 8(2)(a) reads:

> A head may refuse to disclose a record,
>
> That is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law,

[43] 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)

[44] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[12]

[45] 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.[13] 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.[14]

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

[13] Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

[14] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

Section 8(1)(e): endangerment to life or safety

[46] A person's subjective fear, while relevant, may not be enough to justify the exemption.[15]

[47] The appellant explains that in the past he had told an individual, who is also a social worker, but unrelated to the incident at issue in this appeal, that he had videotaped all of their interviews and that a report she filed was not consistent with the videotaped interviews. He states this resulted in the individual levelling a "false allegation" that he was harassing her. He submits that when he requested a copy of the occurrence report pertaining to that incident, the police provided him "with a full report including the home address [of that individual]." He provided a copy of what he described as two pages of the occurrence report with his representations. He submits that this individual works across the street from his place of work and that, "I have never been a threat to her."

[48] The appellant submits that similar circumstances arose with the affected party. The appellant submits that after he had informed "the Attorney General's office" that he had recorded all of the interviews with the affected party, "the next day [the affected party] called the [police] and leveled false allegations against me that I was stalking her." He states that after his independent investigation of the matter, he requested that the police "charge her with filing a false report and public mischief", however, "this was not done".

[49] The appellant further submits:

> The affected party is a social worker and a member of a college with her information being accessible to the public.
>
> She lives near a relative of the requester, and the requester's niece "works for her" so how is he supposed to be "a threat" to the affected party.
>
> The police do not want to disclose the records in order to "cover up the misconduct of their officers and obstruct justice".

[50] The police and the affected party provide confidential submissions in support of their position that section 8(1)(e) applies.

[15] Order PO-2003.

Analysis and finding

[51] In Order PO-2642, Adjudicator Catherine Corban, while addressing the equivalent section in the Provincial Act[16], commented on the type of conduct that could establish the application of the exemption. She wrote:

> The evidence before me indicates that the appellant has not been physically violent towards the affected parties, or any other individuals. However, based on the University's representations (including the confidential portions that I have withheld from the appellant), as well as the confidential submissions of the affected parties, I find that the University has provided sufficient evidence to establish a reasonable basis that endangerment to the life or physical safety of the affected parties and other individuals referred to in the records could reasonably be expected to occur were the information at issue disclosed. I am satisfied that the concerns expressed by the University and the affected parties, with respect to the physical safety of the individuals referred to in the records, are neither frivolous, nor exaggerated. In my view, there is sufficient evidence before me to conclude that the appellant's motives for seeking access to this information are not benevolent and that he has demonstrated a history of intimidating behaviour. I accept that the University, as well as the affected parties, are legitimately concerned that disclosure of the information in the records remaining at issue could reasonably be expected to worsen the situation and I agree.

[52] In my view, this reasoning is equally applicable in the appeal before me. I find that there is sufficient evidence before me to conclude that the appellant's motives for seeking access to this information are not benevolent and that he has demonstrated a history of intimidating behaviour. Applying the standard set out in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*[17], I find that the police and the affected party have provided sufficient evidence to establish a risk of harm that is well beyond the merely possible or speculative and that endangerment to the life or physical safety of the affected party could reasonably be expected to occur were the information at issue to be disclosed. Accordingly, I find that the information at issue qualifies for exemption under section 38(a) of the *Act* in conjunction with section 8(1)(e). In that regard, I am also satisfied that the records could not be reasonable severed without revealing information that is exempt or result in disconnected snippets of information being revealed.[18]

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[16] Section 14(1)(e) of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended.
[17] 2014 SCC 31 (CanLII) at paras. 52-4.
[18] Orders PO-1663 and *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.).

[53] As I have found that section 8(1)(e) applies, it is not necessary for me to consider whether sections 8(1)(l), 8(2)(a) or 38(b) might also apply.

[54] Furthermore, considering all the circumstances of this matter I am satisfied that the police properly exercised their discretion not to disclose the withheld information to the requester.

ORDER:

1. I uphold the reasonableness of the police's search for responsive records.

2. I uphold the decision of the police not to disclose the remaining information at issue to the appellant.

Original signed by: May 15, 2015
Steven Faughnan
Adjudicator