

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3393

Appeal MA15-6-2

The Greater/Grand Sudbury Police Services Board

December 22, 2016

Summary: The appellant made a request to the police under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to any information the police hold about him. The police located responsive records and provided partial access to them, withholding some information relating to other individuals pursuant to the personal privacy exemption at section 38(b) of the *Act* and withholding other information pursuant to the law enforcement exemptions at sections 8(1)(c), 8(1)(e) and 8(1)(l) in conjunction with section 38(a). In this order, the adjudicator upholds the police's decision, in part. She finds that section 38(b) does not apply to some of the information for which the police claimed the exemption, and orders the disclosure of that information to the appellant. She finds, further, that some of the information for which the police claimed the law enforcement exemptions at sections 8(1)(c), 8(1)(e) and 8(1)(f) is not exempt under those provisions, and also orders the disclosure of that information to the appellant.

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

Orders Considered: Orders MO-2830 and PO-2751.

BACKGROUND:

[1] The appellant made a request to the Greater/Grand Sudbury Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to any information the police may have relating to him,

including all personal information, dates, times, and incident numbers.

[2] The police located a number of responsive records and provided partial access to them. The police withheld portions of the records, citing the discretionary personal privacy exemption at section 38(b), as well as the discretionary exemption at section 38(a) in conjunction with law enforcement report exemption at section 8(2)(a). The appellant appealed the police's decision to this office.

[3] A mediator was appointed to attempt a resolution of some or all issues in the appeal. During mediation, the police conducted an additional review of the records and the claimed exemptions, and advised that they were no longer relying on section 8(2)(a) in conjunction with section 38(a) to withhold portions of the records. However, they wished to rely on section 8(1)(c) (reveal investigative techniques and procedures) in conjunction with section 38(a) of the *Act* for some portions of the withheld information. The police's additional review also resulted in additional portions of the records being disclosed to the appellant. The police issued a revised decision with a new index of records.

[4] As the police first raised the possible application of the discretionary exemption at section 8(1)(c) during mediation, the mediator advised that the late raising of discretionary exemptions would be added to the issues on appeal. The mediator also advised the police that in general, the appropriate exemption to consider with respect to police codes is the exemption at section 8(1)(l) (facilitate commission of an unlawful act), and not the exemption at section 8(1)(c).¹ The police, however, maintained their reliance on section 8(1)(c).

[5] No further mediation was possible and the file was referred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*.

[6] I began my inquiry by seeking representations from the police and the affected parties. Representations were received from the police and three affected parties. In the police's representations, they advised that they now also rely on the exemptions at sections 8(1)(e) and 8(1)(l) for some of the withheld information. Therefore, I added the late raising of these discretionary exemptions as an issue in this appeal.

[7] I then sought and received representations from the appellant. As mentioned below, the appellant's representations, for the most part, did not address the issues in the appeal. It was not necessary for me to invite reply representations.

[8] In this order, I uphold the police's decision, in part, and order the disclosure of some of the information that the police withheld pursuant to section 38(b) as well as section 38(a) in conjunction with section 8(1).

¹ See Orders M-781 and PO-1665.

RECORDS:

[9] The records at issue are 59 pages of police records including occurrence reports, occurrence summaries, archive occurrence reports, supplementary occurrence reports, witness statements and an arrest report. The police provided the appellant and this office with an index of the records listing the exemptions of the *Act* that the police applied to each page of records. The information at issue is the information that the police withheld when they disclosed the records to the appellant.

ISSUES:

- A. Should the police be permitted to raise the discretionary exemptions at sections 8(1)(c), 8(1)(e) and 8(1)(l) in conjunction with section 38(a) more than 35 days after they were notified of the appeal?
- B. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- C. Does the discretionary exemption at section 38(b) apply to the information at issue?
- D. Does the discretionary exemption at section 38(a) in conjunction with the section 8(1)(c), 8(1)(e) and/or 8(1)(l) exemptions apply to the information at issue?
- E. Did the police exercise their discretion under sections 38(b), and 38(a) in conjunction with sections 8(1)(c), 8(1)(e) and/or 8(1)(l)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A: Should the police be permitted to raise the discretionary exemptions at sections 8(1)(c), 8(1)(e) and 8(1)(l) in conjunction with section 38(a) more than 35 days after they were notified of the appeal?

[10] The police raised the exemption at section 8(1)(c) in conjunction with section 38(a) during mediation, and raised sections 8(1)(e) and 8(1)(l) in conjunction with section 38(a) during adjudication. Since the police first raised these discretionary exemptions more than 35 days after they were notified of the appeal, the late raising of these exemptions is an issue.

[11] The *Code of Procedure* (the *Code*) provides basic procedural guidelines for parties involved in appeals before this office. Section 11 of the *Code* addresses circumstances where institutions seek to raise new discretionary exemption claims during an appeal. Section 11.01 states:

In an appeal from an access decision an institution may make a new discretionary exemption claim within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

[12] The purpose of the policy is to provide a window of opportunity for institutions to raise new discretionary exemptions without compromising the integrity of the appeal process. Where an institution had notice of the 35-day rule, no denial of natural justice was found in excluding a discretionary exemption claimed outside the 35-day period.²

[13] In determining whether to allow an institution to claim a new discretionary exemption outside the 35-day period, the adjudicator must balance the relative prejudice to the police and to the appellant.³ The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.⁴

Representations

[14] The police submit that the appellant was not prejudiced by the addition of the section 8(1)(c) exemption after the 35-day period, since the severances applied to the responsive records that were initially provided to the appellant included information that the police generally withhold pursuant to section 8(1)(c). The police submit that they applied this exemption at the outset, but that there was an oversight in not referencing it in the decision letter and Index of Records.

[15] The police submit that they would be prejudiced if not allowed to claim the exemption, as "police-related" information such as mapping identifiers, CPIC numbers, and MO codes would become public record, which would impact all police services in Ontario.

[16] The police note, further, that the mediator mentioned the section 8(1)(e) and 8(1)(l) exemptions during mediation, and the police seek to raise those exemptions now as well, if permitted to do so.

[17] Finally, the police submit that the integrity of the appeal process will not be compromised if they are allowed to raise the section 8(1) exemptions, since most of the

² *Ontario (Ministry of Consumer and Commercial Relations v. Fineberg)*, Toronto Doc. 220/95 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 1838 (C.A.). See also *Ontario Hydro v. Ontario (Information and Privacy Commissioner)* [1996] O.J. No. 1669 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 3114 (C.A.).

³ Order PO-1832.

⁴ Orders PO-2113 and PO-2331.

information to which these exemptions apply does not relate to the appellant.

[18] The appellant's representations do not address the late raising of the section 8(1) exemptions.⁵

Analysis and findings

[19] This office has the power to control the manner in which the inquiry process is undertaken.⁶ This includes the authority to set a limit on the time during which an institution can raise new discretionary exemptions not originally raised in the decision letter. The adoption and application of this policy was upheld by the Divisional Court in *Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg*.⁷ Nevertheless, this office will consider the circumstances of each case and may exercise its discretion to depart from the policy in appropriate cases.

[20] I am required to weigh and compare the overall prejudice to the parties. In doing so, I must consider any delay or unfairness that could harm the interests of the appellant, as against harm to the police's interests that may be caused if the exemption claim is not allowed to proceed. In order to assess possible prejudice, the importance of an exemption claim and the interests the exemption seeks to protect in the circumstances of the particular appeal can be important factors.

[21] For the following reasons, I allow the police to raise the applicability of the section 8(1) exemptions to the records.

[22] First, as noted by the police, the appellant had notice before the expiration of the 35-day period that the police wished to exempt the information for which it now claims the section 8(1) exemptions. Although the police only later revised its decision to specify that it was withholding the information under section 8(1)(c), the appellant knew from the outset that this information was in issue. Further, as the police initially claimed the application of section 8(2)(a), the appellant had notice from the outset that the police were claiming a law enforcement exemption for some information in the records.

[23] With respect to the addition of the possible applicability of sections 8(1)(e) and 8(1)(l) to the records, the police also raised these new exemptions after the 35-day time period, during adjudication. However, they claimed these exemptions for the same

⁵ On reviewing the Notice of Inquiry again, I observe that I did not ask the appellant specifically for representations about the police's late raising of section 8(1)(e). As seen below, I am allowing the police to raise it, but have found that it does not apply. Therefore, there is no prejudice to the appellant arising from the omission in the Notice of Inquiry.

⁶ Orders P-345 and P-537.

⁷ December 21, 1995, Toronto Doc. 220/95, leave to appeal to the Court of Appeal refused at [1996] O.J. No. 1838 (C.A.). See also *Duncanson v. Toronto (Metropolitan) Police Services Board*, [1999] O.J. No. 2464 (Div. Ct.).

information that was withheld at the outset. Again, the appellant was already aware that this information was at issue and that the police were claiming a law enforcement exemption.

[24] I also note that the police raised the new exemption claims before the appellant made his representations. Therefore, the inclusion of the newly claimed exemptions for these records has not resulted in any delays to the adjudication process and the appellant has been provided with an opportunity to respond to the police's representations and to provide full representations as to whether the information qualifies for exemption under sections 8(1)(c), 8(1)(e) and/or 8(1)(l).

[25] I have also considered the potential prejudice to the police if I do not allow the section 8(1) exemptions to be claimed with respect to the information. As will be seen below, I have found that much of the information for which the police have claimed an exemption under section 8(1)(l) is, in fact, exempt under section 8(1)(l). To disallow the police's late exemption claim would result in my ordering disclosure of records which fall within the section 8(1) exemption, which I accept may prejudice the operations of the police.

[26] Having weighed the comparative prejudice of each of the parties, I am satisfied that while the appellant will not be prejudiced and the integrity of the adjudication process will not be compromised if I allow the police to raise the application of the section 8(1) exemptions beyond the 35-day time period, there would be some prejudice to the police if I do not allow them to raise these exemptions. Therefore, I will consider the application of sections 8(1)(c), (e) and (l) to the relevant information under Issue D below.

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

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

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

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[28] 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.⁸

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

(2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[30] 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.⁹

[31] Even if information relates to an individual in a professional, official or business

⁸ Order 11.

⁹ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.¹⁰

[32] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.¹¹

Representations

[33] The police submit that the records contain the personal information of various individuals other than the appellant, including neighbours and family members. The police note, however, that on its further review of the some of the information at issue, some of it pertains to individuals in their professional capacities, and would not be considered to be personal information.

[34] The appellant's representations do not directly address the issue of whether the records contain personal information.

Analysis and findings

[35] As noted above, the police identified records responsive to the appellant's request and provided copies to him, with information severed in reliance on the personal privacy and law enforcement exemptions at sections 38(b) and 38(a)/8(1) respectively. From my review of the records, I find that all of them contain the personal information of the appellant. All of the records relate to the appellant as an individual involved with the police in one way or another. None of the records relate to the appellant in a professional capacity. I find, therefore, that the records contain recorded information about an identifiable individual (the appellant) within the meaning of the definition.

[36] I find that the following pages of the records also contain personal information about other identifiable individuals: 1, 2, 3, 4, 6, 8, 10, 11, 13, 18, 19, 23, 24, 29, 30, 31, 32, 34, 35, 37, 40, 41, 42, 43, 45, 47, 51, 52, 53, 54, 55, 56, 57, and 58. These records all contain information relating to identifiable individuals in the context of their involvement with the police. I find that this is information about identifiable individuals in their personal capacities.

[37] I find, however, that some information on the following pages, which the police withheld under section 38(b), is not personal information: 10, 11, and 12. These pages contain information relating to individuals acting in relation to an estate matter. These individuals' information appears in their professional capacity, rather than a personal one. Since the personal privacy exemption can only apply to information that is

¹⁰ Orders P-1409, R-980015, PO-2225 and MO-2344.

¹¹ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

personal information, and since the police have not claimed any other exemption for this information, I will order that it be disclosed to the appellant.

[38] I conclude that all of the records contain the appellant's personal information, and that the pages listed above also contain the personal information of other individuals. I will now consider whether disclosure of the other individuals' personal information would be an unjustified invasion of their personal privacy under section 38(b).

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

[39] 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.

[40] 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.¹²

[41] Sections 14(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy. These provisions are discussed further below.

Analysis and findings

[42] The police's representations are referred to in my analysis and findings below. I have also carefully reviewed and taken into account the appellant's representations; however, for the most part, they do not address the issue of whether the disclosure of the personal information of other individuals would be an unjustified invasion of their personal privacy. Instead, the appellant has elaborated on some of the incidents described in the police records, and has taken issue with the manner in which the police describe some of those incidents in the occurrence reports.

[43] To determine whether disclosure of the personal information of the affected parties would be an unjustified invasion of personal privacy, I will now turn to sections 14(1) to (4).

[44] If personal information fits within any of paragraphs (a) to (e) of section 14(1),

¹² See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 38(b).

disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). Furthermore, if any of paragraphs (a) to (c) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). The appellant did not argue that any of these paragraphs apply, and I find that they do not. Of particular note is that none of the other individuals have consented to the disclosure of their personal information (section 14(1)(a)).

[45] I will now consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties in order to determine whether disclosure of the personal information of the individuals other than the appellant would be an unjustified invasion of their personal privacy.¹³

Section 14(3)(b) presumption: investigation into violation of law

[46] If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 38(b). The police have raised the application of section 14(3)(b), which states:

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;

[47] The police submit that the presumption at section 14(3)(b) applies because the personal information was compiled and is identifiable as part of investigations into possible violations of law under various statutes.

[48] Based on my review of the records, I am satisfied that the withheld personal information in them was compiled and is identifiable as part of various investigations into possible violations of the statutes identified by the police. The presumption can apply to a variety of investigations, including those relating to by-law enforcement.¹⁴ Additionally, for this presumption to apply, it is not necessary for there to have been charges laid. 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.¹⁵

[49] Consequently, I find that the withheld personal information in the records falls

¹³ Order MO-2954.

¹⁴ Order MO-2147.

¹⁵ Orders P-242 and MO-2235.

within the section 14(3)(b) presumption and its disclosure to the appellant is presumed to be an unjustified invasion of the personal privacy of the individuals to whom the information relates.

Sections 14(2)(f): highly sensitive and 14(2)(h): supplied in confidence

[50] Section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.¹⁶ The factors in paragraphs (a), (b), (c) and (d) of section 14(2) generally weigh in favour of disclosure, while those in paragraphs (e), (f), (g), (h) and (i) weigh in favour of privacy protection.¹⁷ The list of factors under section 14(2) is not exhaustive; the institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2).¹⁸

[51] In this case, the police submit that the personal information is highly sensitive within the meaning of paragraph 14(2)(f) and that it was supplied by the individual to whom the information relates in confidence within the meaning of paragraph 14(2)(h). These paragraphs state:

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,

- (f) the personal information is highly sensitive;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence;

[52] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.¹⁹ From my review of the records and the representations of the affected parties who filed representations, I find that it is reasonable to expect that disclosure of some of the information at issue will result in significant personal distress for the individuals to whom the information relates.

[53] As for the factor at section 14(2)(h), it applies if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and if that expectation is reasonable in the circumstances. Section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality

¹⁶ Order P-239.

¹⁷ Order PO-2265.

¹⁸ Order P-99.

¹⁹ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

expectation.²⁰

[54] In Order MO-2830, Adjudicator Colin Bhattacharjee stated that whether an individual supplied his or her personal information to the police in confidence during an investigation is contingent on the particular facts, and such a determination must be made on a case-by-case basis. I agree. Having reviewed the records and the representations of the affected parties, I find that some of the personal information of individuals other than the appellant was supplied by those individuals to the police in confidence. I cannot be more specific without disclosing the identity of these individuals or the nature of the records.

Section 14(2) factors weighing in favour of disclosure

[55] Section 14(2) also lists four factors that, if present, generally weigh in favour of disclosure. They state as follows:

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;
- (b) access to the personal information may promote public health and safety;
- (c) access to the personal information will promote informed choice in the purchase of goods and services;
- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

[56] I have reviewed the appellant's representations and find that he does not raise the application of any of these factors; nor am I satisfied from my review of the records themselves that any of them apply. In particular, the appellant has not submitted that there is any legal proceeding to which the information would be relevant, within the meaning of paragraph 14(2)(d).

Unlisted factor: some of the withheld information consists of the appellant's own statements

[57] An institution must consider any relevant factors, even if they are not listed under section 14(2). A relevant factor here is that, in a few instances, the withheld

²⁰ Order PO-1670.

personal information consists of the appellant's own statements to the police where the disclosure of these statements would not reveal personal information of other individuals beyond what is in the statement. While I note the police's submission that none of the records is a formal "witness statement" of the appellant, the information I am referring to consists of the police's recording of statements that the appellant clearly made to them. In my view, this is a factor that weighs in favour of disclosure of this information to the appellant.

Weighing the factors and presumption

[58] I have found above that the presumption at section 14(3)(b) applies to all of the information at issue, and that the factors at sections 14(2)(f) and 14(2)(h) apply to some of the records. The presumption and the factors all weigh against disclosure. For the majority of the information at issue, there are no factors weighing in favour of disclosure. I find, therefore, that the disclosure of the majority of the information would be an unjustified invasion of the personal privacy of the individuals to whom the information relates, and that information is, therefore, exempt from disclosure pursuant to section 38(b).

[59] However, in the instances where the personal information consists of the appellant's own statements to the police, I find for the following reasons that this factor outweighs the factors and presumption weighing against disclosure.

[60] First, having reviewed the records, I find that the factors at sections 14(2)(f) and (h) do not apply to the appellant's statements mentioned in paragraph 57 of this order. The information contained in these statements is not highly sensitive within the meaning of section 14(2)(f), nor was it supplied by the other individuals in confidence within the meaning of section 14(2)(f) – it was supplied by the appellant, not the other individuals.

[61] Weighing the presumption at section 14(3)(b) on one hand, and the fact that the information consists of the appellant's own statements on the other, I find that the balance tips in favour of disclosure in this case. Although the appellant provided the information in the context of law enforcement, the information contained in the appellant's statements is not particularly sensitive. In the circumstances of this appeal, therefore, I find that the disclosure of the information in these records would not be an unjustified invasion of personal privacy, and I will order that it be disclosed to the appellant.

[62] I would also have arrived at the same result applying the absurd result principle. This office has found that 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.²¹

[63] The absurd result principle has been applied where the requester sought access to his or her own witness statement;²² the requester was present when the information was provided to the institution;²³ or the information is clearly within the requester's knowledge.²⁴ 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.²⁵

[64] In this case, I find that it would be absurd to withhold the appellant's own statements from him under section 38(b). Given the relative lack of sensitivity of the information, I find that disclosure in the circumstances of this appeal is not inconsistent with the purpose of the section 38(b) exemption. Therefore, I will order that this information be disclosed to the appellant.

Issue D: Does the discretionary exemption at section 38(a) in conjunction with the sections 8(1)(c), (e) and/or (l) exemptions apply to the information at issue?

[65] 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.

[66] 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.

[67] 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.²⁶

[68] 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. This is addressed further in the "Exercise of Discretion" discussion under Issue E below.

²¹ Orders M-444 and MO-1323.

²² Orders M-444 and M-451.

²³ Orders M-444 and P-1414.

²⁴ Orders MO-1196, PO-1679 and MO-1755.

²⁵ Orders M-757, MO-1323 and MO-1378.

²⁶ Order M-352.

[69] In this case, the institution relies on section 38(a) in conjunction with sections 8(1)(c), 8(1)(e) and/or 8(1)(l). These provisions 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;
- (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.

[70] 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,
- (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)

[71] The term "law enforcement" has covered the following situations:

- a municipality's investigation into a possible violation of a municipal by-law.²⁷
- a police investigation into a possible violation of the *Criminal Code*.²⁸
- a children's aid society investigation under the *Child and Family Services Act*.²⁹
- Fire Marshal fire code inspections under the *Fire Protection and Prevention Act, 1997*.³⁰

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

²⁷ Orders M-16 and MO-1245.

²⁸ Orders M-202 and PO-2085.

²⁹ Order MO-1416.

³⁰ Order MO-1337-I.

context.³¹

[73] 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.³² The party resisting disclosure must demonstrate that disclosure will result in a risk of harm that is well beyond the merely possible or speculative, but need not prove on the balance of probabilities that disclosure will in fact result in such harm. An institution must, however, provide evidence “well beyond” or “considerably above” a mere possibility of harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.³³

[74] The police severed certain codes from the records including mapping identifiers, CPIC ORI numbers, MO codes, local police file numbers and RCMP FPS numbers. They also withheld some information relating to database search results.

Representations

[75] The police provided representations explaining the function of the various codes and database results that it severed from the records. The police submit that the exemptions at sections 8(1)(c), (e) and (l) all serve to protect the information that was severed pursuant to section 8(1).

Analysis and findings

[76] Many previous orders of this office have found that police operational codes are exempt from disclosure pursuant to section 8(1)(l). For example, in Order MO-2446, Adjudicator Diane Smith stated:

I note that this office has applied section 8(1) to exempt police operational codes. This office has consistently found that section 8(1)(l) applies to these codes (for example, see Orders M-93, M-757, MO-1715, MO-2414 and PO-1665). These orders adopted the reasoning stated in Order PO-1665 by Adjudicator Laurel Cropley:

In my view, disclosure of the “ten-codes” would leave OPP [Ontario Provincial Police] officers more vulnerable and compromise their ability to provide effective policing services as it would be easier for individuals engaged in illegal activities to carry them out and would jeopardize the safety of OPP officers who

³¹ *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

³² Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

³³ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

communicate with each other on publicly accessible radio transmission space.

[77] I agree with this reasoning and find that it is relevant in the circumstances of this appeal. As a result, I am satisfied that disclosure of the police operational codes could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. Accordingly, subject to my findings on the police's exercise of discretion, below, I find that the police codes that have been withheld from the appellant pursuant to section 8(1) qualify for exemption under section 38(a) in conjunction with section 8(1)(l) of the *Act*.

[78] I find, further, that certain markers and database results found on pages 27, 42 and 47 are exempt from disclosure pursuant to section 8(1)(l). While this information does not fall within the category of "operational codes", I find, for other reasons, that the disclosure of this information could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. I cannot be more specific without revealing the contents of the records. In this regard, I rely on the police's confidential representations found under paragraph (e) on page 8 of its representations.

[79] I find, however, for the following reasons, that the database search result found on page 54 of the records does not fall within the section 8(1)(c), 8(1)(e) or 8(1)(l) exemptions.

[80] The police submit as follows:

Acronyms are used to identify databases that are searched by police in order to confirm or gather information that may be available for those individuals who have had dealings with the police. Information gathered could be specific to criminal involvement or complainant involvement. In the records responsive the databases referenced include OMPPAC (previous Records Management System or RMS), Niche which is the current RMS and CPIC - Canadian Police Information Centre. Acronyms may indeed be familiar to the public, but it is the information gleaned from these searches that could compromise an investigation if revealed.

[81] In Order PO-2751, Adjudicator John Higgins made the following comments relative to the application of the section 8(1)(c) exemption:

In order to meet the "investigative technique or procedure" requirement, the institution must show that disclosure of the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. The fact that a particular technique or procedure is generally known to the public would normally lead to the conclusion that its effectiveness would not be hindered or compromised by disclosure and,

accordingly, that the technique or procedure in question is not within the scope of section 14(1)(c) [see Orders P-170, P-1487, PO-2470]. The techniques or procedures must also be "investigative". The exemption will not apply to "enforcement" techniques or procedures [Orders PO-2034, P-1340].

[82] I agree with Adjudicator Higgins' description of the scope of the section 8(1)(c) exemption. In the present case, I find that it would be generally known that the police rely on databases to gather information about individuals who have had dealings with the police. The existence of such databases and their acronyms would not, therefore, qualify for an exemption under section 8(1)(c). Although the police argue that it is the information gleaned from the searches that could compromise an investigation, I find, based on my review of the information at issue, that its disclosure could not be expected to hinder or compromise the effective utilization of the databases. I find, therefore, that section 8(1)(c) does not apply.

[83] I also find that the disclosure of the information could not reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person within the meaning of section 8(1)(e). Although the police rely on section 8(1)(e), their representations contain no argument on how this section applies. On my review of the withheld information on page 54, I find that its disclosure could not reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person. Therefore, section 8(1)(e) does not apply to it.

[84] Finally, I find that section 8(1)(l) also does not apply. The information is not a "code", so the reasoning in Order MO-2446, above, does not apply to it. Further, I find that the information is of a different nature from the information withheld on pages 27, 42, and 47. From my review of the information, I find that its disclosure could not reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime.

[85] As I have found that the information is not subject to section 8(1)(c), (e) nor (l), I find that the exemption at section 38(a) does not apply. I will, therefore, order the disclosure of this information to the appellant.

Issue E: Did the institution exercise its discretion under sections 38(b), and 38(a) in conjunction with section 8(1)? If so, should this office uphold the exercise of discretion?

[86] The sections 38(a) and 38(b) exemptions are discretionary, and 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.

[87] 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.

[88] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.³⁴ This office may not, however, substitute its own discretion for that of the institution.³⁵

Relevant considerations

[89] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:³⁶

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution

³⁴ Order MO-1573.

³⁵ Section 43(2).

³⁶ Orders P-344 and MO-1573.

- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

Representations

[90] The police submit that they exercised their discretion and only withheld the appellant's information to the extent necessary to protect the privacy of other individuals and protect the police's interests pursuant to section 8(1).

[91] From my review of the police's representations as a whole as well as the records themselves, I am satisfied that the police exercised their discretion. In particular, it is evident that the police took into account the fact that the records contain the appellant's own personal information. In withholding the personal information of others, the police took into account its sensitivity and the relationship between the appellant and others.

[92] Finally, there is no evidence that the police exercised their discretion in bad faith or for an improper purpose, that it took into account irrelevant considerations or that it failed to take into account relevant considerations.

[93] Therefore, I uphold the police's exercise of discretion.

ORDER:

1. I uphold the police's decision, in part. I order the police to disclose to the appellant the highlighted information on the copy of the records that is being provided to the police with this order.
2. The disclosure referred to in paragraph 1 is to take place by **January 30, 2017** but not before **January 24, 2017**.
3. In order to ensure compliance with provisions 1 and 2 of this Order, I reserve the right to require the police to provide me with a copy of the records they disclose to the appellant.

Original Signed by: _____
Gillian Shaw
Adjudicator

December 22, 2016 _____