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Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3563

Appeal MA15-507

Niagara Regional Police Services Board

February 15, 2018

Summary: The police received a request from an individual for information captured on “contact cards” relating to him. The police granted partial access to the records, but denied access to portions of the records that contained the personal information of another individual under section 38(b) (personal privacy) and withheld portions on the basis of the law enforcement exemption in section 8(1)(c) in conjunction with section 38(a) (discretion to deny requester’s own information). In this order, the decision of the police to withhold another individual’s personal information is upheld, but the application of section 8(1)(c) is not upheld, and the police are ordered to disclose those portions of the records.

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

OVERVIEW:

[1] The Niagara Regional Police Services Board (the police) received a request for access to the following:

...information captured on “contact cards” filled out about me by members of [the police]. The cards are also known as 208’s, Field Information Reports, Street Checks, and Community Engagement Reports.

I seek all of the data gathered from each contact, plus photo copies of all related material.

[2] The police issued a decision granting partial access to the requested information, and denying access to portions of the records on the basis of the exemption in section 38(b) (personal privacy). In addition, the police advised that information unresponsive to the request was severed from the records.

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

[4] During mediation, the police issued a revised decision advising that access to the information at issue was denied pursuant to sections 38(a) (discretion to deny requester's own information) in conjunction with section 8(1)(c) (law enforcement), and section 38(b), with reference to the presumption in section 14(3)(b) of the *Act*. The police also advised that information unresponsive to the request was severed from the records, and that they were refusing to confirm or deny the existence of additional records pursuant to section 8(3) of the *Act*.

[5] The appellant advised the mediator that he is not pursuing access to the information severed on the basis that it is not responsive to the request. The appellant continued to take issue with the remaining sections relied upon by the police.

[6] Mediation did not resolve the appeal, and it was transferred to the inquiry stage of the process, where an adjudicator conducts an inquiry under the *Act*.

[7] I commenced my inquiry by seeking representations from the police, who provided representations. The non-confidential portions of the police's representations were shared with the appellant, who also provided representations.

[8] In this order, I uphold the decision of the police to withhold another individual's personal information, but find that the remaining information is not exempt under sections 38(a) and 8(1)(c), and order the police to disclose those portions of the records.

RECORDS:

[9] The information at issue in this appeal is the withheld information contained in three identified records (Records A, B and C), each of which is three pages long.

ISSUES:

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

- B. Does the discretionary exemption at section 38(b) apply to the information for which it is claimed?
- C. Does the discretionary exemption at section 38(a) in conjunction with section 8(1)(c) apply to the information for which it is claimed?
- D. Did the police exercise their discretion under section 38(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Preliminary issue – responsiveness of records

[10] As noted above, the police issued an access decision granting partial access to responsive records on the basis of identified exemptions, and noting that information that was not responsive to the request was severed from the records. During mediation the police issued a revised decision which indicated that, in addition to the exemptions claimed earlier, they were denying access on the basis of additional exemption claims, including sections 38(a), 8(1)(c) (law enforcement), and 8(3) (refuse to confirm or deny the existence of records) of the *Act*. The appellant confirmed that he was not pursuing access to information that it is not responsive to the request.

[11] In the Notice of Inquiry I sent to the police, I invited the police to address the responsiveness issue, which they did. I also set out the test for whether records are responsive to a request as follows:

Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

- (1) A person seeking access to a record shall,
 - (a) make a request in writing to the institution that the person believes has custody or control of the record;
 - (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; ...
- (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

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.¹

To be considered responsive to the request, records must "reasonably relate" to the request.²

[12] I also noted that the request was specifically for:

...information captured on "contact cards" filled out about me by members of the NRPS. The cards are also known as 208's, Field Information Reports, Street Checks, and Community Engagement Reports.

[13] The police provided confidential representations to me.

[14] From the various types of records listed in the appellant's request it is clear that he is seeking records of police interactions with him. The three records addressed below all document police interactions with the appellant, and they are the only records at issue in this appeal responsive to the request.³ Furthermore, the information severed from the bottom of the three responsive records, which contains administrative information, is not responsive to the request.⁴

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

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

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

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

¹ Orders P-134 and P-880.

² Orders P-880 and PO-2661.

³ As a result, there is no need to address the possible application of section 8(3) in this appeal.

⁴ This includes information such as the date the record was printed after the police received the access request.

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;

[16] 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.⁵

[17] 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.⁶

[18] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.⁷

[19] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁸

⁵ Order 11.

⁶ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁷ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁸ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[20] The police submit that all of the records contain the personal information of the appellant, and one record contains the personal information of another identifiable individual. They state that the personal information in the records is about the individuals in a personal capacity, and includes names, dates of birth, sex, ethnicity, addresses, telephone numbers, and drivers licence numbers.

[21] The appellant takes the position that the records contain his personal information and that he therefore has a general right of access to the records pursuant to section 36(1) of the *Act*.

[22] Based on my review of the records, I find that they contain the appellant's personal information as defined in section 2(1) of the *Act*. I also find that a portion of one record (Record A) contains the personal information of another identifiable individual.

B. Does the discretionary exemption at section 38(b) apply to the information for which it is claimed?

[23] The police submit that the discretionary exemption at section 38(b) applies to the withheld portion of page 1 of Record A as this portion contains another individual's (the affected party's) personal information.

[24] 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.⁹

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

[26] The police submit that the section 38(b) personal privacy exemption applies because the withheld information contains the affected party's personal information including their name, address, telephone number, date of birth, gender, ethnicity, driver's license number and other personal information relating to the affected party. The police also submit that the information is now a number of years old and that it is not clear that the specific detailed information is known to the appellant. The police

⁹ See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 38(b).

submit that there does not appear to be a compelling need for the appellant to obtain the other individual's personal information.

[27] The appellant provides background information relating to his interactions with the police, and then indicates why he is requesting the information at issue. He identifies concerns about how he has been treated by the police and he states that he requires the information in the records to support his allegations and to prove his position in other proceedings involving the police. He states that this constitutes a compelling reason to disclose the responsive information to him.

[28] In my view, the appellant's representations do not support a finding that any of the factors favouring disclosure in sections 14(2) are relevant in the circumstances of this appeal. In an apparent indirect reference to section 14(2)(d), the appellant submits that he requires the information in the records to support his allegations and to prove his position in other proceedings involving the police. Section 14(2)(d) 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,

the personal information is relevant to a fair determination of rights affecting the person who made the request;

[29] Previous orders have confirmed that, for section 14(2)(d) to apply, the appellant must establish that:

- (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and
- (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
- (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.¹⁰

[30] In my view, the appellant's general statement in support of his interest in accessing the information is not sufficient to establish that that the disclosure of the

¹⁰ Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).

withheld personal information of the affected party is required to prepare for any existing proceeding, or to ensure an impartial hearing. In view of the nature of the withheld information, I am not persuaded that the personal information is relevant to a fair determination of rights affecting the appellant, and I find that this factor does not apply.

[31] In the absence of any factors favouring disclosure, and given the nature of the affected party's information at issue and the fact that it was collected by the police, I find that disclosure of the personal information of the affected party would constitute an unjustified invasion of that individual's personal privacy.

[32] I have also considered whether the absurd result principle applies to the information. As discussed in previous orders, the absurd result principle may apply whether or not the factors or circumstances in section 14(2) or the presumptions in section 14(3) apply, in situations where the requester originally supplied the information, or the requester is otherwise aware of it. In appropriate circumstances, the information may be found not exempt under section 38(b) because to find otherwise would be absurd and inconsistent with the purpose of the exemption.¹¹

[33] I have no information before me regarding the circumstances through which the affected party's information was provided to the police (ie: whether it was discussed in the appellant's presence or whether it was simply transcribed by the police during the course of their interaction with the appellant and the affected party). In the absence of information concerning whether the appellant is aware of the personal information of the affected party, and given the detailed nature of that information and the age of the record, I find that the absurd result principle does not apply in the circumstances of this appeal.

[34] As a result, and subject to my review of the police's exercise of discretion, I find that section 38(b) applies to the affected party's personal information contained on page 1 of Record A.

C. Does the discretionary exemption at section 38(a) in conjunction with section 8(1)(c) apply to the information for which it is claimed?

[35] 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.

[36] Section 38(a) reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

¹¹ Orders M-444, M-451, M-613, MO-1323, PO-2498 and PO-2622.

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.

[37] The police rely on section 8(1)(c) to deny access to portions of the information in the responsive records. Section 8(1)(c) reads:

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

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

[38] Section 38(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.¹²

[39] 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)

[40] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.¹³

[41] 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.¹⁴ The institution must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative, although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the

¹² Order M-352.

¹³ *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

¹⁴ Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

consequences.¹⁵

[42] In order to meet the “investigative technique or procedure” test, 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 exemption normally will not apply where the technique or procedure is generally known to the public.¹⁶ Moreover, the techniques or procedures must be “investigative”. The exemption will not apply to “enforcement” techniques or procedures.¹⁷

[43] In their representations the police state that the records contain the appellant’s personal information, but that small portions of the records contain information which, if disclosed, would reveal a confidential investigative technique. The police state that disclosing the information would compromise the effective use of the law enforcement technique in the future. The police also provide confidential representations in support of their position that the withheld information qualifies for exemption under section 8(1)(c), and also indicate why they take the position that the disclosure of these portions would result in identified harms.

[44] The appellant submits that the records contain the personal opinions and views of police officers that relate to him. He believes that the information is being used to flag him internally, and to record “personal and biased views and opinions” about him.

[45] As noted above, in order to meet the investigative technique or procedure test, the police must show that disclosure of the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. Normally, the exemption will not apply where the technique or procedure is generally known to the public.

[46] Based on my review of the information which the police claim falls within section 8(1)(c), I am not satisfied that it is exempt under that section. Although I agree that the information withheld on the basis of the section 8(1)(c) exemption is “an investigative technique or procedure,” I have not been provided with sufficient evidence to satisfy me that the public would not generally be aware of this technique or procedure. Although I cannot specifically refer to the technique or procedure in this order, on my review of it, I am not satisfied that the technique or procedure is not generally known to the public, or could otherwise be known by using “common sense perceptions or ... similar situations depicted in popular films and books.”¹⁸ As a result, I find that disclosure of the withheld portions of the second page of each of the three records is not exempt from disclosure under section 8(1)(c), as the disclosure could not

¹⁵ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

¹⁶ Orders P-170, P-1487, MO-2347-I and PO-2751.

¹⁷ Orders PO-2034 and P-1340.

¹⁸ See *R. v. Mentuck*, [2001] 3 SCR 442.

reasonably be expected to hinder or compromise the effective utilization of this investigative technique or procedure.

[47] The police have not claimed any other exemptions for this information and, as a result, I will order that it be disclosed.

D. Did the institution exercise its discretion under section 38(b)? If so, should this office uphold the exercise of discretion?

[48] The section 38(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, this office may determine whether the institution failed to do so.

[49] In addition, this office 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.

[50] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁹ This office may not, however, substitute its own discretion for that of the institution.²⁰

[51] Relevant considerations in determining whether the institution properly exercised its discretion may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:²¹

- 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

¹⁹ Order MO-1573.

²⁰ Section 43(2).

²¹ Orders P-344 and MO-1573.

- 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
- 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.

[52] The police submit that they released as much of the appellant's personal information as possible and submit that they properly exercised their discretion in responding to the appellant's requests.

[53] As noted above, in his representations the appellant provides some background information about why he is seeking the records at issue. This includes his concerns about how he has been treated by members of the police service, his references to certain legal proceedings and his view that access to the records would assist him. The appellant provides additional information in support of his position. The appellant also submits that the police acted in bad faith in failing to take into account all of the circumstances surrounding his access request, and have erred in exercising their discretion in this case.

[54] On my review of the manner in which the police exercised their discretion in this appeal, I am satisfied that they properly did so. With respect to their exercise of discretion under section 38(b), I find that the police considered the sensitive nature of the information and the interests of the affected party and the appellant. Although the appellant references his concerns about the manner in which the police have dealt with him in the past, I am not satisfied that the police improperly exercised their discretion in this appeal, and I uphold their exercise of discretion under section 38(b) of the *Act*.

ORDER:

1. I order the police to disclose the withheld portions of page 2 of each of the three records to the appellant by **March 21, 2018**.

2. I uphold the decision of the police to deny access to the withheld portion of page 1 of Record A on the basis of the exemption in section 38(b) of the *Act*.

Original Signed by: _____

Frank DeVries
Senior Adjudicator

February 15, 2018 _____