Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3615

Appeal MA17-372

Sault Ste. Marie Police Services Board

May 28, 2018

Summary: The police received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to certain police records between specified dates and regarding a particular investigation. The police granted partial access to the records, with severances pursuant to the exemptions in sections 38(a) applied in conjunction with the law enforcement exemption at sections 8(1)(c) and 8(1)(l), and the discretionary personal privacy exemption at section 38(b). The police also withheld information on the basis that it was not responsive to the appellant's request. In this order, the adjudicator finds that the information does not qualify for exemption pursuant to section 38(a), read with section 8(1)(c), and orders that information to be disclosed. The adjudicator upholds the police's decision to deny access under section 38(a), together with section 8(1)(l), and upholds the police's application of section 38(b), as well as its decision to deny access to information that is not responsive to the request.

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

Orders and Investigation Reports Considered: Orders MO-2424, MO-3393, PO-2254, and PO-3662.

Cases Considered: *Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg*, December 21, 1995, Toronto Doc. 220/95, leave to appeal to the Court of Appeal refused at [1996] O.J. No. 1838 (C.A.).

OVERVIEW:

[1] The Sault Ste. Marie Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to certain police records. Specifically, the requester sought all reports dated September 14, 2006 and September 18-19, 2006 including "complete info on so-called phone infor. [sic] of call to [a specified location] and original dialogue relating to" a specified third party.

[2] The police located records responsive to the request and issued a decision granting partial access to them, relying on sections 38(a) (discretion to refuse requester's own information) in conjunction with section 8(1)(c) (reveal investigative techniques or procedures), and section 38(b) (personal privacy) to deny access to the portions they withheld.

[3] The requester appealed the police's decision to this office, becoming the appellant in this appeal.

[4] During mediation, the police explained that they also withheld information relating to the printing of the records at issue because, in their view, it was not responsive to the request.

[5] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process. The adjudicator began the inquiry by inviting the police's representations in response to the Notice of Inquiry. The adjudicator then invited the appellant to provide representations in response to the Notice of Inquiry and the non-confidential portions of the police's submissions, which were shared in accordance with *Practice Direction Number 7* and the IPC's *Code of Procedure*.

[6] The file was then transferred to me to complete the inquiry. For the reasons that follow, I order the police to disclose portions of the records withheld pursuant to section 38(a), together with section 8(1)(c). I uphold the police's decision to deny access to other information under section 38(a), together with section 8(1)(l) (facilitate the commission of an unlawful act),[1] and uphold the police's application of section 38(b). I also uphold the police's decision to deny access to information that is not responsive to the appellant's request.

RECORDS:

[7] The records at issue consist of an occurrence summary (pages 1-2), arrest report (page 3), case file synopsis (page 4), and witness statements (pages 5-17). In total, there are 17 pages at issue.

[1] The application of section 38(a) in conjunction with section 8(1)(l) was raised by the police at the inquiry stage of the appeal process.

ISSUES:

A. Late raising of the discretionary section 8(1)(l) exemption by the police

B. What is the scope of the request? What information is responsive to the request?

C. Do the records contain "personal information" as defined in section 2(1) of the *Act*?

D. Does the discretionary personal privacy exemption in section 38(b) apply?

E. Do the records contain law enforcement information that is exempt under the discretionary exemption in section 38(a), in conjunction with section 8(1)(c) or 8(1)(l)?

F. Did the institution exercise its discretion under sections 38(a) and 38(b)?

DISCUSSION:

Issue A: Late raising of the discretionary section 8(1)(l) exemption by the police

[8] In the representations provided during adjudication, the police raised the exemption at section 38(a) in conjunction with 8(1)(l). Since the police first raised this discretionary exemption more than 35 days after they were notified of the appeal, the late raising of this exemption is an issue that I must consider.

[9] The IPC's *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.

[10] 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]

[11] 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]

[12] In their submissions, the police state that a review of past orders has led them to believe that they should have claimed section 8(1)(l) with respect to the police code information that appears in some of the records at issue. Until this point, the police had only relied on the discretionary exemption in section 38(a) together with section 8(1)(c) for this information.

[13] The appellant's submissions do not address the application of section 38(a) in conjunction with section 8(1)(l), nor do they address the police's late raising of the exemption.

[14] This office has the power to control the manner in which the inquiry process is undertaken.[5] 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*.[6] Nevertheless, this office will consider the circumstances of each case and may exercise its discretion to depart from the policy in appropriate cases.

[15] 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, against harm to the police's interest that may be caused if the exemption claim is not allowed to proceed. In order to assess the possible prejudice, the importance of an exemption claim and the interests the exemption seeks to protect in the circumstances of the appeal can be important considerations.

[16] For the following reasons, I allow the police to raise the applicability of the discretionary section 8(1)(l) exemption.

[17] First, the appellant was aware from the police's decision letter that the police intended to withhold information pursuant to the law enforcement exemption at section

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[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.
[5] Orders P-345 and P-537.
[6] 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.).

8(1) of the *Act*, read in conjunction with section 38(a). Therefore, the appellant had notice from the outset that the police were claiming a law enforcement exemption for some information in the records.

[18] In addition, while the police added the application of section 8(1)(l) in particular during adjudication, no additional information was sought to be withheld from disclosure. The police claimed the additional exemption for the same information that was withheld in its original decision. Therefore, the appellant was already aware that this information was at issue and suffered no delay in its non-disclosure.

[19] I also note that the police raised the new exemption claim before the appellant made his representations. Therefore, the inclusion of the newly claimed exemption has not resulted in any delays to the adjudication process.

[20] In addition, the police's representations clearly state, "A review of past orders has [led] this institution to believe that we should have also included and used 8(1)(l) regarding the police codes involved in these records […]" thereby indicating that the exemption is being raised late. The appellant was provided with an opportunity to respond to the police's submissions and to provide full representations as to whether the information qualifies for the exemptions relied upon by the police.

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

[22] I am satisfied that the appellant will not be prejudiced nor will the integrity of the adjudication process be compromised if I allow the police to raise the application of the section 8(1)(l) exemption beyond the 35-day time period. Conversely, there would be some prejudice to the police if I do not allow them to raise the exemption. Weighing these considerations, I have decided to consider the possible application of section 8(1)(l) to the relevant information under Issue E, below.

Issue B: What is the scope of the request? What information is responsive to the request?

[23] The appellant challenges the police's decision to withhold certain information on the basis of non-responsiveness. Therefore, section 17 of the *Act*, which imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records, is relevant. 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).

[24] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*.[7] Generally, ambiguity in the request should be resolved in the requester's favour.[8]

[25] To be considered responsive to the request, records must "reasonably relate" to the request.[9]

Representations

[26] The police submit that they originally received handwritten correspondence from the appellant, following which they contacted the appellant and asked that he submit a Request Form along with the application fee. The appellant submitted a Request Form, on which he requested,

> Complete info on so-called phone infor. of call to [specified location] & original dialogue relating of, to, [specified third party], of Septs 14 2006 and Septs and following Sept 18-19-2006 as requested in original required 3 wks ago info. all related report and by who when [sic].

[27] The police submit that they attempted to speak with the appellant by telephone, but he refused. Instead, he placed a third party on the line. The third party indicated that she would call the police back regarding their questions; however, the police submit that no further information was supplied nor were the questions answered, but she continued to indicate that the appellant wanted the reports.

[28] The police state that a search was conducted to locate any records considered responsive to the appellant's request. Due to the uncertainty of the dates specified in the request ("of Septs 14 2006 and Septs and following Sept 18-19-2006" and "reports dating of Sept 4/2006 & Sept 18-19/2006"), the police submit that they widened the search field to ensure a thorough search of the databases.

[29] The police maintain that no further records exist. In addition, the police maintain that they are not in possession of any "recorded dialogue" between the specified third party and the police in 2006.

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[7] Oder P-880.
[8] Orders P-134 and P-880.
[9] Orders P-880 and PO-2661.

[30] The appellant's submissions do not directly address the scope of his request, nor do they specifically speak to the issues set out below. I have read the appellant's submissions in their entirety, and will consider them when determining each of the issues. Here, I summarize the appellant's submissions to illuminate the reasons for his request, which in turn informs its intended scope.

[31] The appellant submits that the police's "ignorance and obscene attitude" have cost him in many ways since 2006. For example, he submits that due to the police's actions, he has been wrongfully incarcerated; lost his residence; had to move around to find lodging; has spent time living in his car; has spent thousands of dollars and had to file for bankruptcy; and has suffered from anxiety and loss of dignity.

[32] The appellant submits that the police improvised and fabricated facts to enhance their own ideas. The appellant refers to a newspaper article that he claims contains fraudulent statements and demonstrates previous episodes of deceit by the police.

[33] The appellant submits that he has seen many instances of police officers making "mistakes of judgment" as well as engaging in professional misconduct for profit. He maintains that there is a lot of corruption, and that he has witnessed officers using the power of their badges and uniforms "to wrongfully and forcefully" achieve their goals "no matter what." The appellant submits that the police's "many misconducts" impede true justice being served in society. He submits that he does not want these serious issues to be hidden any longer.

[34] The appellant's submissions suggest that he wishes to review the records to determine whether they contain "provocative" and untrue statements and "distorted events." The appellant maintains that he has seen "many similar cases left in darkness" but now his case is one of the same and it is time for actions, recourse, penalties, and restitution with costs. The appellant states that his intention is to receive costs for cleared false charges on the record, which have taken "liberties away from [his] good name."

Analysis and findings

[35] Based on my review of the evidence, I accept that the police attempted to contact the appellant upon receipt of his request in order to clarify its scope. When they were unable to obtain satisfactory responses from the appellant, the police proceeded by interpreting the request broadly when searching for responsive records.

[36] Upon review of the records at issue, I am satisfied that the police adopted a liberal interpretation of the request, and ensured that any ambiguity in the request was resolved in the appellant's favour.

[37] In each record, the police identify the portions that were withheld as being non-responsive to the request. I note that in all cases, this information relates to when the particular record was printed.

[38] In Order PO-2254, the adjudicator found administrative information relating to the printing of the reports to be non-responsive to the appellant's request:

> The information in these portions of the record reflect when the record was printed and by whom, and was created after the appellant's request. I am satisfied that this information is not covered by the scope of the appellant's request, and I uphold the Ministry's decision to withhold this information.

[39] I adopt this reasoning for the purposes of this appeal. From my review of the records, the only information marked as non-responsive relates solely to the date the record was printed. This information does not relate to the incident(s) that is the subject of the appellant's request. Accordingly, I find that the information marked as non-responsive does not reasonably relate to the request and is not within the scope of the appellant's request. I uphold the police's decision to withhold this information as non-responsive to the request, and I will not consider those portions further in this order.

Issue C: Do the records contain "personal information" as defined in section 2(1) of the *Act*?

[40] Under the *Act*, different exemptions may apply depending on whether a record does or does not contain the personal information of the appellant.[10] Where a record contains the appellant's own information, access is addressed under Part II of the *Act* and the exemptions at section 38 may apply. Where a record contains the personal information of individuals other than the appellant, access is addressed under Part I of the *Act*, and the exemptions at sections 6 to 15 may apply.

[41] 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,

[10] Order M-352.

> (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;

[42] 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.[11]

[43] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[12]

Representations

[44] The police submit that an incident involving the appellant and the specified third party was investigated in September 2006. During the course of the investigation, the police obtained the names, sex, dates of birth, addresses, telephone numbers, etc. of a number of individuals. The police maintain that the appellant was provided with copies of the police reports; however, he was denied access to the addresses, personal telephone numbers, dates of birth, etc., contained in the police reports relating to the specified third party/complainant and any witnesses. The police maintain that this information was redacted on the basis that it constitutes other individuals' personal information pursuant to paragraphs (a), (c), and (d) of section 2(1) of the *Act*.

[45] The police also submit that the records contain other personal information of the individuals who made statements to the police.

[46] The appellant's submissions do not address whether the records contain his

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[11] Order 11.

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

personal information or the personal information of other identifiable individuals.

Analysis and findings

[47] Based on my review of the records, I find that they contain the personal information of the appellant and other identifiable individuals.

[48] Specifically, as the occurrence report, arrest report, case file synopsis, and witness statements relate to incidents that were reported to the police involving the appellant's behaviour and his subsequent arrest, I find that they contain the appellant's personal information within the meaning of section 2(1) of the *Act*. This includes statements made by the complainant and witnesses to the police about the appellant, pursuant to paragraph (g) of section 2(1).

[49] In addition, I find that the records contain the personal information of other identifiable individuals, including their dates of birth and sex [paragraph (a)], the addresses and telephone numbers of these individuals [paragraph (d)], and their names along with other personal information about them or where the disclosure of the name would reveal other personal information about them [paragraph (h)].

[50] As I have found that the records contain the personal information of the appellant and other individuals, I will consider whether the withheld information can be exempt from disclosure pursuant to the discretionary exemptions at sections 38(a) or (b), found in Part II of the *Act*.

Issue D: Does the discretionary personal privacy exemption in section 38(b) apply?

[51] 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. Section 38(b) is the discretionary personal privacy exemption under Part II of the *Act*. It 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.

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

[53] If the information falls within the scope of section 38(b), that does not end the matter. Despite this finding, the police may exercise its discretion to disclose the information to the requester. This involves a weighing of the appellant's right of access to his or her own personal information against the other individual's right to protection

of their privacy. I discuss the police's exercise of discretion under Issue F below.

[54] 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 (3) and balance the interests of the parties.[13]

Analysis and findings

[55] The index of records indicates that the police rely on section 38(b) to withhold information in pages 1-7, 9-11, and 13-17. In particular, the police rely on the presumptions in section 14(3)(b) and the factors listed in sections 14(2)(f) and (i) to withhold access to some of the information at issue. These sections read:

> (2) 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;
> >
> > (i) the disclosure may unfairly damage the reputation of any person referred to in the record.
>
> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> > (b) 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.

[56] The police maintain that disclosure of the information at issue would constitute an unjustified invasion of personal privacy on the basis that the records were collected or created as part of an investigation into a possible violation of law that was conducted at the request of the specified third party.

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

[58] 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.[14] The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.[15]

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[13] Order MO-2954.
[14] Orders P-242 and MO-2235.
[15] Orders MO-2213, PO-1849 and PO-2608.

[59] Section 14(3)(b) does not apply if the records were created after the completion of an investigation into a possible violation of law.[16]

[60] I agree with the police's position that the presumption 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, namely the *Criminal Code*. The occurrence summary, arrest report, case file synopsis and witness statements were created by the police as part of their investigation into a possible violation of law; therefore, the presumption in section 14(3)(b) applies to these records, and weighs in favour of non-disclosure of the personal information contained therein.

[61] However, given that the records contain the appellant's personal information, I must also consider and weigh any applicable factors in balancing the appellant's and other individuals' interests.

[62] The police maintain that the factors weighing against disclosure in paragraphs (f) and (i) of section 14(2) apply to the information at issue.

[63] With respect to section 14(2)(f), the police state that the information is highly sensitive as it involves a domestic-related situation and/or criminal harassment related to that domestic situation. The police submit that the appellant's focus and intent appears to centre around records involving the specified third party, her statements, and therefore her personal information and description of events surrounding any or all investigations. In considering the release of records in these situations, the police maintain that they consider the interests of all parties involved. In the case at hand, the police submit that a release of the specified third party's information would not be in her best interests and would be an unjustified invasion of her personal privacy.

[64] The appellant's submissions do not address the factors in section 14(2). Specifically, he does not argue that there are any factors favouring disclosure, and it is not evident from my review that any would apply.

[65] To be considered highly sensitive pursuant to section 14(2)(f), there must be a reasonable expectation of significant personal distress if the information is disclosed.[17] Given the nature of the allegation against the appellant and the relationships between the parties involved, I find it reasonable to expect that the other individuals would experience significant personal distress if their personal information was disclosed to the appellant.[18] Accordingly, I find that the factor favouring non-disclosure in section 14(2)(f) applies to the records.

[66] While the police raise the applicability of section 14(2)(i), they do not provide any evidence to support the claim that disclosure may unfairly damage the reputation of the other individuals whose personal information is contained in the records. Based

[16] Orders M-734, M-841, M-1086, PO-1819 and PO-2019.
[17] Orders PO-2518, PO-2617, MO-2262 and MO-2344.
[18] Order PO-2518, PO-2617, MO-2262, and MO-2433.

on my review of the records, I am not satisfied of this factor's relevance to the records at issue, and I find that it does not apply.

Summary

[67] Given the application of the presumption in section 14(3)(b), the factor weighing against disclosure in section 14(2)(f), and the fact that no factors in favour of disclosure were claimed or established, I am satisfied that the disclosure of the remaining personal information in the records would constitute an unjustified invasion of other individuals' personal privacy. Accordingly, I find that this information is exempt from disclosure under section 38(b) of the *Act*, subject to my review of the police's exercise of discretion.[19]

[68] I note that some of what the police claim to be law enforcement information exempt from disclosure pursuant to the discretionary exemption at section 38(a) in conjunction with section 8(1) also contains the personal information of identifiable individuals other than the appellant. Where this occurs, this information is exempt from disclosure pursuant to section 38(b), regardless of my finding on whether the law enforcement exemption applies.

Issue E: Do the records contain law enforcement information that is exempt under the discretionary exemption in section 38(a), in conjunction with section 8(1)(c) or 8(1)(l)?

[69] Section 38(a) provides additional exemptions to an individual's general right of access to their own personal information held by an institution. In particular, 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.

[70] The police withheld information under the discretionary exemption in section 38(a), together with sections 8(1)(c) and (l), which 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; […]

[19] For clarity, at this point I have determined that the redacted information in the following pages should be withheld as it is either non-responsive or exempt under section 38(b) of the *Act*: 4, 5, 8, 10, 12 and 17. Accordingly, those pages will not be considered for the purpose of my discussion on section 38(a).

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

[71] The term "law enforcement" is defined in section 2(1) of the *Act* and applies to police investigations into possible violations of the *Criminal Code.*[20]

[72] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[21]

Analysis and findings

Section 8(1)(l)

[73] The police note that the appellant has not limited his request to the witness statements of the specified third party, but he also appears to seek access to the portion of the records that were withheld under section 8, including police or administrative codes. As discussed above, the police argue, therefore, that section 8(1)(l) applies to the police codes that appear in some of the records.

[74] The appellant's submissions do not address the application of section 38(a) in conjunction with sections 8(1)(l).

[75] In order to justify the application of section 8(1)(l), the police must provide evidence of how disclosure could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. This office has consistently held that the disclosure of police codes could reasonably be expected to lead to the result envisioned in section 8(1)(l).[22] Given this office's consistent approach to section 8(1)(l), and subject to my findings on the police's exercise of discretion below, I find that the police codes that appear in pages 1, 2, and 3 qualify for exemption under section 38(a) in conjunction with section 8(1)(l) of the *Act*.

Section 8(1)(c)

[76] The police also applied section 38(a) in conjunction with section 8(1)(c) to portions of the occurrence summary (pages 1-2), arrest report (page 3), and witness statements (pages 6, 7, 9, 11, 13, 14, 15, and 16).

[77] The police submit that the responsive records were created pursuant to a law enforcement investigation into a criminal harassment matter over a period of six months. The police submit that during the investigation, officers used investigative techniques to gather information, take witness statements, and investigate a possible violation of the *Criminal Code*.

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[20] Orders M-202 and PO-2085.
[21] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[22] Order M-757. See also, MO-1715, MO-2414, MO-2446, MO-3393, and PO-1665.

[78] The police maintain that "[t]he key purpose of taking a statement from a witness, is to ensure an accurate record of their recollection of an event exists. Statement protocols may vary from Police Service to Police Service." The police submit that the need to safeguard investigative techniques and procedures is paramount to maintaining their effectiveness and upholding the police's ability to successfully carry out its mandate.

[79] The appellant's submissions do not address the application of section 38(a) in conjunction with sections 8(1)(c). He alleges that the police engage in fraudulent and deceitful tactics when conducting investigations, and he hopes to uncover instances of professional misconduct through his access request.

[80] Establishing a section 8 exemption requires the police to provide evidence to satisfy me of a logical connection between disclosure and the potential harm, which the police seek to avoid by applying the exemption.[23] It is not enough for the police to take the position that the harms under section 8 are self-evident from the record.[24] The police must demonstrate a risk of harm that is well beyond the merely possible or speculative although they 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.[25]

[81] With regard to the section 8(1)(c) exemption in particular, 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 will not normally apply where the technique or procedure is generally known to the public.[26] The techniques or procedures must be "investigative". The exemption will not apply to "enforcement" techniques or procedures.[27]

[82] With this standard in mind, I have reviewed the police's representations and the information that remains at issue in pages 6, 7, 9, 11, 13, 14, 15, and 16.[28] I am not persuaded that disclosure of the information over which the police have claimed section 38(a) together with 8(1)(c) could reasonably be exepcted to reveal, hinder or compromise the effective use of police investigative techniquies or procedures.

[83] The police rely on section 8(1)(c) to withhold information relating to the handling of property that was seized during its investigation. In Order MO-2424, Adjudicator Catherine Corban upheld the application of section 8(1)(c) to information regarding "procedures applied by officers at crime scenes or in relation to seized property in order to gather evidence to assist in the resolution of the investigation." I find, however, that the information at issue in the case before me does not reveal investigative techniques

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[23] Orders 188 and P-948.
[24] Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.
[25] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[26] Orders P-170, P-1487, MO-2347-I and PO-2751.
[27] Orders PO-2034 and P-1340.
[28] All of which are witness statements.

or procedures. It appears to be more administrative in nature. I am not satisfied that disclosure of this information would hinder the police's future investigations. Accordingly, sections 38(a) and 8(1)(c) does not apply to this information.

[84] The police also rely on section 38(a) together with 8(1)(c) with withhold information describing the databases that were searched as well as the search results. In Order MO-3393, Adjudicator Gillian Shaw made the following comments relating to police use of databases during investigations:

> 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 acronomyms 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.[29]

[85] Further, in Order PO-3662, Adjudicator Steven Faughnan stated the following in finding that section 14(1)(c), the provincial equivalent to section 8(1)(c), was not applicable:

> The ministry argues that the information withheld under this exemption is information that details techniques and procedures. It submits in particular that they relate to the kinds of prior checks that are conducted by the OPP on suspects, the staging and monitoring activities that are performed, as well as the specific types of OPP resources that are deployed when responding to threats of domestic assault. In addition, the ministry submits that they relate to evaluative tools that the OPP use to consider the threat that someone poses.
>
> […]
>
> In that regard, while revealing some of the remaining information may disclose a risk assessment, in my view, it would not reveal an investigative technique or procedure with respect to the generation of a risk assessment or with respect to the evaluation of a threat that someone poses so as to qualify as an "investigative" technique or procedure under section 14(1)(c).[30]

[86] I agree with the adjudicators' approaches and adopt them for the purposes of this appeal. I am satisfied that the public would generally assume that the referenced databases would be searched by the police in conducting an investigation. I am also

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[29] At para 82.
[30] At paras 124 and 126.

satisfied that disclosure of the information relating to the databases searched and the results of those searches could not reasonably be expected to hinder or compromise the police's effective use of those databases in the future. Accordingly, I find that information is not exempt pursuant to section 38(a) in conjunction with section 8(1)(c). I note, however, that in some cases, the results of database searches contain the personal information of identifiable individuals other than the appellant. Where this occurs, that information is exempt from disclsoure pursuant to section 38(b), per my findings above.

[87] The police also rely on section 38(a) together with section 8(1)(c) to withhold information about a report that was completed by a police officer and about a a consultation that took place in determining whether to lay a charge. The police did not provide representations alleging that existence of this sort of report or consultation would not generally be known to the public, nor did they explain how any investigative technique or procedure would be revealed or compromised if the information is disclosed. The police merely state that the need to safeguard investigative techniques and procedures is paramount to maintaining their effectiveness and upholding the police's ability to successfully carry out its mandate. In the absence of sufficient evidence from the police, I am not satisfied that the information describes any investigative techniques or procedures that would not generally be known to the public, nor does it contain information that could reasonably be expected to reveal investigative techniques and procedures currently in use or likely to be used in law enforcement. Accordingly, I find this information does not fit within the ambit of section 8(1)(c).

[88] Finally, the police rely on section 38(a) in conjunction with section 8(1)(c) to withhold information describing the course of events that took place on particular days during their investigation. The information withheld includes why the police attended a particular location on that day, information they received about the appellant's whereabouts, statements that were taken, a cell number at the police station, and police shift descriptions. In the circumstances of this appeal, the police have not persuaded me that there is a risk of harm "well beyond the merely possible or speculative" to current law enforcement techniques that could reasonably result from the disclosure of this information. As I am not persuaded that disclosure could reasonably be expected to hinder or compromise the effectiveness of police investigative methods, I find that section 8(1)(c) does not apply.

Summary

[89] I find that the police codes that appear in pages 1, 2, and 3 qualify for exemption under section 38(a) in conjunction with section 8(1)(l) of the *Act*, subject to my review of the police's exercise of discretion.

[90] For the remainder of the records, the police have not provided sufficient evidence to demonstrate that the public would not generally know the techniques or procedures mentioned in the records at issue, nor did they sufficiently describe the potential harms that could reasonably be expected to ensue if that information were to

be disclosed. Therefore, I do not uphold the police's application of section 38(a) together with section 8(1)(c) to pages 6, 7, 9, 11, 13, 14, 15, or 16.

[91] 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. The police's exercise of discretion under section 38(a), together with section 8(1)(l), is addressed below.

Issue F: Did the institution exercise its discretion under section 38(a) and section 38(b)?

[92] The section 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.

[93] 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.

[94] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[31] This office may not, however, substitute its own discretion for that of the institution.[32]

Representations

[95] The police submit that in determining whether to disclose the information at issue to the appellant, they looked to the purpose of the *Act*, which states that individuals should have a right of access to their own personal information and that the privacy of individuals (particularly in this matter, the specified third party) should be protected. The police submit that all personal information of the appellant was released to him. The only information not released to the appellant was information related to law enforcement and/or investigative techniques, police codes, personal identifiers of the specified third party and any witnesses, and the specified third party's own description of events.

[96] The police submit that in exercising their discretion to withhold information from the appellant, they took into consideration that the police codes were withheld for law enforcement reasons that outweigh the appellant's right or need to receive such

[31] Order MO-1573.
[32] Section 43(2).

information. The police maintains that the appellant did not present any strong views on the disclosure of this specific information but focused originally on a phone call made by a specified third party and records related to the criminal charge against the appellant.

[97] The police maintain that they acted in good faith when making very limited and specific severances to the records at issue. Further, the police maintain that no information was severed from the records for an improper purpose. The police submit that their exercise of discretion should be upheld.

[98] The appellant's representations do not specifically address the police's exercise of discretion in this case. However, it is clear from his submissions that he does not trust the police to act in good faith.

Analysis and findings

[99] Upon review of the parties' submissions and the records at issue, I find that the police properly exercised their discretion under section 38(a) and section 38(b) of the *Act*. Based on the evidence before me, I am satisfied that the police did not exercise their discretion in bad faith or for an improper purpose in this case. From my review of the records, it is clear that the police considered the principles that the appellant should be able to access his own personal information, and that the affected parties should have their privacy protected. In addition to the privacy protection interests served by the presumptions in section 14(3) and the factors in section 14(2), I am satisfied that the police properly considered the law enforcement interests protected by section 8(1)(l). I am satisfied that the police took relevant factors into consideration and did not take into account irrelevant factors. Accordingly, I uphold the police's exercise of discretion to apply section 38(a) and section 38(b) to the information that I have found qualifies for those exemptions.

ORDER:

1. I order the police to disclose the information over which it claimed section 38(a) in conjunction with section 8(1)(c) in pages 6, 7, 9, 11, 13, 14, 15 and 16. The information is to be disclosed to the appellants by **July 3, 2018** but not before **June 29, 2018**.

2. I uphold the police's decision to withhold the remaining portions of the records under section 38(b), section 38(a) in conjunction with section 8(1)(l), and on the basis that the information is not responsive to the appellant's request.

3. In order to verify compliance with the terms of this order, I reserve the right to require the police to provide me with a copy of the information disclosed to the appellant pursuant to order provision 1.

Original Signed By May 28, 2018

Jaime Cardy
Adjudicator