

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3279

Appeal MA14-426

Niagara Regional Police Services Board

January 18, 2016

Summary: The police received a request for access to records relating to the appellant's father covering a specific time period. The appeal arises from the police's decision to grant partial access to the records. Subsequently, the appellant advised the police that she had power of attorney for her father and was exercising his right to access his own information. The police issued a revised decision, denying access to portions of the records pursuant to the discretionary exemption at section 38(a) (discretion to refuse a requester's own information), read in conjunction with the law enforcement exemptions at section 8(1), and the discretionary exemption at section 38(b) (personal privacy) of the *Act*. The police also claimed that some of the information was not responsive to the request. In this order, the adjudicator partially upholds the police's decision to deny access to the information, ordering the police to disclose to the appellant information that falls within the absurd result principle.

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

Orders Considered: Order PO-1665.

OVERVIEW:

[1] The appellant submitted an access request to the Niagara Regional Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). Specifically, the appellant sought access to all police records

including police notes and incident reports involving her father at his home between November 24, 2012 and July 10, 2014. In her request, the appellant indicated that she has power of attorney for her father with respect to his financial affairs and that she was applying to the court to gain power of attorney for her father's personal care.

[2] The police issued a decision in response to the request advising that it had reviewed the power of attorney of the appellant with her request and concluded that the appellant was authorized to act for her father in relation to financial matters but not personal matters as required by section 66(b) of the *Act*. Section 66(b) permits an individual's power of attorney for personal care to exercise that individual's right of access under the *Act*. As a result, the police granted partial access to the responsive records. They advised that they had severed the personal information of the appellant's father, as well as the personal information of other identifiable individuals, pursuant to the discretionary exemptions at sections 38(b) (personal privacy) and 38(a) (discretion to refuse a requester's own information), read in conjunction with the law enforcement exemption at section 8(1)(l) of the *Act*. The police also indicated that they had severed some information from the records that they deemed to be not responsive to the request. Finally, the police advised that they refused to confirm or deny the existence of any additional records, citing section 14(5) of the *Act*.

[3] The appellant appealed the police's decision to deny access to portions of the records.

[4] During mediation, the appellant advised that she was not interested in pursuing access to the information that had been severed from the responsive records. However, she took the position that there must be additional responsive records, including 911 records relating to the incidents documented in the responsive records, and records relating to other incidents. As a result, the issue of reasonable search was raised.

[5] The police agreed to conduct a further search for responsive records. Additionally, the appellant submitted a new request under the *Act* seeking access to:

- duty book notes and police records regarding the safety of her father's health care at [an identified healthcare facility]— she referred to a specific report number and police officer;
- duty book notes and police records regarding a fraud allegation with respect to her father's bank accounts; and,
- all police reports and duty book notes of all attending officers from December 1, 2014 to January 10, 2015.

[6] With her new request, the appellant enclosed a copy of minutes of settlement that granted her power of attorney with respect to her father's personal care. As a

result, the police accepted that the appellant has the right to exercise her father's right of access to his own personal information pursuant to section 66(b) of the *Act*. This appeal therefore continued on the basis that the appellant is acting on behalf of both herself and her father. I will refer in this appeal to the appellant and her father separately, even though both are requesting their own information and appealing the police's decision.

[7] As a result of the appellant's authority to act on her father's behalf pursuant to section 66(b) of the *Act*, the police issued a new access decision for records responsive to both of the appellant's requests. They revised their earlier decision, granting partial access to two general occurrence reports, the duty book notes of two identified police officers and four 911 call records. As the appellant was now exercising her father's right of access, the police denied access to portions of the records pursuant to the exemptions at section 38(b) and 38(a), read in conjunction with section 8(1) of the *Act*. They also severed portions of some of the records as not responsive to the request. Additionally, the police advised that they were withdrawing the section 14(5) claim.

[8] The appellant advised that she wishes to pursue access to the information that has been severed from the responsive records. However, she is not interested in the birth dates, contact information or driver's licence numbers of her father or another specifically identified individual.

[9] As a mediated resolution could not be reached, the appeal was transferred to the adjudication stage of the appeal process for an adjudicator to conduct an inquiry. I began my inquiry in this appeal by sending a Notice of Inquiry to the police, initially. The police provided representations in response which I shared with the appellant. The appellant advised that she did not wish to submit representations but confirmed that she continues to pursue access to the information at issue.

[10] In this order, I partially uphold the police's decision. Specifically, I make the following findings:

- the information identified by the police as non-responsive, is indeed not responsive to the request;
- all of the records contain the personal information of the appellant's father, together with personal information relating to the appellant and other identifiable individuals;
- the discretionary exemption at section 38(b) applies to the majority of the information for which it was claimed, with the exception of the information in one of the 911 call records that was supplied by the appellant and previously disclosed to her in another record;

- the discretionary exemption at section 38(a), read in conjunction with the law enforcement exemption at section 8(1)(l), applies to the information for which it was claimed; and,
- the police's exercise of discretion was reasonable.

RECORDS:

[11] The records at issue and respective exemption claims are as follows:

- General Occurrence Report 2013-59458 (7 pages)
 - section 38(b), read in conjunction with section 14(3)(b)
 - not responsive to the request
- General Occurrence Report 2014-50245 (7 pages)
 - section 38(b), read in conjunction with section 14(3)(b)
 - not responsive to the request
- Duty Book notes of [named constable] (3 pages)
 - section 38(b), read in conjunction with section 14(3)(b)
 - section 38(a), read in conjunction with section 8(1)
 - not responsive to the request
- Duty Book Notes of [named constable] (2 pages)
 - section 38(b), read in conjunction with section 14(3)(b)
 - section 38(a), read in conjunction with section 8(1)
 - not responsive to the request
- 911 Call Record CP 2012-109134 Nov. 25, 2012 (5 pages)
 - section 38(b), read in conjunction with section 14(3)(b)
 - section 38(a), read in conjunction with section 8(1)
 - not responsive to the request

- 911 Call Record CP 2012-108877 Nov. 24, 2012 (5 pages)
 - section 38(b), read in conjunction with section 14(3)(b)
 - section 38(a), read in conjunction with section 8(1)
 - not responsive to the request
- 911 Call Record CP 2013-59458 July 12, 2013 (8 pages)
 - section 38(b), read in conjunction with section 14(3)(b)
 - section 38(a), read in conjunction with section 8(1)
 - not responsive to the request
- 911 Call Record CP 2014-50245 June 19, 2014 (3 pages)
 - section 38(b), read in conjunction with section 14(3)(b)
 - section 38(a), read in conjunction with section 8(1)
 - not responsive to the request

ISSUES:

- A. Is some of the information in the records not responsive to the appellant's request?
- B. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- C. Does the mandatory personal privacy exemption at section 14(1) or the discretionary personal privacy exemption at section 38(b) apply to the information at issue?
- D. Does the discretionary exemption at section 38(a), read in conjunction with the section 8(1) law enforcement exemption apply to the information at issue?
- E. Did the police exercise their discretion under sections 38(a) and/or (b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A. Is some of the information in the records not responsive to the appellant's request?

[12] The police identified and severed portions of the records as not responsive to the appellant's request. These portions are found in Occurrence Reports 2013-59458 and 2014-50245, police officers' memorandum book notes and the 911 call records.

[13] To be considered responsive to the request, records must "reasonably relate" to the request.¹ It has previously been established that institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.²

[14] During mediation, the police explained that the information that was severed as non-responsive relates to other matters. In their representations, the police do not make specific mention of the portions of information that they have severed as non-responsive but state that they felt that the request provided sufficient detail to identify the records responsive to the request. They also submit that as the appellant asked for all records created by all attending officers within a specific time frame, all records made by all attending officers within the specified date range were collected.

[15] I have reviewed the records and have considered the severed portions that the police claim are not responsive to the appellants' request. I am satisfied that these portions of the records are not responsive to the request. In the police officers' memorandum book notes, this information relates to other calls that the police officers responded to during their time on duty that were unrelated to the incidents involving the appellant's father. In the other records, this information consists of administrative information that I accept is not responsive to the appellant's request. Consequently, I find that the information severed as non-responsive by the police is, in fact, not responsive to the request and I uphold the police's decision to withhold it.

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

[16] Under the *Act*, different exemptions may apply depending on whether a record at issue contains or does not contain the personal information of the requester.³ Where the records contain the requester's own personal information, access to the records is addressed under Part II of the *Act* and the discretionary exemptions at section 38 may apply. Where the records contain the personal information of individuals other than the

¹ Orders P-880 and PO-2661.

² Orders P-134 and P-880.

³ Order M-352.

requester but do not contain the personal information of the requester access to the records is addressed under Part I of the *Act* and the mandatory exemption at section 14(1) may apply.

[17] Accordingly, 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) of the *Act*:

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

personal information.⁴

[19] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁵

Representations

[20] The police submit that the records at issue contain information that qualifies as "personal information" within the meaning of the definition of that term in section 2(1) of the *Act*. They submit that this information relates to identifiable individuals including the appellant, the appellant's father, as well as other individuals.

[21] The police submit that this personal information includes these individuals' names, dates of birth, addresses, telephone numbers and statements. The police also submit that the information includes the appellant's father's medical information.

Analysis and findings

[22] Having closely reviewed the responsive records, I find that all of them contain the personal information of the appellant's father and other identifiable individuals, including, in some records, the personal information of the appellant.

[23] All of the records contain the personal information of the appellant's father, as well as that of other identifiable individuals. This includes information relating to their race, age, sex or marital or family status (paragraph (a)), their medical, criminal or employment history (paragraph (b)), identifying numbers assigned to them (paragraph (c)), their addresses and telephone numbers (paragraph (d)), the view or opinions of other individuals about them (paragraph (g)), and their names, where they appear with other personal information about them (paragraph (h)).

[24] Two of the 911 call records also contain the personal information of the appellant, including information relating to her race, age, sex, and marital or family status (paragraph (a)), an identifying number assigned to her (paragraph (c)), her address and telephone numbers (paragraph (d)), and her name, where it appears with other personal information about her (paragraph (h)).

[25] In sum, I find that the records at issue contain the "personal information" of both the appellant's father and other identifiable individuals, including the appellant, within the meaning of the definition of that term at section 2(1) of the *Act*.

[26] As described above, in circumstances where the appellant's personal information

⁴ Order 11.

⁵ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

is mixed with that of other identifiable individuals, Part II of the *Act* applies. Therefore, in this case, I must consider whether the information at issue in 911 Call Records CP 2012-108877 and CP 2012-109134, which contain the appellant's personal information, is properly exempt pursuant to the discretionary personal privacy exemptions at sections 38 of the *Act*.

[27] Generally, where records contain only the personal information of individuals other than the appellant, Part I of the *Act* applies and I must consider whether the information is properly exempt pursuant to the mandatory personal privacy exemption at section 14(1) of the *Act*. However, in the circumstances of this appeal, as the appellant has power of attorney for her father's personal care, under section 66(b) of the *Act*, she is authorized to stand in her father's shoes and be granted access to his information as if he made the access request himself. Accordingly, as a result of the application of section 66(b), even though the remainder of the records do not contain the appellant's personal information, as they contain the personal information of her father, for whom she has power of attorney for personal care, the appropriate analysis is whether the discretionary personal privacy exemptions at section 38 of the *Act* apply.

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

[28] Section 36(1) of the *Act* 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. Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.⁶

[29] Sections 14(1) to (4) are considered in determining whether the unjustified invasion of personal privacy threshold in section 38(b) is met. The exceptions in sections 14(1)(a) to (e) are relatively straightforward. None of them apply in the context of this appeal. The exception in section 14(1)(f) (where "disclosure does not constitute and unjustified invasion of personal privacy"), that applies in this appeal is more complex and requires a consideration of additional parts of section 14. The exception at section 14(1)(f) applies in the context of this appeal.

[30] Section 14(2) lists various factors that may be relevant in determining whether

⁶ See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 38(b).

disclosure of personal information would constitute an unjustified invasion of personal privacy. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Finally, section 14(4) identifies information whose disclosure is not an unjustified invasion of personal privacy. None of the paragraphs in section 14(4) are applicable in the circumstances of this appeal.

[31] For records claimed to be exempt under section 38(b) (ie., records that contain the requester's personal information), this office will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties in determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy.⁷

Absurd result

[32] Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may not be exempt under section 38(b), because to withhold the information would be absurd and inconsistent with the purpose of the exemption.⁸

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

- the requester sought access to his or her own witness statement⁹
- the requester was present when the information was provided to the institution¹⁰
- the information is clearly within the requester's knowledge¹¹

[34] However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.¹²

Representations

[35] The police submit that the discretionary exemption at section 38(b) applies to the records because all of the records contain the personal information of the appellant's father (for whom the appellant has power of attorney), as well as the personal information of other identifiable individuals. The police also submit that some of the records contain the personal information of the appellant herself, together with

⁷ Order MO-2954.

⁸ Orders M-444 and MO-1323.

⁹ Orders M-444 and M-451.

¹⁰ Orders M-444 and P-1414.

¹¹ Orders MO-1196, PO-1679 and MO-1755.

¹² Orders M-757, MO-1323 and MO-1378.

that of other identifiable individuals.

[36] The police also submit that the information was compiled and is identifiable as part of an investigation into a possible violation of law as contemplated by the presumption at section 14(3)(b) as the records relate to police investigations of possible assaults which is an offence under section 266 of the *Criminal Code of Canada*.

[37] Finally, the police submit that the absurd result principle does not apply to the information at issue as they have disclosed to the appellant information that was supplied by her or her father or that they felt was within her knowledge.

Analysis and findings

[38] From my review of the personal information for which section 38(b) has been claimed, I accept the police's position that the majority of its disclosure would amount to an unjustified invasion of the personal privacy of a number of identifiable individuals. I find that the remainder of that information however, falls under the absurd result principle.

Absurd Result Principle

[39] Although the police submit that they have disclosed to the appellant any information that was supplied to them either by her or her father, in what appears to be an oversight, they have severed information supplied to them by the appellant found at the bottom of the page 2 and the top of page 3 of 911 Call Record CP 2012-108877. This portion of the record identifies a related event, that which is documented by 911 Call Record CP 2012-109134 in which the appellant is the complainant. This information was not only provided to the police by the appellant but has also been disclosed to her in 911 Call Record CP 2012-109134, with the exception of the birth date of an identifiable individual that appears in the middle of the page. The appellant has confirmed that she does not seek access to this type of information relating to this individual. Accordingly, I will order the police to disclose this information, with the exception of the birth date, to the appellant.

Section 14(3)(b) – investigation into a possible violation of law

[40] Having closely reviewed the remainder of the information for which section 38(b) has been claimed, I find that it is subject to the presumption against disclosure at section 14(3)(b) of the *Act* which relates to records compiled as part of an investigation into a possible violation of law. The presumption at section 14(3)(b) is the only presumption that the police have claimed and appears to be the only presumption that is applicable in the circumstances of this appeal.

[41] Under section 14(3)(b), if the records are found to have been compiled as part of an investigation into a possible violation of law, the disclosure of personal information

contained within them is presumed to amount to an unjustified invasion of the personal privacy of the individual to whom that personal information relates.

[42] Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.¹³ The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.¹⁴

[43] From my review of the records at issue, the withheld personal information was clearly compiled by the police in the course of their investigation into a number of incidents involving the appellant's father. The information at issue consists of 911 call records, occurrence summaries and police memorandum book notes detailing the complaints and the police's investigation into those incidents. In my view, this information was clearly compiled and is identifiable as part of an investigation into possible violations of law. Accordingly, I find that all of the personal information remaining at issue in the records falls under section 14(3)(b) of the *Act* and its disclosure constitutes a presumed unjustified invasion of the personal privacy of individuals other than the appellant and her father under section 38(b).

Section 14(2)(h) – factor weighing against disclosure: information supplied in confidence

[44] Section 14(2) provides some factors for the police to consider in making a determination on whether the disclosure of personal information would result in an unjustified invasion of the affected parties' personal privacy. The list of factors under section 14(2) is not exhaustive. The police must also consider any circumstances that are relevant, even if they are not listed under section 14(2).¹⁵ Some of these criteria weigh in favour of disclosure, while others weigh in favour of privacy protection.

[45] The police have not specifically raised the possible application of any of the factors listed at section 14(2) or any other relevant factors and the appellants have not submitted any representations on this, or any other issue. Nevertheless, on my review of the information before me, the consideration weighing against disclosure listed at section 14(2)(h) might be relevant. That section reads:

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,

¹³ Orders P-242 and MO-2235.

¹⁴ Orders MO-2213, PO-1849 and PO-2608.

¹⁵ Order P-99.

the personal information has been supplied by the individual to whom it relates in confidence;

[46] The factor at section 14(2)(h) weighs in favour of privacy protection. For it to apply, both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Thus, section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.¹⁶

[47] In my view, the context and surrounding circumstances of the complaints that form the subject matter of the records at issue are such that a reasonable person would expect that the information that these identifiable individuals supplied to the police in the context of this law enforcement matter would be subject to a degree of confidentiality. Accordingly, in this appeal, I find that the factor in section 14(2)(h) is a relevant consideration that weighs in favour of protecting the privacy of the individuals other than the appellants and of withholding their personal information.

Summary

[48] As noted above, for records claimed to be exempt 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 in determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy.¹⁷ Accordingly, in conclusion, I must consider the interests of the parties in light of the presumption at section 14(3)(b) and the factor at section 14(2)(h), both of which I have found to apply in the circumstances of this appeal.

[49] I have found that the presumption at section 14(3)(b) applies to the personal information at issue, specifically, the personal information belonging to identifiable individuals other than the appellant and her father, because it was compiled as part of investigations into possible violations of law. Accordingly, the disclosure of this information is presumed to result in an unjustified invasion of the personal privacy of identifiable individuals other than the appellant and her father. I have also found that the factor weighing against disclosure at section 14(2)(h) is a relevant consideration as the information at issue was, in my view, supplied to the police in confidence. In addition, I have been provided with insufficient evidence to support a conclusion that any factors or criteria weighing in favour of the disclosure of the personal information of individuals other than the appellant and her father might apply.

[50] As a result, I find that the disclosure of the information at issue would constitute an unjustified invasion of personal privacy of the individuals to whom it relates and the

¹⁶ Order PO-1670.

¹⁷ Order MO-2954.

discretionary exemption at section 38(b) applies to it. Accordingly, subject to my discussion below on the police's exercise of discretion, I uphold their decision not to disclose it.

D. Does the discretionary exemption at section 38(a), read in conjunction with the section 8(1) law enforcement exemption apply to the information at issue?

[51] 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]

[52] 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.¹⁸

[53] 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.

[54] In this case, the police rely on section 38(a) in conjunction with sections 8(1)(c) and 8(1)(l). Those sections state:

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

(c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

(l) facilitate the commission of an unlawful act or hamper the control of crime.

[55] The term "law enforcement" is used in several parts of section 8, and is defined in section 2(1) as follows:

"law enforcement" means,

(a) policing,

¹⁸ Order M-352.

(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)

[56] The term “law enforcement” has been found to apply in the following circumstances:

- a municipality’s investigation into a possible violation of a municipal by-law.¹⁹
- a police investigation into a possible violation of the *Criminal Code*.²⁰
- a children’s aid society investigation under the *Child and Family Services Act*.²¹
- Fire Marshal fire code inspections under the *Fire Protection and Prevention Act, 1997*.²²

[57] The term “law enforcement” has been found *not* to apply in the following circumstances:

- an internal investigation by the institution under the *Training Schools Act* where the institution lacked the authority to enforce or regulate compliance with any law.²³
- a Coroner’s investigation or inquest under the *Coroner’s Act*, which lacked the power to impose sanctions.²⁴

[58] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.²⁵

[59] 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.²⁶ The institution must provide

¹⁹ Orders M-16 and MO-1245.

²⁰ Orders M-202 and PO-2085.

²¹ Order MO-1416.

²² Order MO-1337-I.

²³ Order P-352, upheld on judicial review in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (1993), 102 D.L.R. (4th) 602, reversed on other grounds (1994), 107 D.L.R. (4th) 454 (C.A.).

²⁴ Order P-1117.

²⁵ *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

²⁶ Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

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.²⁷

[60] It is not sufficient for an institution to take the position that the harms under section 8 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfilment of the requirements of the exemption.²⁸

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

[61] I find that section 8(1)(l) applies to the information for which it has been claimed. For the small amount of information to which the police have applied the exemption at section 8(1)(c), they have also claimed the application of section 8(1)(l). On my review of this information, I find that as it also falls within the scope of section 8(1)(l) it is not necessary for me to make a determination as to whether section 8(1)(c) applies to it.

[62] The police submit that confidential police codes have been severed from the police officers' memorandum book notes and from some of the 911 call records under the law enforcement exemption at section 8(1)(l). This information also includes the police code or internal police communication that identifies the investigative technique for which the police have claimed the exemption at section 8(1)(c).

[63] It is well established in orders previously issued by this office that the release of police codes, patrol zone information and other types of internal police communications is exempt from disclosure under section 8(1)(l).²⁹ Many of these orders have adopted Adjudicator Laurel Cropley's reasoning in Order PO-1665, where she stated:

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

[64] On my review of the records at issue, I find that the information for which the police have claimed section 8(1)(l) amounts to numerical police codes, including 10-

²⁷ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (Can LII) at paras 52-4.

²⁸ Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

²⁹ Orders M-93, M-757, MO-1715, PO-1665, MO-2607 and MO-3224.

codes as well as the internal police communication or alphabetical police code describing a specific investigative technique. In keeping with the reasoning expressed by Adjudicator Cropley in Order PO-1665 which has been followed by many other orders, I accept that, given the difficulty of predicting future events in the law enforcement context and given the nature of the information that the police have severed under section 8(1)(l), the disclosure of these police codes and internal communications could reasonably be expected to compromise the police officers' ability to provide effective policing services. Accordingly, I find that this information qualifies for exemption under section 38(a), read in conjunction with section 8(1)(l) of the *Act*, subject to my determination of the police's exercise of discretion below.

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

[65] The exemptions at sections 38(a) and/or (b) are discretionary. They permit 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.

[66] 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.

[67] In any of these cases this office may send the matter back to the institution for an exercise of discretion based on proper considerations.³⁰ This office may not, however, substitute its own discretion for that of the institution.³¹

[68] The police submit that when exercising its discretion under sections 38(a) and (b) not to disclose the information that it withheld, they weighed the appellant's need for the information against the law enforcement considerations. They also submit that they attempted to grant the appellant access to as much information as possible, including to information about her father, while protecting the privacy of other identifiable individuals, keeping in mind the particular circumstances surrounding the appellant's request for access to information.

[69] Considering the circumstances, I am satisfied that the police exercised their

³⁰ Order MO-1573.

³¹ Section 43(2).

discretion in good faith and for a proper purpose taking into account all relevant factors. The police disclosed a large amount of the information in the supplementary occurrence reports and other records, specifically, the majority of the information relating to the appellant and her father. The information that the police severed, is restricted to police code information or is solely related to or inextricably intertwined with the personal information of identifiable individuals other than the appellant or her father. I accept that the police did not err in exercising their discretion to deny the appellant access to the information that I have found subject to the discretionary personal privacy exemptions in section 38.

[70] Accordingly, I find that the police considered all relevant factors and exercised their discretion under sections 38(a) and (b) of the *Act* appropriately.

ORDER:

1. I order the police to disclose to the appellant the portions of pages 2 and 3 of 911 Call Record CP 2012-108877 that consist of the information that was already disclosed to her in 911 Call Record CP 2012-109134. This information is to be disclosed to the appellant by **February 16, 2016**.
2. I uphold the police decision to deny access to the remaining information.
3. In order verify compliance with this order, I reserve the right to require the police with a copy of the records disclosed to the appellant under order provision 1.

Original Signed by: _____
Catherine Corban
Adjudicator

January 18, 2016 _____