Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3475

Appeal MA16-109

Toronto Police Services Board

July 27, 2017

Summary: The appellant seeks access to records related to an incident involving his son. The police located responsive records and granted the appellant partial access to them. The police withheld portions of the records under the discretionary exemptions in sections 38(a), read with section 8(1)(c) (reveal investigative techniques and procedures), and 38(b) (personal privacy) of the *Act*. The police also advised the appellant that they withheld certain portions of the records as non-responsive to this request. The appellant appealed the police's decision and raised the possible application of the public interest override to the records. Additionally, the appellant claimed that additional responsive records exist, thereby raising the reasonableness of the police's search as an issue. The adjudicator upholds the police's decision to withhold the personal information at issue under section 38(b) of the *Act* and finds that the public interest override in section 16 does not apply. The adjudicator also upholds the police's decision to withhold certain portions of the records as not responsive. However, the adjudicator finds that section 38(a), read with section 8(1)(c), does not apply and orders the police to disclose the portion of the records subject to that exemption. Finally, the adjudicator upholds the police's search as reasonable.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of "personal information"), 8(1)(c), 14(1), 14(3)(b), 17, 24, 38(a) and 38(b).

Orders and Investigation Reports Considered: Order MO-2854

OVERVIEW:

[1] The appellant made an access request under the *Municipal Freedom of*

Information and Protection of Privacy Act (the *Act*) to the Toronto Police Services Board (the police) for all records related to a 2012 incident involving his son. The appellant provided the police with an authorization from his son to release his son's personal information contained in the records.

[2] The police located responsive records and issued a decision granting the appellant partial access to them. The police denied the appellant access to portions of the records claiming the application of the discretionary exemptions in sections 38(a), in conjunction with section 8(1)(c) (reveal investigative techniques and procedures), and 38(b) (personal privacy). In relation to the personal privacy exemption in section 38(b), the police raised the application of the presumption in section 14(3)(b) to the records. The police also advised the appellant that portions of the records were withheld as not responsive to the request and marked "N/R".

[3] The appellant appealed the police's decision to this office.

[4] During mediation, the appellant raised the issue of whether the police's search for responsive records was reasonable. As a result, the issue of reasonable search was added to this appeal. In addition, the appellant advised the mediator that he believes there is a public interest in the disclosure of the records. Accordingly, the public interest override in section 16 of the *Act* was added as an issue to this appeal.

[5] Mediation did not resolve this appeal and it was transferred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. The adjudicator originally assigned to the appeal invited the police to provide representations in response to a Notice of Inquiry. The police submitted representations. The adjudicator then invited the appellant to submit representations in response to the police's representations, which were shared in accordance with Practice Direction Number 7 of the IPC's *Code of Procedure*. The appellant did not make submissions in response to the Notice of Inquiry, but copied the IPC on a number of documents he sent to the Office of the Public Guardian and Trustee of Ontario.

[6] The appeal was then transferred to me.

[7] I note that while the appellant did not submit formal representations addressing the issues raised in the Notice of Inquiry, he provided a number of documents relating to his allegations regarding the police's conduct in relation to his son and his son's right to engage the services of the Office of the Public Guardian and Trustee of Ontario. I have reviewed this material and will consider it, where relevant, in my discussion below.

[8] In the discussion that follows, I uphold the police's decision to withhold portions of the records, in part. I find that the records contain the personal information of the appellant and other identifiable individuals and that the police properly applied section 38(b) to the information at issue. I also uphold the police's decision to withhold certain portions of the records as not responsive. However, I find that section 38(a), read in conjunction with section 8(1)(c), does not apply to the single portion the police identified as exempt and order the police to disclose it to the appellant. I uphold the

police's search for records as reasonable.

RECORDS:

[9] The records at issue consist of an 11-page record of arrest and 17 pages of officers' notes.

ISSUES:

A. What records are responsive to the request?

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(a) in conjunction with the section 8(1)(c) exemption apply to the information at issue?

D. Does the discretionary exemption at section 38(b) apply to the information at issue?

E. Did the police exercise their discretion under section 38(b)? If so, should this office uphold their exercise of discretion?

F. Is there a compelling public interest in the disclosure of the records that clearly outweighs the purpose of the section 38(b) exemption?

G. Did the police conduct a reasonable search for records?

DISCUSSION:

Issue A: What records are responsive to the request?

[10] Section 17 of the *Act* imposes certain obligations on institutions when responding to requests for access to records. Institutions must adopt a liberal interpretation of a request in order to best serve the purpose and spirit of the *Act*. To be considered responsive to the request, the records must *reasonably relate* to the request.[1]

[11] The police withheld portions of pages 3, 7, 12-14, 16, 18, 19-21, 23, 24 and 28 as not responsive to the appellant's original request. The majority of the information withheld as not responsive are contained in the officers' notes and concern matters or activities unrelated to the subject of the appellant's request. I reviewed these portions of the officers' notes and find that they are not responsive to the appellant's request. I have also reviewed the portions of the Record of Arrest withheld as not responsive and

[1] Orders P-880 and PO-2661.

find that they are not responsive to the appellant's request.

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

[12] In order to determine which sections of the *Act* may apply, it is necessary to describe 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

The list of example 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] To qualify as personal information, the information must be

[2] Order 11.

about the individual in a *personal capacity* and it must be reasonable to expect that an individual may be identified if the information is disclosed.[3]

[13] The police submit that the records contain the name, address, telephone number, date of birth and other identifying information about an identifiable individual, as well as the information that individual provided to the police. In addition, the police submit that the records contain the personal information of other identifiable individuals identified in the responsive records.

[14] The appellant did not specifically address whether the records contain the *personal information* of identifiable individuals.

[15] The record of arrest and officer's notes at issue contain the names, telephone numbers, address, dates of birth, medical history, personal opinions, views about others, as well as other information of personal nature of the appellant and other affected parties who could be identified if the information were disclosed. I find that this information qualifies as the personal information of the appellant and other affected parties under paragraphs (a), (b), (c), (d), (e), (g) and (h) of the definition of personal information in section 2(1) of the *Act*.

[16] Having found that the record contains the mixed personal information of the appellant and other affected parties, I will consider the appellant's right of access to the report under sections 38(a) and (b) of the *Act*.

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

[17] 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. Section 38(a) gives the police the discretion to refuse to disclose the appellant's personal information to him if the record contains information that would be exempt under sections 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 of the *Act*. In this appeal, the police submit that section 38(a), read in conjunction with section 8(1)(c), applies to a portion of page 4. Section 8(1)(c) of the *Act* reads as follows:

> 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.

[18] The term *law enforcement* is defined in section 2(1) of the *Act* and applies to a

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

police investigation into a possible violation of the *Criminal Code*.[4]

[19] It is not enough for an institution to take the position that the harms under section 8 are self-sufficient from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter.[5] The institution must provide 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.[6]

[20] In order to meet the "investigative technique or procedure" requirement under section 8(1)(c), 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.[7] The techniques or procedures must be *investigative*. The exemption will not apply to *enforcement* techniques or procedures.[8]

[21] The police applied section 38(a), read with section 8(1)(c), to one portion of page 4 of the records. The police assert that this exemption applies to the portion of page 4.

[22] The portion of page 4 that is subject to the section 38(a), read with section 8(1)(c), exemption refers to an offence under the *Criminal Code* and a direction. The information subject to the police's section 38(a) claim does not contain any details regarding an investigative technique or procedure. The police's representations do not explain how any investigative technique or procedure would be revealed if the withheld information is disclosed. Moreover, the police do not provide any submissions to demonstrate that disclosure of the investigative technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. As stated above, it is not sufficient for the police to take the position that the harms under section 8 are self-evident from the record. In this case, the police merely assert that section 38(a), read with section 8(1)(c), applies to one portion of page 4 and offer no further explanation regarding the application of the exemption.

[23] Therefore, upon review of the police's representations and page 4, I find that section 38(a), read with section 8(1)(c), does not apply in this appeal. I also find that no other mandatory exemption applies to this portion and will order the police to disclose it to the appellant.

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[4] Orders M-202 and PO-2085.
[5] Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, 1994 CanLII 10564 (ON SC).
[6] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-54.
[7] Orders P-170, P-1487, MO-247-I and PO-2571.
[8] Orders PO-2034 and P-1340.

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

[24] Section 38(b) gives the police the discretion to refuse to disclose the appellant's personal information to him in this appeal if the record contains his personal information as well as that of the affected parties and disclosure of the information would constitute an *unjustified invasion* of the affected parties' personal privacy. 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.

[25] Even if the personal information falls within the scope of section 38(b), the police may exercise their discretion to disclose the information to the appellant after weighing the appellant's right of access to his own personal information against the affected parties' right to protection of their privacy. Section 14 provides guidance in determining whether the unjustified invasion of personal privacy threshold is met. If the information fits within any of the paragraphs of section 14(1) or 14(4), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b).

[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 section 14(2) and 14(3) and balance the interests of the parties.[9] 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). In this appeal, the police assert that section 14(3)(b) applies to the personal information at issue in the records. Section 14(3)(b) 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

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.[10]

[27] The police submit that section 14(3)(b) applies to the personal information that

[9] Order MO-2954.
[10] Orders P-242 and MO-2235.

remains at issue. The police submit that they conducted an investigation of the appellant's son's actions involving a security guard and a police officer. The police submit that they compiled personal information about identifiable individuals as part of an investigation into a possible violation of law. As such, the police submit that the disclosure of the information that remains at issue would constitute an unjustified invasion of personal privacy.

[28] The appellant did not address whether the personal information contained in the records are exempt from disclosure under section 38(b).

[29] I agree with the police's position that the presumption against disclosure in section 14(3)(b) applies to the records. The personal information contained in the records was clearly compiled and is identifiable as part of an investigation into a possible violation of law. The report was created by the police as part of their investigation into a possible violation of law relating to the appellant's son, a security guard and a police officer. Therefore, section 14(3)(b) weighs in favour of non-disclosure of the record.

[30] The records contain the appellant's personal information. As such, I must consider and weigh any applicable factors in balancing the appellant's and affected parties' interests. Upon review of the limited personal information that remains at issue, I find that none of the factors in section 14(2) apply.

[31] In addition, I have reviewed the records and find that none of the personal information that remains at issue relates directly to either the appellant or his son. The personal information at issue relates primarily to identifiable individuals other than the appellant and his son.

[32] Finally, I have considered the possible application of the absurd result principle. The absurd result principle may apply in circumstances where denying access to information would yield manifestly absurd or unjust results. I reviewed the records and find that none of the information at issue is clearly known to the appellant. Further, in the circumstances of this appeal, I find that denying the appellant access to the information at issue would not yield manifestly absurd or unjust results. Accordingly, I find that the absurd result principle has no application in these circumstances.

[33] Therefore, the information at issue is exempt from disclosure under section 38(b) because its disclosure would result in an unjustified invasion of the personal privacy of individuals other than the appellant and his son, subject to my review of the police's exercise of discretion below.

Issue E: Did the police exercise their discretion under section 38(b)? If so, should this office uphold their exercise of discretion?

[34] The section 38(b) exemption is discretionary and permits an institution to disclose the information subject to the exemption despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the IPC may determine

whether the institution failed to do so. 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 person, it takes into account irrelevant considerations or it fails to take into account relevant considerations. In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[11] This office may not, however, substitute its own discretion for that of the institution.[12]

[35] The police submit that they exercised their discretion in a manner that adheres to the mandate and the spirit of the *Act*. The police submit that they did not exercise their discretion in bad faith or for an improper purpose and they took into account all relevant considerations.

[36] The appellant did not make submissions with regard to the police's exercise of discretion. However, the appellant makes a number of allegations that the police acted in bad faith in their interactions with his son.

[37] Upon review of the parties' submissions and the information at issue, I find that the police exercised their discretion under section 38(b) properly. I am satisfied that the police did not exercise their discretion in bad faith or for an improper purpose as there is no evidence before me that this is the case. Based on the manner in which they severed the records, it is clear that the police considered the principles that the appellant should be able to access his own and his son's personal information, as his son provided his consent, and that the affected parties should have their privacy protected. In addition, the police considered the specific interests protected by the presumption in section 14(3)(b) as well as the wording of the section 38(b) exemption. Accordingly, I find the police took relevant factors into account and did not take into account irrelevant factors and I uphold their exercise of discretion to apply section 38(b) of the *Act* to the information at issue.

Issue F: Is there a compelling public interest in the disclosure of the records that clearly outweighs the purpose of the section 38(b) exemption?

[38] During mediation, the appellant raised the possible application of the public interest override in section 16 of the *Act* to the record. Section 16 states

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

Although section 38(b) is not listed, section 16 may apply to override section 38(b) because it may apply to override the application of section 14 of the *Act*.[13] If section 16 were to apply in this case, it would have the effect of overriding the application of

[11] Order MO-1573.
[12] Section 43(2) of the *Act*.
[13] See, for example, Order PO-2246 which deals with the equivalent sections of the provincial *Act*.

section 38(b) and the appellant would have a right of access to the information at issue.[14]

[39] For section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[40] The *Act* is silent as to who bears the burden of proof in section 16. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 16 applies. To find otherwise would be to impose an onus which would seldom, if ever, be met by an appellant. Accordingly, the IPC will review the records with a view to determine whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.[15]

[41] In considering whether there is a *public interest* in disclosure of the records, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[16] Previous orders state that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[17]

[42] The appellant did not directly claim that there is a public interest in the information at issue. However, the appellant makes a number of broad allegations regarding the police's conduct both during an investigation relating to his son and in response to his access request, suggesting a larger conspiracy.

[43] The police submit that there is no public interest in the disclosure of the records that clearly outweighs the purposes of the personal privacy exemption. The police submit that the records relate to an incident involving the appellant's son that resulted in his arrest. The police assert that the information is of "no interest to the public and clearly does not outweigh the purposes of section 38(b)."

[44] Based on my review of the information that remains at issue and the parties' representations, I find that there is no compelling public interest in the disclosure of the record that clearly outweighs the purposes of the personal privacy exemption. In Order MO-2854, the adjudicator considered the application of the public interest override to police occurrence reports. Reviewing the circumstances of the appeal, the adjudicator stated as follows:

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[14] Order MO-2854.
[15] Orders P-244.
[16] Orders P-984 and PO-2607.
[17] Orders P-984 and PO-2556.

> In my view, disclosure of the remaining withheld portions of personal information in the records would not "serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices", as required in Order P-984. There is no allegation that the experience of the appellant has occurred with any frequency at other bail hearings, or that the conduct of the police is somehow in question. Rather, in my view, the appellant seeks access to the severed portions of the records in order to pursue his own interests. While these are of importance to him, in my view, they are in the nature of a private, rather than a public interest.

[45] I adopt this analysis for the purpose of my review. Reviewing the circumstances of the appellant's request and appeal and the information he submitted during the inquiry, I find that the appellant is pursuing access to the record for a predominately personal reason.[18] While the appellant raises a number of concerns regarding the police's conduct, there is no evidence to suggest that his concerns are founded. Furthermore, I reviewed the records and find that none of the personal information at issue would, if disclosed, "serve the purpose of informing the citizenry about the activities of their governments, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices."[19]

[46] Overall, it appears the appellant seeks access to the severed portions of the records in order to pursue his own interest in confirming his theories regarding the police's treatment of his son. While this issue appears to be important to the appellant, in my view, it is in the nature of a private rather than a public interest.

[47] In conclusion, I find that there is not any public interest, compelling or otherwise, in the disclosure of the information that I found to qualify for exemption under section 38(b) of the *Act*. Accordingly, I find that section 16 does not apply in this appeal.

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

[48] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution conducted a reasonable search for records as required by section 17 of the *Act*.[20] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the police's search. If I am not satisfied, I may order further searches.

[49] The *Act* does not require the institution to prove with absolute certainty that further records do not exist, However, the institution must provide sufficient evidence to

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[18] Order M-319.
[19] Order P-984.
[20] Orders P-85, P-221 and PO-1954-I.

show that it made a reasonable effort to identify and locate responsive records.[21] To be responsive, a record must be *reasonably related* to the request.[22]

[50] A reasonable search is one in which an experienced employee, knowledgeable in the subject matter of the request, expends a reasonable effort to locate records which are reasonably related to the request.[23]

[51] A further search will be ordered if the institution dos not provide sufficient evidence to demonstrate that it made a reasonable effort to identify and locate all of the responsive records within its custody or control.[24]

[52] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[25]

[53] The police submit that they conducted a reasonable search for records responsive to the appellant's request. They submit that the appellant's request was unambiguous and there was no need for clarification. The police also submit that a review of the appellant's request form suggests that the appellant did not request access to specific records, but provided background information regarding the incident in question and identified the appellant's concerns regarding the police's treatment of his son. The police state that the attending officers at the incident are the only individuals who could respond to the appellant's concerns. As such, the police submit that they decided to provide the appellant with the responsive records so that the appellant could contact the attending officers with any further concerns.

[54] The appellant did not make submissions in response to the Notice of Inquiry. However, in the document he submitted during the inquiry, the appellant submits that the police hid or destroyed certain evidence relating to another matter as part of a conspiracy or "cover up" of certain crimes committed against his son.

[55] Based on my review of the parties' submissions, I am satisfied that the police conducted a reasonable search for responsive records. As set out above, the *Act* does not require the police to prove with absolute certainty that additional records do not exist, but only to provide sufficient evidence to establish that they made a reasonable effort to locate responsive records. In my view, the police provided me with a sufficient explanation of their search for responsive records.

[56] In addition, I find that the appellant did not provide sufficient evidence to demonstrate there is a reasonable basis for his belief that additional responsive records should exist. While the appellant alleges that the police concealed or destroyed responsive records relating to an unrelated matter, he did not provide any evidence to

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[21] Orders P-624 and PO-2559.
[22] Order PO-2554.
[23] Orders M-909, PO-2469 and MO-2592.
[24] Order MO-2185.
[25] Order MO-2246.

substantiate these claims. In fact, the appellant did not provide any evidence regarding the existence of additional records that are responsive to this request. Further, upon review of the documents the appellant submitted during the inquiry, I am not satisfied that the appellant demonstrated that there is a reasonable basis for his conclusion that the police concealed or destroyed records responsive to this request or that additional responsive record exist.

[57] In conclusion, I am satisfied that the police conducted a reasonable search for records that are responsive to the appellant's request.

ORDER:

1. I order the police to disclose the portion of page 4 for which they made their section 38(a), read with section 8(1)(c), claim. I find that this portion of page 4 is not exempt from disclosure. I order the police to disclose this portion of the records to the appellant by **August 25, 2017**.

2. I uphold the police's application of section 38(b) to the remainder of the personal information at issue. I also uphold the police's decision to withhold portions of the records as not responsive to the appellant's request.

3. I uphold the police's search as reasonable.

Original Signed by: July 27, 2017
Justine Wai
Adjudicator