Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3229

Appeal MA13-567

York Regional Police Services Board

August 17, 2015

Summary: The appellant requested records relating to matters pertaining to her. The York Regional Police Services Board originally identified two police officers' notes, a Call Hardcopy, and a recording of a 911 call as being responsive to the request. Relying on the discretionary exemption at section 38(b) (personal privacy) of the *Act*, the police denied access to portions of the police officers' notes and the Call Hardcopy, as well as the entire 911 call. The appellant appealed the decision. At mediation, the appellant decided not to pursue access to a telephone number which was the only information remaining at issue in one of the police officer's notes. In addition, the police issued a supplementary decision letter relying on section 38(a) (discretion to refuse requester's own information) in conjunction with 8(3) (refuse to confirm or deny) with respect to a record that was not originally identified as responsive to the request. This order upholds the decision of the police to deny access to the withheld portions of the police officer's notes remaining at issue and the Call Hardcopy as well as the entirety of the 911 call. This order does not uphold the application of section 38(a) (in conjunction with section 8(3)) to the record the police identified at mediation, but finds that CPIC system code information in the record qualifies for exemption under section 38(a) in conjunction with section 8(1)(l) (facilitate unlawful act). The police are ordered to disclose to the appellant a copy of this record after severing the CPIC system code information.

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)(c), 8(1)(e), 8(1)(l), 8(3), 14(2)(a), 14(2)(f), 38(a) and 38(b).

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

BACKGROUND:

[1] The York 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 the following information relating to matters involving the appellant:

1. Any records related to a General Occurrence Report bearing a specified number, including a call to the police and the police officer's notes.

2. The names and badge numbers of the police officers attending at the requester's residence.

3. The names and badge numbers of police officers that attended at a specified address.

[2] The police identified two police officers' notes, a Call Hardcopy, and a recording of a 911 call as being responsive to the request and issued an initial decision letter. The police granted partial access to these responsive records, relying on the discretionary exemption at section 38(b) (personal privacy) of the *Act* to deny access to the portion they withheld.

[3] The requester (now the appellant) appealed the police's decision.

[4] During mediation, the appellant indicated that she was not interested in the telephone number of an identifiable individual which was the only information remaining at issue in one of the police officer's notes. As a result, that information is no longer at issue in the appeal. The appellant maintained her position that she should be given access to the remaining withheld information. Also during mediation, the police issued a supplementary decision letter raising, for the first time, the potential application of the discretionary exemption at section 8(3) (refuse to confirm or deny) of the *Act*.[1] This arose because the Mediator had expressed his opinion to the police that a General Occurrence Report containing information pertaining to a CPIC entry was a responsive record that fell within the scope of the appellant's request. The police did not entirely agree with the Mediator's opinion, but did not seriously challenge his assessment. Instead, they decided to issue a supplementary decision letter refusing to confirm or deny the existence of a record. Until the issuance of this order, the appellant may not have been aware of the existence of this record.

[1] As a result of the wording of the request, which seeks access to information relating to matters involving the appellant, any responsive record, if it exists, would likely contain the personal information of the appellant. As a result, I determined that the police are seeking to apply section 38(a) (discretion to refuse requester's own information), in conjunction with section 8(3).

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

[6] I commenced my inquiry by sending a Notice of Inquiry to the police and a health care provider whose interests may be affected by disclosure. Only the police provided responding representations. I then sent a Notice of Inquiry to the appellant, along with the police's non-confidential representations. The appellant provided representations in response.

OVERVIEW:

[7] In this order, I uphold the decision of the police to deny access to the remaining withheld portions of a police officer's notes, a Call Hardcopy and the recording of the 911 call, in its entirety.

[8] I do not uphold the refusal of the police to confirm or deny the existence of the General Occurrence Report identified at mediation because, in my view, disclosure of the existence of this record 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. I am also ordering the General Occurrence Report to be disclosed to the appellant, subject to the severance of any CPIC system code information, as also set out in more detail below.

[9] As a result, I confirm that a responsive record exists. 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.

RECORDS REMAINING AT ISSUE:

[10] Remaining at issue in this appeal are withheld portions of a police officer's notes and a Call Hardcopy, as well as a recording of a 911 call on a CD, which was withheld in full. Also at issue is whether the police can rely on section 38(a) of the *Act* in conjunction with section 8(3), to refuse to confirm or deny the existence of a record and finally, if section 8(3) does not apply, whether that record, or any portion thereof, qualifies for exemption under section 38(a), in conjunction with sections 8(1)(c), (e) or (l).

Issue A: Do the records contain personal information?

[11] The discretionary exemptions in sections 38(a) and 38(b) of *MFIPPA* apply to "personal information". Consequently, it is necessary to determine whether the records

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 where 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.

[12] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[2]

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[2] Order 11.

[13] 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 (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.

[14] 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.[3]

[15] 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.[4]

[16] The police submit that the withheld information remaining at issue in a police officer's notes and the Call Hardcopy qualifies as the personal information of the health care provider under section 2(1) of the *Act*. The police further submit that the recording of the 911 call contains the personal information of the health care provider, the appellant and other identifiable individuals.

[17] I find that all of the records at issue contain the personal information of the appellant.

[18] I also find that, at all material times the health care provider was acting in a professional, not personal role. Although it is possible for individuals in the role of the health care provider to cross the threshold from professional to personal information, this, in my view, is not one of those occasions.

[19] Furthermore, paragraphs (e) and (g) of the definition of personal information provide that the personal opinions or views of an individual are that individual's personal information, except where they relate to another individual and that the view and opinions of another individual about an individual are the second individual's personal information. In light of my conclusion above, the net effect of these paragraphs, in the circumstances of this appeal, is that any view or opinions held by the health care provider about the appellant, or for that matter, other identifiable

[3] Orders P-257, P-427, P-1412, P-1621, R-980015 and PO-2225.
[4] Orders P-1409, R-980015, PO-2225 and MO-2344.

individuals, are the personal information of the appellant and those individuals, as the case may be, and not the health care provider.

[20] Therefore, with certain limited exceptions, the information provided by the health care provider does not qualify as her personal information. That said, the information that I find to be her personal information is information related to her home phone number, which is the sole remaining information at issue withheld from a police officer's notes as well as the Call Hardcopy and is also contained in the 911 call recording.

[21] I further find that, in addition to the personal information of the healthcare provider and the appellant, the 911 call recording also contains the personal information of other identifiable individuals.

[22] Finally, I find that the General Occurrence Report identified at mediation contains the personal information of the appellant, only.

Issue B: Does the discretionary exemption at section 38(b) apply to the personal information at issue?

[23] 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.

[24] Because of the wording of section 38(b), the correct interpretation of "personal information" in the preamble is that it includes the personal information of other individuals found in the records which also contain the requester's personal information.[5]

[25] In other words, where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

[26] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), this office will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.[6]

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[5] Order M-352.
[6] Order MO-2954.

[27] The police submit that:

> The personal information contained in the 911 voice recording relates to the appellant and [identifiable individuals]. Some of the information contained in this record relates to the medical and psychiatric information of the appellant, but this information was provided by [identifiable individuals] and not the appellant, …
>
> …
>
> … . The records at issue are portions of a call history, officers' notebook entries and the voice recording of a 911 call made to police in relation to the investigation of a mentally ill person complaint wherein the appellant's physician had issued a Form 1 under the *Mental Health Act* … . Releasing the personal information of the affected parties to the appellant would be an unjustified invasion of personal privacy as the information was compiled as part of an investigation into a possible violation of law, ….
>
> The records at issue, particularly the voice recording of the 911 call is highly personal and sensitive, …. There is no way that the disclosure of this record is desirable for the purpose of subjecting the activities of the police service to public scrutiny. The rights of the appellant have not been affected. The appellant was granted access to the hardcopy of the call history, so she is fully aware of the circumstances surrounding the reason for the call. The information contained in the 911 call is highly sensitive and there is a reasonable expectation of significant personal distress to [identifiable individuals] if disclosed … . Releasing the voice recording would only continue to cause distress to the [identifiable individuals].
>
> When an individual calls 911, they are seeking the support of fire, ambulance or police or in some cases all three. Although their call is being taped, there is a reasonable expectation that the call will only be shared with the appropriate services in order to provide assistance and not become a public record. Particularly in relation to this type of call, wherein highly personal and sensitive information is collected.

[28] The police specifically refer to the presumption at section 14(3)(b) of the *Act* in support of their decision to withhold the information at issue on page three of the General Occurrence Report. In addition, the police's representations discuss certain elements pertaining to sections 14(2)(f) and (h).

[29] The appellant submits that there is no basis for the allegation that there was a possible violation of law, and that there were no grounds for the police to apprehend her pursuant to a Form 1. The appellant alleges that the police acted on a false report

made by the health care provider and were negligent in doing so. This may raise the possible application of the factor favouring disclosure at section 14(2)(a) of the *Act*.

[30] Sections 14(2)(a), (f) and (h) of the *Act* read:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;
>
> (f) the personal information is highly sensitive;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence.

[31] Section 14(3)(b) reads:

> 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.

Section 14(2)(a)

[32] The objective of section 14(2)(a) of the *Act* is to ensure an appropriate degree of scrutiny of government and its agencies by the public. After reviewing the materials provided by the appellant, and the records, I conclude that disclosing the subject matter of the withheld personal information of other identifiable individuals, including that contained in the recording of the 911 call, would not result in greater scrutiny of the police. The appellant's allegations that the police acted on a false report made by the health care provider and were negligent in doing so, are not sufficient to displace my determination in this regard. Additionally, in my view, the subject matter of the information sought does not suggest a public scrutiny interest.[7]

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[7] See Order PO-2905 where then Assistant Commissioner Brian Beamish found that the subject matter of record need not have been publicly called into question as a condition precedent for the factor in section 21(2)(a) of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 (the provincial equivalent of section 14(2)(a) of *MFIPPA*) to apply, but rather that this fact would be one of several considerations leading to its application.

[33] Accordingly, in the circumstances, I find that the factor at section 14(2)(a) is not a relevant consideration.

Section 14(2)(f)

[34] Having carefully reviewed the representations and the contents of the records remaining at issue, as well as the circumstances surrounding the incident that is at the core of the appellant's request, I find that the factor favouring privacy protection at section 14(2)(f) applies. I am satisfied that the records contain highly sensitive personal information which, if disclosed, would cause the health care provider as well as the other identifiable individuals significant personal distress.[8]

[35] As I have found that section 14(2)(f) applies and there are no factors favouring disclosure, it is not necessary for me to also consider whether section 14(2)(h) or 14(3)(b) might also apply.

[36] Given the application of the factor in section 14(2), and the fact that no factors favouring disclosure were established, and balancing all the interests, I am satisfied that the disclosure of the remaining withheld personal information would constitute an unjustified invasion of another individual's personal privacy. Accordingly, I find that this personal information is exempt from disclosure under section 38(b) of the *Act*.

[37] I am also satisfied that the personal information of the appellant could not be reasonably severed from the personal information in the 911 recording which pertains to the health care provider as well as other identifiable individuals, without revealing information that is exempt or result in disconnected snippets of information being revealed.[9]

[38] Finally, having regard to the above, and all the circumstances of this appeal, I conclude that the police properly exercised their discretion to withhold the information I found exempt under section 38(b).

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

[39] 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.

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[8] See Order PO-2518 for the applicable test.

[9] Orders PO-1663 and *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.).

[40] 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.

[41] In this appeal, because a responsive record, if it existed, would relate to the appellant, the police are actually relying 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.

[42] 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.

[43] This section acknowledges the fact that in order to carry out their mandates, 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.[10]

[44] The police provide confidential representations in support of their submission that section 8(3) applies in the circumstances of this appeal. Without revealing confidential information, the gist of the police's argument is that disclosing a responsive record, if it exists, would reveal procedures not generally known to the public, negatively impact on the safety of police officers, prevent the sharing of important information and compromise the integrity of the system. That said, the police do not specify the provisions of section 8(1) that they are relying on. Based upon my review of their confidential representations and the General Occurrence Report, however, I will assume that they are seeking to rely upon sections 8(1)(c) and/or (e). In the circumstances of this appeal, I will also consider whether section 8(1)(l) applies.

[45] The appellant questions why the police asserted the application of section 8(3) in the circumstances of this appeal.

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[10] Orders P-255 and PO-1656.

Part One: Would a record (if it exists) qualify for exemption under sections 8(1)(c), 8(1)(e) and/or 8(1)(l) ?

[46] Sections 8(1)(c),(e) and (l) state:

> (1) 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;
>
> (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.

[47] 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)

[48] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[11]

[49] 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.[12] 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

[11] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[12] Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

evidence is needed will depend on the type of issue and seriousness of the consequences.[13]

Analysis and findings

[50] As stated above, the representations submitted by the police regarding the application of section 38(a) in conjunction with 8(3) were withheld as confidential and, consequently, are not reproduced in this order. However, I have considered these submissions, in their entirety. I conclude that the police have failed to provide sufficiently detailed and convincing evidence to connect the disclosure of information, if it existed, with the harms that sections 8(1)(c) or (e) seek to avoid. I am satisfied however, that disclosing any CPIC system code information in the General Occurrence Report, if it exists, would cause harm under section 8(1)(l) of the *Act*.

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

[51] In order to meet the "investigative technique or procedure" test, the police 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.[14]

[52] The techniques or procedures must be "investigative". The exemption will not apply to "enforcement" techniques or procedures.[15]

[53] Even accounting for the confidential police submissions, I find that they have failed to provide me with sufficient evidence to establish that "investigative" techniques or procedures could reasonably be expected to be revealed by disclosure. Furthermore, I am not satisfied that disclosure could reasonably be expected to compromise the efficacy of any "investigative" technique or procedure or prejudice its use by the police in future investigations.

[54] Accordingly, I find that section 8(1)(c) does not apply.

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

[55] In my view, after carefully considering the police's confidential representations (which, because of their confidential nature, I am unable to reproduce in this order), I conclude in the circumstances of this appeal that the police have failed to provide sufficiently detailed and convincing evidence to make the connection between disclosure of the information, if it exists, and any section 8(1)(e) harms. It must be kept

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[13] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[14] Orders P-1487, MO-2347-I and PO-2751.
[15] Orders P-1340 and PO-2034.

in mind that what is at issue here is harm that could reasonably be expected to result from disclosure of the record, if it exists.

[56] In my view, in light of what has been disclosed to the appellant and what is already within her knowledge, including the existence of "flags" related to her mental state, more would be required to establish the application of section 8(1)(e), in the circumstances of the appeal before me.

Section 8(1)(l): facilitate unlawful act

[57] Previous orders of this office have established that disclosure of CPIC system code information, including transmission access codes, could reasonably be expected to facilitate the commission an unlawful act – the unauthorized use of CPIC content – according to section 8(1)(l).[16] Accordingly, revealing CPIC system code information, if it exists, would cause the type of harm that falls within the scope of section 8(1)(l) of the *Act*. Accordingly, the first part of the section 8(3) test is met with respect to CPIC system code information, including transmission access codes.

[58] I will now consider the second part of the test.

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?

[59] 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).

[60] The police do not make specific submissions with respect to this part of the test, however, I am able to make a finding having considered:

1. the representations of the police (including their confidential representations),

2. the circumstances of this appeal, and

3. the information that has already been disclosed to the appellant, including the existence of "flags" related to her mental state.

[61] Based on these factors, I am not satisfied that the disclosure of the fact that a record exists or does not exist would in itself convey information to the appellant which could reasonably be expected to harm one of the interests sought to be protected by

[16] See, for example, Orders M-933, MO-1335 and MO-1698.

sections 8(1) or (2), and in particular, the interests protected by sections 8(1)(c), (e) or (l). With respect to section 8(1)(l), I found above that disclosing the CPIC system code information (including transmission access codes), if it exists, could reasonably be expected to cause harm under section 8(1)(l). However, in my view, and considering the evidentiary threshold set out in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*[17], I am not satisfied that simply disclosing the fact that a record containing CPIC system code information (including transmission access codes) exists, or does not exist, would cause the requisite harm.

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

[63] I have found that section 38(a) in conjunction with section 8(3) does not apply, and I have confirmed that a responsive record exists. That said, based on my analysis above, I am satisfied that the CPIC system code information which appears on the General Occurrence Report identified at mediation qualifies for exemption under section 38(a) in conjunction with 8(1)(l) of the *Act*.

[64] I will therefore order the police to disclose the General Occurrence Report identified at mediation, with CPIC system code information severed, to the appellant.

ORDER:

1. I uphold the decision of the police not to disclose the withheld portions of the police officer's notes and the Call Hardcopy that remain at issue, as well as the recording of the 911 call, to the appellant.

2. 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 **September 17, 2015** in relation to my decision that section 8(3) does not apply, I will send a copy of this order to the appellant after **September 17, 2015**.

3. I also order the police to disclose to the appellant, by **September 25, 2015**, but not before **September 17, 2015** a copy of the General Occurrence Report identified at mediation, with CPIC system code information severed.

[17] 2014 SCC 31 (CanLII) at paras. 52-4.

4. In order to verify compliance with order provision 3, I reserve the right to require the police to provide me with a copy of the General Occurrence Report as disclosed to the appellant.

Original Signed By: August 17, 2015
Steven Faughnan
Adjudicator