Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3517

Appeal MA16-246-2

Toronto Police Services Board

November 8, 2017

Summary: The Toronto Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*) for records related to the requester's arrest. The police denied access to the responsive records in part, citing the discretionary personal privacy exemption in section 38(b) and the discretionary exemption in section 38(a) (discretion to refuse requester's own information), in conjunction with section 9(1) (relations with other governments).

In this order, the adjudicator upholds the police's decision under section 38(b) and the police's search for responsive records. The adjudicator does not uphold the police's decision under section 9(1)(d), with section 38(a).

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), 38(b), 14(3)(b), 38(a), 9(1)(d), 17(1).

Orders Considered: MO-1224, MO-1288, MO-3052, and PO-2503.

OVERVIEW:

[1] The Toronto Police Services Board (TPS or the police) received the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*):

> This letter is a request for the disclosure of ALL documents/records related to the [date] arrest of [requester's name] [(requester's date of birth)], including, but not limited to,
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> • records of arrests,
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> • incident reports and witness statements,
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> • names of all officers involved,
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> • memorandum book notes from all officers involved,
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> • all locations to and from which I was transported and times of transport,
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> • records of 9-1-1 call(s) or other call(s) placed to police in regard to the incident,
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> • name of the offender for whom the original call to police was placed.

[2] The requester, now the appellant, initially filed a deemed refusal appeal to this office.

[3] The appeal was resolved when the police issued a decision granting partial access to the records. The police denied access to portions of the records pursuant to the discretionary personal privacy exemption in section 38(b) of the *Act*, and pursuant to the discretionary law enforcement exemption in section 8 of the *Act*.

[4] The police subsequently issued a revised decision granting partial access to the records. The police continued to deny access to portions of the records pursuant to section 38(b). The police also denied access to portions of the records pursuant to the discretionary exemption in section 38(a) of the *Act*, in conjunction with both the law enforcement exemptions in sections 8(1)(c) and 8(1)(l) of the *Act* and the relations with other governments exemption in section 9(1)(d) of the *Act*.

[5] The appellant appealed the police's revised access decision to this office.

[6] During the course of mediation, the appellant advised the mediator that she was appealing the police's decision to withhold portions of the records under the claimed exemptions.

[7] The appellant also questioned the adequacy of the police's search for records. She took the position that all records responsive to the request had not been located by the police.

[8] The police affirmed their access decision but agreed to conduct a second search

for responsive records.

[9] The police subsequently located photographs and issued a supplementary decision granting partial access to these photographs. In the Index of Records, which was forwarded to the appellant, the police claimed the personal privacy exemption in section 38(b) of the *Act* to deny access to some of the photographs, in whole or in part.

[10] The Index of Records also identified the police's decision to deny access to portions of the records that were deemed to be not responsive to the request.

[11] The appellant advised the mediator that she wished to pursue access to the withheld records. She, however, did not wish to pursue access to the following information in the records:

- The particulars of individuals, such as their names, addresses, phone numbers and dates of birth, which had been withheld pursuant to the personal privacy exemption in section 38(b) of the *Act.*

- Police codes and other such information relating to the operations of the police, which had been withheld pursuant to section 38(a) of the *Act*, in conjunction with the law enforcement exemptions in sections 8(1)(c) and 8(1)(l) of the *Act*. The law enforcement exemptions are, accordingly, no longer at issue in this appeal.

- The portions of the records withheld by the police as not responsive to the request.

[12] The appellant also advised the mediator that she continued to believe that all records responsive to the request had not been located.

[13] The appellant also advised the mediator that she wished to proceed to adjudication, where an adjudicator conducts an inquiry, and that she would be raising a constitutional question.

[14] During adjudication, the appellant advised that she did not want access to personal or private information about individuals, but she did want access to contact information that is otherwise available to the public.

[15] Representations were shared between the police and the appellant in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[16] In this order, I uphold the police's decision under section 38(b) and the police's search for responsive records. I do not uphold the police's decision under section 9(1)(d), with section 38(a).

RECORDS:

[17] The records remaining at issue consist of the withheld portions of the following:

- Record of Arrest and Supplementary Records of Arrest;
- Police and Civilian Witness Lists;
- Police Officers' Notes;
- I/CAD (Computer Aided Dispatch) Event Details Report; and
- Photographs.[1]

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 personal privacy exemption at section 38(b) apply to the information at issue?

C. Does the discretionary exemption at section 38(a), in conjunction with the section 9(1)(d) relations with other governments exemption, apply to the information at issue?

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

E. Did the institution conduct a reasonable search for records?

DISCUSSION:

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

[18] 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:

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[1] Excluding the information referred to above that the appellant does not wish to pursue access to.

> "personal information" means recorded information about an identifiable individual, including,
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> > (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,
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> > (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;

[19] 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.[2]

[20] 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.[3]

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

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[2] Order 11.
[3] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[4]

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

[23] The police state that the records were created in connection to a police investigation and contain the names, addresses, telephone numbers, dates of birth and other identifying information about the other identifiable individuals provided to police during the course of the investigation of the specified incident. They submit that the personal information does not relate to individuals in a professional, official or business capacity.

[24] The appellant only states that the records do not contain personal information.

Analysis/Findings

[25] Based on my review of the records at issue, as identified by the police, I find that they contain the personal information of the appellant and other individuals in their personal capacity. Although the records contain some information about individuals in their professional capacity, I find that disclosure of this information would reveal something of a personal nature about them.

[26] As the records contain both the personal information of the appellant and other individuals, I will consider whether the discretionary personal privacy exemption at section 38(b) applies to this information.

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

[27] 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.

[28] 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.

[29] Sections 14(1) to (4) provide guidance in determining whether disclosure of the

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[4] Orders P-1409, R-980015, PO-2225 and MO-2344.
[5] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

information would be an unjustified invasion of personal privacy.

[30] If the information fits within any of paragraphs (a) to (e) of section 14(1) or paragraphs (a) to (d) of section 14(4), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). In this appeal, the information does not fit within these paragraphs of sections 14(1) or (4).

[31] 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.[6]

[32] 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).

[33] The police rely on the presumption in section 14(3)(b), which reads:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where 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;

[34] The police state that section 14(3)(b) applies as they conducted an investigation and gathered personal information about identifiable individuals as part of an investigation into a possible violation of law.

[35] The appellant first raised the application of the *Canadian Charter of Rights and Freedoms* (the *Charter*) when she provided representations in response to the Notice of Inquiry.

[36] The appellant submits that the exception about continuing the investigation in section 14(3)(b) applies, as "…the requested documents are for the purpose of re-examining the evidence in order to determine whether or not a remedy under section 24 of the Charter could be sought…"

[37] Section 24(1) of the *Charter* reads:

> Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to

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[6] Order MO-2954.

> obtain such remedy as the court considers appropriate and just in the circumstances.

[38] The appellant states that she would like a determination that section 24, along with the equality provision in section 15, of the *Charter* protects access to information. She relies on the finding in *Ontario v. Criminal Lawyers Association* that section 2(b) of the *Charter* guarantees freedom of expression, not access to information and that access is a derivative right which may arise where it is a necessary precondition of meaningful expression on the functioning of government. She states:

> It is my position that access to the information at the centre of this appeal is a derivative right based on the fact that the information is a necessary precondition for equality rights and for the enforcement of those guaranteed rights and freedoms. The response to the constitutional question will help to determine the scope of sections 15(1) and 24 protection[s] as [they relate] to access to information.

[39] In reply, the police object to the late raising of the constitutional issue by the appellant and also submit that the appellant is entwining the processes under which 'records' may be accessed through a *MFIPPA* request and that of court disclosure under which relevant 'evidence' is provided to a defendant to prepare a proper defense. They state that she mistakenly assumes that information once provided through court disclosure, or heard during a trial, is somehow exempt from the provisions of *MFIPPA*.

[40] In sur-reply, the appellant states that she is requesting access to the records as a victim of multiple violations of her rights under the *Charter* by members of the police.

Analysis/Findings

[41] As noted above, the police rely on the presumption in section 14(3)(b). This presumption can apply to a variety of investigations, including those relating to by-law enforcement[7] and violations of environmental laws or occupational health and safety laws.[8]

[42] I find that the presumption in section 14(3)(b) applies to the information at issue in the records. It is clear from the wording of the appellant's request and the parties' representations that the records were compiled and are identifiable as part of an investigation into a possible violation of law.

[43] 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

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[7] Order MO-2147.
[8] Orders PO-1706 and PO-2716.

into a possible violation of law.[9] The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.[10]

[44] I do not accept the appellant's argument that the exception to continue the investigation in section 14(3)(b) applies. In Order PO-2503, the appellant in that appeal sought disclosure of a police report in order to allow him to pursue a possible legal action. He also relied upon the provision in section 21(3)(b) of the *Freedom of Information and Protection of Privacy Act*[11] that allows for the disclosure of information, if the disclosure is necessary to continue an investigation into a possible violation of law.

[45] In Order PO-2503, I stated:

> I do not accept the appellant's submission that the information should be disclosed as it is necessary for him to pursue a legal action against the identifiable individual listed in the record, and that this constitutes a continuation of the investigation within the meaning of section 21(3)(b). Prior orders have provided that an appellant's own "investigation" does not constitute the continuation of the "investigation into a possible violation of law" referred to in section 21(3)(b). In Order PO-2167, Adjudicator Bernard Morrow stated:
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> > I acknowledge the appellant's concerns that he requires this information in order to complete his own investigation. However, in my view, the drafters of the *Act* did not intend to justify the rebutting of the presumption against disclosure under section 14(3)(b) in circumstances where a private individual or organization wished to pursue their own investigation. The phrase "continue the investigation" refers to the investigation in which the information at issue was compiled. This view has been followed in previous orders of this office (Orders MO-1356, M-718 and M-249).

[46] I find that the purpose of the appellant's request is to pursue her own investigation. The records concern the circumstances surrounding the appellant's arrest for assault. She considers herself to be both the accused and a victim and claims that she is requesting the records as a victim of violations of her rights by the Crown and the police.

[47] The appellant states that the information at issue should have been disclosed

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[9] Orders P-242 and MO-2235.
[10] Orders MO-2213, PO-1849 and PO-2608.
[11] Section 21(3)(b) of the *Freedom of Information and Protection of Privacy Act* (*FIPPA*), the provincial equivalent of section 14(3)(b) of *MFIPPA*.

during the criminal proceedings brought against her. She states that she requires the information to ascertain whether or not false or misleading statements were made under oath at her trial. She states that the information at issue in the records:

> …was relevant in that it relates to my testimony given at trial. Because there are discrepancies between the information contained in the disclosed portions of the officers' memorandum book notes and the officers' testimony during the trial, full disclosure of the record is necessary to ascertain whether or not false or misleading statements were made under oath.

[48] I agree with the police that the appellant is confusing access to information with the process of disclosure under the criminal system. The appellant quotes from Order MO-1224, as follows:

> In my view, the appellant is confusing access under the *Act* to disclosure in the criminal context. I find that the rights the accused is entitled to under due process of law are not relevant to an access request for personal information under the *Act*. However, I find that disclosure of this information in the records is relevant to the appellant's ability to understand and monitor the manner in which the Police investigated the matter.
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> .. in weighing the appellant's rights to disclosure of the information and the factors weighing in favour of non-disclosure, I find that, in the circumstances of this appeal, the sensitivity and confidentiality of the law enforcement investigation outweigh the appellant's desire to know what and how the police are conducting their investigation.

[49] Although she quotes from Order MO-1224, the appellant does not dispute the police's submission that what she is seeking is to obtain greater disclosure of records produced in the criminal cases in which she is involved in and has confused the process of disclosure under the criminal system with that of disclosure under *MFIPPA*.

[50] Concerning the information at issue, as noted above, the appellant does not want access to:

- the particulars of individuals, such as their names, addresses, phone numbers and dates of birth,
- police codes and other such information relating to the operations of the police, and
- the portions of the records withheld by the police as not responsive to the request.

[51] Taking this into account, remaining at issue under section 38(b) is the information from the following pages of the records:

- Pages 2, 3, 7, 10, 18 to 23, 26 to 40, 42 to 46, 52 to 64, 68 to 73, 77 to 90 and portions or all of the photographs in the remaining pages.[12]

[52] Based on my review of this information, I find that it primarily consists of the personal information of individuals other than the appellant. This information is all personal information compiled as part of an investigation into a possible violation of law.

[53] Therefore, I find that the presumption in section 14(3)(b) applies to the information at issue in the records.

[54] The appellant was advised in the Notice of Inquiry that section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.[13] Some of the factors favour disclosure of information under *MFIPPA*. The appellant was also advised that the list of factors under section 14(2) is not exhaustive.

[55] The appellant indicated in her representations that section 14(2) did not apply in this appeal.

[56] As stated above, 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.[14]

[57] In this appeal the presumption in section 14(3)(b) applies. No factors favouring disclosure have been raised by the parties. Therefore, I find that disclosure of the information at issue in the records is presumed to be an unjustified invasion of personal privacy under section 38(b).

[58] Subject to my review of the absurd result principle and the police's exercise of discretion, the information at issue is exempt under section 38(b).

Absurd result

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

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[12] The police claim that section 9(1)(d) applies to the information at issue at pages 12 and 47 and some of the information at issue on page 35.
[13] Order P-239.
[14] Order MO-2954.

exemption.[15]

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

- the requester sought access to his or her own witness statement[16]
- the requester was present when the information was provided to the institution[17]
- the information is clearly within the requester's knowledge[18]

[61] However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.[19]

[62] The appellant relies on the absurd result principle and states that as the accused in a criminal case, she was not given access to all available evidence as required by law. She claims that the police redacted from the records information that had already been presented at trial, and is, therefore, clearly within her knowledge, including all accounts of what transpired on the date of the incident in the record in 2007 when she was unresponsive.

[63] Based on my review of the records at issue and the appellant's representations, I find that the Absurd Result Principle does not apply. The information at issue is not clearly within her knowledge. As well, the appellant is not seeking access to her own witness statement and, based on the information in the records, it is not evident that she was present when the information was provided to the police by other individuals. In fact, the appellant admits that she was not even responsive when some of the information was obtained by the police.

[64] Accordingly, I find that the absurd result principle does not apply in this appeal.

[65] Lastly, I will briefly address the appellant's representations relating to the application of the *Charter*.

[66] The police argue that the appellant's request for *a Charter* remedy is late and refer to the IPC's *Code of Procedure for Appeals Under FIPPA and MFIPPA* states:

> 12. Constitutional Questions- Raised by a party:

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[15] Orders M-444 and MO-1323.
[16] Orders M-444 and M-451.
[17] Orders M-444 and P-1414.
[18] Orders MO-1196, PO-1679 and MO-1755.
[19] Orders M-757, MO-1323 and MO-1378.

> 12.01 An appellant may raise a constitutional question in an appeal only within 35 days after giving the IPC notice of the appeal. Any other party may raise a constitutional question only within 35 days after the party is notified of the appeal.

[67] Even if I were to accept the appellant's late application for a *Charter* remedy, I find that the appellant has not provided me with sufficient evidence as to how her rights or freedoms, as they relate to the disclosure of the information at issue under *MFIPPA*, have been infringed or denied under section 24(1) of the *Charter*.

[68] I find that the appellant's *Charter* argument concerns disclosure of information to her with respect to the criminal proceedings brought against her and not with respect to the denial of access under *MFIPPA*. I agree with the police that the appellant mistakenly assumes that all information once provided through court disclosure, or heard during a trial, should somehow be not exempt under the provisions of *MFIPPA*.

[69] I have also considered the appellant's reference to section 15(1) of the *Charter* in her representations. This section reads:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[70] From my review of the appellant's representations and the information at issue in the records, I cannot see how either sections 15(1) or 24(1) of the *Charter* apply.

C. Does the discretionary exemption at section 38(a), in conjunction with the section 9(1)(d) relations with other governments exemption, apply to the information at issue?

[71] 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.

[72] Section 38(a) reads:

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

[73] 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.[20]

[74] 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.

[75] The police claim that section 38(a) in conjunction with section 9(1)(d) applies to the information at issue at pages 12 and 47 and some of the information at issue on page 35. Section 9 states:

> (1) A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,
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> (a) the Government of Canada;
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> (b) the Government of Ontario or the government of a province or territory in Canada;
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> (c) the government of a foreign country or state;
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> (d) an agency of a government referred to in clause (a), (b) or (c); or
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> (e) an international organization of states or a body of such an organization.
>
> (2) A head shall disclose a record to which subsection (1) applies if the government, agency or organization from which the information was received consents to the disclosure.

[76] The purpose of this exemption is to ensure that governments under the jurisdiction of the *Act* continue to obtain records which other governments might otherwise be unwilling to supply without having this protection from disclosure".[21]

[77] If disclosure of a record would permit the drawing of accurate inferences with respect to information received from another government, it may be said to "reveal" the information received.[22]

[78] For a record to qualify for this exemption, the institution must establish that:

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[20] Order M-352.
[21] Order M-912.
[22] Order P-1552.

1. disclosure of the record could reasonably be expected to reveal information which it received from one of the governments, agencies or organizations listed in the section; and

2. the information was received by the institution in confidence.[23]

[79] The focus of this exemption is to protect the interests of the supplier of information, and not the recipient. Generally, if the supplier indicates that it has no concerns about disclosure or vice versa, this can be a significant consideration in determining whether the information was received in confidence.[24]

[80] The police claim that section 9(1)(d) applies to the information at issue at pages 12 and 47 and some of the information at issue on page 35. It provided both confidential and non-confidential representations on the application of this exemption.

[81] In their non-confidential representations,[25] it states that the information is from the Canadian Police Information Centre (CPIC) database and quotes from the CPIC manual, as follows:

> Information that is contributed to, stored in and retrieved from CPIC is supplied in confidence by the originating agency for the purposes of assisting in the detection, prevention or suppression of crime and enforcement of law.

[82] The police were asked in the Notice of Inquiry whether it sought consent under section 9(2) to disclose the record. This section reads:

> A head shall disclose a record to which subsection (1) applies if the government, agency or organization from which the information was received consents to the disclosure.

[83] The police states that it:

> … is under no obligation to seek the consent of the organization in question… As this entry relates to an incident to have occurred approximately 10 years ago, this institution did not seek the consent of the organization in question and exercised its discretion to deny access.

[84] The appellant's representations focus on the police's exercise of discretion under section 38(a) concerning this exemption.

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[23] Orders MO-1581, MO-1896 and MO-2314.
[24] Orders M-844 and MO-2032-F.
[25] All of the police's representations in this appeal were non-confidential, except for two short severances under section 9(1)(d).

Analysis/Findings

[85] In Order MO-3052, similar records were at issue to those at issue in this appeal, namely, police reports that contain a requester's personal information. In that appeal, the police submitted that section 9(1)(d) applied. In that order, in not upholding the application of this exemption, the adjudicator stated:

> This office has consistently found in previous orders that CPIC records containing a requester's personal information do not qualify for exemption under section 9(1)(d) of the *Municipal Freedom of Information and Protection of Privacy Act.*[26] In Order MO-1288, former Adjudicator Holly Big Canoe rejected the argument of the Toronto Police Service that they had received CPIC information "in confidence" for the purposes of the section 9(1)(d) exemption:
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> > The CPIC computer system provides a central repository into which the various police jurisdictions within Canada enter electronic representations of information they collect and maintain. Not all information in the CPIC data banks is personal information. That which is, however, deserves to be protected from abuse. Hence, a reasonable expectation of confidentiality exists between authorized users of CPIC that the personal information therein will be collected, maintained and distributed in compliance with the spirit of fair information handling practices. However, the expectation that this information will be treated confidentially on this basis by a recipient is not reasonably held where a requester is seeking access to his own personal information.
> >
> > There may be specific instances where the agency which made the entry on the CPIC system may seek to protect information found on CPIC from the data subject. Reasons for this might include protecting law enforcement activities from being jeopardized. These concerns will not be present in every case, and will largely depend on the type of information being requested. The Police have not identified any particular concerns in this area in the circumstances of this appeal, and it is hard to conceive of a situation where an agency inputting suspended driver or criminal record information would require the Police to maintain its confidentiality from the data subject. In fact, although members of the public are not authorized to access the CPIC

[26] Orders MO-1288, MO-2508, PO-2647 and PO-3075. In the provincial *Act*, the relevant provision is section 15(b).

> system itself, the CPIC Reference Manual[27] contemplates disclosure of criminal record information held therein to the data subject, persons acting on behalf of the data subject, and disclosure at the request or with the consent of the data subject.
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> Accordingly, I find that there is no reasonable expectation of confidentiality in the circumstances of this appeal, where the appellant is the requester and the information at issue relates to the suspension of the appellant's drivers licence and a history of his previous charges and convictions, the fact of which he must be aware. In my view, section 9(1)(d) does not apply to the [withheld records].

[86] The adjudicator in Order MO-3052 adopted the reasoning in Order MO-1288 and found the following:

> There are certainly circumstances in which the police receive records in confidence from the RCMP. Indeed, in the appeal before me, the pages of record 10 that I found, above, to be exempt under section 38(b), together with section 14(3)(b), would have fallen into that category. However, with respect to the appellant's personal information, I conclude that there is no reasonable expectation of confidentiality. As in Order MO-1288, the appellant is the requester and in this case the information relates only to whether or not there are entries on CPIC related to him. Given my conclusion that there is no reasonable expectation of confidentiality in the appellant's personal information on page 3 of record 10 for the purpose of the exemption in section 9(1)(d), I find that it does not apply. Therefore, I find that section 38(a), in conjunction with section 9(1)(d), does not apply to the appellant's personal information on page 3 of record 10.

[87] I adopt the reasoning in Order MO-3052 and the orders cited therein. The appellant is seeking access to her own personal information. The information withheld by the police under section 9(1)(d) is information obtained from CPIC records and only contains the appellant's personal information.

[88] At issue is the information found on pages 12 and 47 and some of the information at issue on page 35. This information is from 2006 and only concerns the appellant. The police acknowledge in their representations that the information is about the appellant. They have not raised the application of the law enforcement exemption in section 8 or the personal privacy exemption in section 38(b) to this information, nor have they identified any particular concerns in this area in the circumstances of this appeal.

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[27] Only Part 8 of the (current) CPIC Policy Manual was excerpted by the police and provided with their representations in this appeal.

[89] Accordingly, relying on the findings set out above in Order MO-3052 and the orders cited therein, I find that the information at issue which is the appellant's personal information, is not exempt under section 9(1)(d), read with section 38(a).

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

[90] 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, the Commissioner may determine whether the institution failed to do so.

[91] 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.

[92] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[28] This office may not, however, substitute its own discretion for that of the institution.[29]

[93] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[30]

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information

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[28] Order MO-1573.
[29] Section 43(2).
[30] Orders P-344 and MO-1573.

- 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.

[94] The police state that section 38(b) applies because the records contain the personal information of individuals other than the appellant. It contends the following:

- it did not exercise its discretion in bad faith or for an improper purpose;
- it took into account all irrelevant considerations; and,
- it took into account all relevant considerations

[95] The police further state that:

> This institution will not contest the appellant's assertion of being a part of a marginalized group, nor her global argument regarding exploited persons; however, nowhere in the responsive records is the appellant identified as a victim. She is, however identified as the accused in an assault police incident where her personal situation is of no consequence.
>
> This institution, via the *MFIPPA* access to information process, adhered to the mandate and spirit of the *Act* by providing the appellant with the right of access. They relied upon exemptions to information were appropriate, limited and specific and applied in good faith.

[96] The appellant submits that the police exercised their discretion under section 38(b) in bad faith and took into consideration irrelevant factors, while failing to consider relevant factors.

[97] The appellant states:

> My request was for information about an arrest relating to a [#] Division case that occurred on 8 May 2007; however, the TPS chose to disclose

> information contained in the memorandum book notes of Detective [name], relating to a [#] Division case which it had received "in confidence" from a government organization in April of 2006 and which does not relate to the information requested…
>
> If, in the exercise of their discretion, the TPS relied upon instructions in the CPIC manual, then the confidentiality of all information, including the disclosed information received from the CPIC approximately 11 years ago, would also have been respected…
>
> Therefore, the age of the information is not a relevant factor and their disregard for confidentiality suggests that other irrelevant factors were considered.

Analysis/Findings

[98] The appellant is objecting to receiving information in some pages of the records about a 2006 incident she was involved in, as she had only requested information about a 2007 incident. The information about the 2006 incident was contained in the records describing the 2007 incident at issue in this appeal, therefore, I do not agree that the police exercised their discretion improperly by disclosing information about the earlier incident.

[99] The appellant is also claiming that the police exercised their discretion in an improper manner by not considering that she has made this request in capacity as a victim and an accused.

[100] I find that the police did not withhold information from the records on the basis of the capacity within which the appellant made her request.

[101] Based on my review of the records and the parties' representations, I find that the police exercised their discretion in a proper manner, taking into account relevant factors and not taking into account irrelevant factors in deciding to withhold the information I have found subject to section 38(b).

[102] Therefore, I find that the information that I have found subject to section 38(b) is exempt under this exemption.

E. Did the institution conduct a reasonable search for records?

[103] The police were asked to provide a written summary of all steps taken in response to the request. In particular, they were asked:

> 1. Did the institution contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.

2. If the institution did not contact the requester to clarify the request, did it:

(a) choose to respond literally to the request?

(b) choose to define the scope of the request unilaterally? If so, did the institution outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did the institution inform the requester of this decision? Did the institution explain to the requester why it was narrowing the scope of the request?

3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.

4. Is it possible that such records existed but no longer exist? If so, please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

5. Do responsive records exist which are not in the institution's possession? Did the institution search for those records? Please explain.

[104] The police state that the appellant was unambiguous in detailing the records she sought to access; therefore, additional clarification on the part of this institution was not required. They state that the incident in the records, is very straightforward, and describes in detail what information the appellant is seeking access to.

[105] The police state that the relevant responsive records, as interpreted by an experienced employee of the institution, were thought to only consist of the arrest report, the Event Details Report (911-call print out) and the memorandum book notes of the attending officers.

[106] The police state that, although responsive, the photographs of the officers' injuries were thought to be the only photographic records in relation to the incident surrounding this request; and as access was not going to be granted to these records, the photographs were overlooked during the initial processing of this request in lieu of the more substantive records. They state that during mediation the appellant raised the issue of the responsive photographs and also inquired about property, i.e. a "credit card slip" believed by the appellant to have been seized by police. They state that photographs were gathered and the mediator was also provided information, to forward to the appellant, regarding the police's Property Video Evidence Management Unit and the process in which seized property is returned to the rightful owner.

[107] In response, the appellant does not respond directly to the police's representations, but instead refers to records that should have been disclosed during her trial.

Analysis/Findings

[108] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.[31] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[109] 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 show that it has made a reasonable effort to identify and locate responsive records.[32] To be responsive, a record must be "reasonably related" to the request.[33]

[110] 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.[34]

[111] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[35]

[112] 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.[36]

[113] In this appeal, I find that the appellant has not provided a reasonable basis for me to conclude that additional responsive records exist. I find that the police have conducted a reasonable search and I uphold their search.

ORDER:

1. I order the police to disclose the appellant by **December 11, 2017** the information on pages 12 and 47 and some of the information at issue on page 35

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[31] Orders P-85, P-221 and PO-1954-I.
[32] Orders P-624 and PO-2559.
[33] Order PO-2554.
[34] Orders M-909, PO-2469 and PO-2592.
[35] Order MO-2185.
[36] Order MO-2246.

that they have applied the section 9(1)(d) exemption, in conjunction with section 38(a).

2. I uphold the police's decision that the information they have claimed is subject to the personal privacy exemption in section 38(b) is exempt under this section.

3. I uphold the police's search for responsive records.

Original Signed by: November 8, 2017

Diane Smith
Adjudicator