

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-3622

Appeal MA16-661

Peel Regional Police Services Board

June 14, 2018

**Summary:** Peel Regional Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* for street check records relating to the requester. The police denied access to two street check records in part, citing the personal privacy exemption in section 14(1) or 38(b) and the law enforcement exemptions in sections 8(1)(g) (intelligence information) and 8(1)(l) (facilitate commission of a unlawful act) in conjunction with section 38(a) (discretion to refuse requester's own information).

In this order, I uphold the police's decision under the discretionary personal privacy exemption in section 38(b) that the personal information of individuals other than the appellant in the records is exempt. I uphold the application of section 38(a) in conjunction with section 8(1)(l) to the 10-code information in Record 1. I do not uphold the application of section 38(a) with sections 8(1)(g) or 8(1)(l) to the CPIC information in Record 2.

**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), 8(1)(g), 8(1)(i).

**Orders Considered:** Order MO-2871.

### OVERVIEW:

[1] Peel Regional Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA or the Act) for

all records in the police database relating to the requester, including carding information and a request to know which police members accessed his criminal records.

[2] In response to the request, the police located records, including street check records, and issued a decision granting partial access to the records, with redactions pursuant to sections 14(1) and 38(b) (personal privacy) with reference to the presumption in section 14(3)(b) (investigation into violation of law), and 38(a) (discretion to deny requester's own information) in conjunction with section 8(1)(g) (intelligence information) of the *Act*.

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

[4] During mediation, the appellant sought clarification about the existence and nature of the street check records. The mediator conferred with the police, who confirmed that there are three responsive records resulting from street check interactions between the police and the appellant. The appellant advised the mediator that he is only interested in obtaining access to the street check records.

[5] Mediation did not resolve the appeal, and it was transferred to the adjudication stage of the appeal process for an adjudicator to conduct an inquiry. The adjudicator formerly assigned to this appeal decided to begin the inquiry by sending the police a Notice of Inquiry setting out the facts and inviting representations on the issues.

[6] After receiving the Notice of Inquiry, the police issued a revised decision granting full access to one street check record and partial access to the remaining two street check records. The redactions to the two records were made pursuant to section 14(1) with reference to the presumption in 14(3)(b), and 38(a) in conjunction with sections 8(1)(g) and 8(1)(l) (facilitate commission of an unlawful act) of the *Act*.

[7] The police were then sent a revised Notice of Inquiry and provided representations in response. The appellant was invited to provide representations in response to the police's representations but did not do so.

[8] In this order, I uphold the police's decision under section 38(b) that the personal information of individuals other than the appellant in the records is exempt. I also uphold the application of section 38(a) with section 8(1)(l) to the 10-code information in Record 1. I do not uphold the application of section 38(a) with sections 8(1)(g) and (l) to the CPIC information in Record 2.

## **RECORDS:**

[9] The records remaining at issue are the withheld portions of two street check records, as follows:

<b>Record #</b>	<b>Exemptions claimed</b>
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1	38(b), 38(a) with 8(1)(l)
2	38(b), 38(a) with 8(1)(g) and (l)

**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) (discretion to refuse requester’s own information) in conjunction with the sections 8(1)(g) and 8(1)(l) law enforcement exemptions apply to the information at issue?
- D. Did the institution exercise its discretion under sections 38(a) in conjunction with 8(1)(l), and 38(b)? If so, should this office uphold the exercise of discretion?

**DISCUSSION:**

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

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

“personal information” means recorded information about an identifiable individual, including,

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

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except if they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

[11] 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.<sup>1</sup>

[12] 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.<sup>2</sup>

[13] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.<sup>3</sup>

[14] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.<sup>4</sup>

[15] The police representations assert that the records at issue contain the personal information of third parties but did not provide specific representations on this issue. The appellant did not provide representations in the course of this appeal.

[16] Both records at issue include personal information in the form of dates of birth, addresses, and the genders of individuals who interacted with police officers. As well,

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<sup>1</sup> Order 11.

<sup>2</sup> Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

<sup>3</sup> Orders P-1409, R-980015, PO-2225 and MO-2344.

<sup>4</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

one record contains an identifying number associated with another individual, namely their licence plate number.

[17] This information qualifies as personal information under the definition at section 2(1) of the *Act* under paragraphs (a), (c), (d), and (h). The two records in question each contain the aforementioned personal information relating to distinct third parties, and both records contain the aforementioned personal information relating to the appellant.

[18] Therefore, the records in question contain both the appellant's and other individuals' personal information. Accordingly, I will consider whether the discretionary personal privacy exemption in section 38(b) applies to the personal information of other individuals in the records.

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

[19] 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.

[20] 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.<sup>5</sup>

[21] Sections 14(1) to (4) provide guidance in determining whether disclosure of the information would be an unjustified invasion of personal privacy.

[22] If the information fits within any of paragraphs (a) to (e) of section 14(1) or paragraphs (a) to (c) 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.

[23] 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.<sup>6</sup>

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<sup>5</sup> See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 38(b).

<sup>6</sup> Order MO-2954.

[24] 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).

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

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

[26] 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.<sup>7</sup> The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.<sup>8</sup>

[27] Section 14(3)(b) does not apply if the records were created after the completion of an investigation into a possible violation of law.<sup>9</sup>

[28] The presumption can apply to a variety of investigations, including those relating to by-law enforcement<sup>10</sup> and violations of environmental laws or occupational health and safety laws.<sup>11</sup>

[29] The police state that the redacted information does not relate to the appellant, and is solely the personal information of two separate individuals.

[30] The police further state that the information at issue was compiled as part of an investigation into a possible violation of the *Highway Traffic Act* (the *HTA*) and/or the *Criminal Code of Canada*, although no charges were laid.

[31] In the initial, and in the revised, Notice of Inquiry, the police were asked to answer the following question:

Was the personal information compiled and is it identifiable as part of an investigation into a possible violation of law? Please identify the law or legislative provision.

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<sup>7</sup> Orders P-242 and MO-2235.

<sup>8</sup> Orders MO-2213, PO-1849 and PO-2608.

<sup>9</sup> Orders M-734, M-841, M-1086, PO-1819 and PO-2019.

<sup>10</sup> Order MO-2147.

<sup>11</sup> Orders PO-1706 and PO-2716.

[32] Other than generally citing the *HTA* and the *Criminal Code*, the police did not identify the law or legislative provision that the police relied on to investigate a possible violation of law. Nor can I ascertain such a law or legislative provision from my review of the records.

[33] I cannot find, therefore, that the information at issue was compiled and is identifiable as part of an investigation into a possible violation of law. As a result, the presumption in section 14(3)(b) does not apply.

[34] 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.<sup>12</sup>

[35] The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2).<sup>13</sup>

[36] The police and the appellant were asked whether

... any of the section 14(2) factors apply, or are there any unlisted factors or relevant circumstances that should be considered?

[37] Neither party provided a response to this question about section 14(2).

[38] As noted 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.

[39] In the absence of representations from the appellant as to whether any of the factors in section 14(2) favouring disclosure apply, and considering that only the personal information of individuals other than the appellant is at issue and given the nature of this information and the fact that it was collected by the police, I find on balance that the privacy interests of these other individuals prevail. These interests weigh in favour of protecting these individuals' privacy and outweigh any interest the appellant has in disclosure of these individuals' personal information in the records.

[40] Therefore, subject to my review of the police's exercise of discretion, the personal information at issue in the records is exempt under section 38(b).

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<sup>12</sup> Order P-239.

<sup>13</sup> Order P-99.

**C. Does the discretionary exemption at section 38(a) (discretion to refuse requester's own information) in conjunction with the sections 8(1)(g) and 8(1)(l) law enforcement exemptions apply to the information at issue?**

[41] 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.

[42] 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.

[43] 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.<sup>14</sup>

[44] 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.

[45] In this appeal, the police have claimed the application of the exemptions at sections 8(1)(g) and 8(1)(l) in conjunction with section 38(a). Sections 8(1)(g) and 8(1)(l) state:

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

(g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;

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

[46] The term "law enforcement" is used in several parts of section 8, and is defined in section 2(1) as follows:

"law enforcement" means,

(a) policing,

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<sup>14</sup> Order M-352.



(b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or

(c) the conduct of proceedings referred to in clause (b)

[47] The term “law enforcement” has covered a police investigation into a possible violation of the *Criminal Code*.<sup>15</sup>

[48] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.<sup>16</sup>

[49] It is not enough for an institution to take the position that the harms under section 8 are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter.<sup>17</sup> The institution must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.<sup>18</sup>

[50] There are two police street check records at issue in this appeal.

### ***Record 1***

[51] The police state that the only remaining information severed from Record 1 is internal police 10-code information. They state that their officers are directed to use 10-codes in all radio communications and also use 10-codes to communicate in written communications. They state that these codes are used by police agencies and other emergency personnel to facilitate confidential communications without publicly identifying the underlying meaning of the message.

[52] The police further state that the messages are encoded so as to avoid those involved in criminal activity from attempting to counter police action, thus reducing the risk of harm to police personnel and the general public. They submit that the security of those encoded messages would be compromised if released and would negate the usefulness of the codes in the future.

[53] I have previously considered the application of section 8(1)(l) to 10-code

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<sup>15</sup> Orders M-202 and PO-2085.

<sup>16</sup> *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

<sup>17</sup> Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

<sup>18</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

information. In Order MO-2871, I stated that:

This office has issued numerous orders with respect to the disclosure of police codes and has consistently found that section 8(1)(l)<sup>19</sup> applies to "10 codes" (see Orders M-93, M-757, MO-1715 and PO-1665), as well as other coded information such as "900 codes" (see Order MO-2014). These orders adopted the reasoning of Adjudicator Laurel Cropley in Order PO-1665:

In my view, disclosure of the "ten-codes" would leave OPP officers more vulnerable and compromise their ability to provide effective policing services as it would be easier for individuals engaged in illegal activities to carry them out and would jeopardize the safety of OPP officers who communicate with each other on publicly accessible radio transmission space....

Concerning section 8(1)(l), I also agree with Adjudicator [Colin] Bhattacharjee in Order MO-2112 that this office has issued numerous orders with respect to the disclosure of police codes and has consistently found that section 8(1)(l) applies to "10 codes". Adopting this reasoning, I find that disclosure of the 10 codes in the records could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime and that section 38(a) read in conjunction with section 8(1)(l) applies to this information. I will consider below whether the police exercised their discretion under section 38(a) in a proper manner concerning this information.

[54] I adopt my previous findings in Order MO-2871, as well as the orders cited therein, and find that the 10-codes at issue are subject to the law enforcement exemption in section 8(1)(l) of the *Act*. Disclosure of this information in the records could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. Subject to my review of the police's exercise of discretion, this information is exempt under section 38(a) read in conjunction with section 8(1)(l).

## ***Record 2***

[55] The police state that the only remaining information in Record 2 is a reference to a Canadian Police Information Centre (CPIC) investigative database notation, the substance of which has already been disclosed to the appellant. They state that this notation on CPIC has since been removed in response to the appellant's request for a file destruction of the RCMP.

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<sup>19</sup> Section 8(1)(l) of the *Municipal Freedom of Information and Protection of Privacy Act* (the municipal *Act*), the equivalent of section 14(1)(l) of *FIPPA*.

[56] The police submit that flagged information on the CPIC investigative database is intended to alert law enforcement officers about past police interventions, which may signal, among other things, future safety and intervention concerns when dealing with the individual. They state that the notation is intended to be used for officer and public safety as well as for investigative purposes and is intended to be kept confidential. They state that:

... all of the "substantive content" information in the record has been disclosed to the appellant, the notation has since been purged from CPIC and access to [the record] has been restricted... it is simply the format of the flag in the CPIC investigative database that the [police] submit is exempt under the law enforcement exemption in MFIPPA.

[57] The police rely on both sections 8(1)(g) and (l) for the CPIC information in Record 2.

[58] The police are concerned only about the format of the CPIC flag in Record 2, as the substantive information has already been disclosed to the appellant.

[59] The term "intelligence information" used in section 8(1)(g) means:

Information gathered by a law enforcement agency in a covert manner with respect to ongoing efforts devoted to the detection and prosecution of crime or the prevention of possible violations of law. It is distinct from information compiled and identifiable as part of the investigation of a specific occurrence.<sup>20</sup>

[60] The information at issue appears to be only a few words about the appellant. As the substance of this information has been disclosed to the appellant, I cannot ascertain how the remainder of this information comes within section 8(1)(g). In particular, I cannot ascertain how disclosure could reasonably be expected to interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons. Therefore, I find that section 8(1)(g) does not apply to this information.

[61] Similarly, as the appellant is aware of the information about him in the information severed from Record 2, I cannot ascertain how disclosure could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime under section 8(1)(l) and find that this exemption does not apply.

[62] In conclusion, I have found that, subject to my review of the police's exercise of discretion, the 10-code information in Record 1 is exempt under section 38(a), read

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<sup>20</sup> Orders M-202, MO-1261, MO-1583 and PO-2751; see also Order PO-2455, confirmed in *Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 4233 (Div. Ct.).

with section 8(1)(l).

[63] I have also found that the CPIC information in Record 2 about the appellant is not exempt under section 38(a), read with wither sections 8(1)(g) or (l). As no other exemptions have been claimed for this information, I will order it disclosed.

**D. Did the institution exercise its discretion under sections 38(a) in conjunction with 8(1)(l), and 38(b)? If so, should this office uphold the exercise of discretion?**

[64] The sections 38(a) with 8(1)(l) 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.

[65] 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.

[66] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>21</sup> This office may not, however, substitute its own discretion for that of the institution.<sup>22</sup>

[67] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:<sup>23</sup>

- 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

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<sup>21</sup> Order MO-1573.

<sup>22</sup> Section 43(2).

<sup>23</sup> Orders P-344 and MO-1573.

- the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- 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.

[68] The police state that they considered the above relevant considerations in exercising their discretion, including the balancing of rights of the appellant, and the need to protect sensitive information and third party personal information. They state that the exemptions from the right of access were limited and specific and the appellant has been granted access to the substantive content of all of his own personal information.

### ***Analysis/Findings***

[69] Based on my review of the police's representations and the information at issue in the records that I have found subject to the claimed exemptions, I find that they exercised their discretion in a proper manner, taking into account the relevant considerations listed above.

[70] Accordingly, I am upholding the police's exercise of discretion under sections 38(a) in conjunction with 8(1)(l), and 38(b) and find that the personal information of other individuals in the records is exempt under section 38(b) and that the 10-codes in Record 1 are exempt by reason of section 38(a) in conjunction with section 8(1)(l).

**ORDER:**

1. I order the police to disclose to the appellant by **July 6, 2018** the information in Record 2 for which it has claimed the application of section 38(a) with sections 8(1)(g) and 8(1)(l). For ease of reference, I am providing the police with a copy of Record 2, highlighting the information that I have ordered disclosed from this record.
2. I uphold the police's decision to deny access to the remaining information at issue in the records.

Original Signed by: \_\_\_\_\_  
Diane Smith  
Adjudicator

\_\_\_\_\_ June 14, 2018