

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3633

Appeal MA17-358

Ottawa Police Services Board

July 9, 2018

Summary: The Ottawa Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for all interactions that the appellant has had with the police. The police issued a decision granting partial access to the records responsive to the request. Access to the withheld information was denied pursuant to the exemptions in section 38(a) (discretion to refuse requester's own personal information) in conjunction with section 8 (law enforcement), and the personal privacy exemptions in sections 14(1) and 38(b) of the *Act*. As the records contain the personal information of the appellant, section 38(a) (discretion to refuse requester's own information) was added in conjunction with the section 8 exemptions. This order upholds the police's decision to deny access to the information at issue in the records and also upholds their search for responsive records as reasonable.

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

Orders Considered: Order MO-2871.

OVERVIEW:

[1] The Ottawa Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for records about all interactions that the requester has had with the police.

[2] The requester specified that he is seeking the officer's names and badge numbers, in addition to 911 call transcripts and the names of the parties who called 911. The requester asked that he be informed if any information was disclosed to his former employers or the Canadian Border Service Agency. The requester provided five specified phone numbers and three specified addresses which may relate to the request. The requester also detailed six different occurrences which he was seeking records for, several of which were identified by year.

[3] The police issued a decision granting partial access to the records responsive to the request. Access to the withheld information was denied pursuant to the exemptions in sections 8 (law enforcement), 14(1) and 38(b) (personal privacy) of the *Act*.

[4] The requester (now the appellant) appealed the police's decision.

[5] Since no further mediation was possible, this appeal was transferred to adjudication, where an adjudicator conducts an inquiry. Representations were exchanged between the police and the appellant in accordance with section 7 of the *IPC's Code of Procedure and Practice Direction 7*.

[6] I also added the issue of the possible application of section 38(a) (discretion to refuse requester's own information) in conjunction with the section 8 exemptions, as the records contain the personal information of the appellant.

[7] In this order, I uphold the police's decision that the information at issue in the records is exempt and I also find that the police's search was reasonable.

RECORDS:

[8] The records at issue are four occurrence reports which were withheld in whole or in part, as follows:

Police file #	Record #	Pages #	Exemptions
2010-[#]	1	3-11, 16	8(1)(i), 38(a)
		1-11, 16	8(1)(l), 38(a)
		1, 3-11, 16	14(1), 14(3)(b) and 38(b)
2005-[#]	2	7	8(1)(i) and 8(1)(l), 38(a)
		2, 4-6	14(1), 14(3)(b) and 38(b)
2006-[#]	3	2, 4-5, 8-9	14(1), 14(3)(b) and 38(b)
2007-[#]	4	2-4	14(1), 14(3)(b) and 38(b)

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)(i) or 8(1)(l) law enforcement exemptions apply to the information at issue?
- D. Did the institution exercise its discretion under sections 38(a) and (b)? If so, should this office uphold the exercise of discretion?
- E. Did the police 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?

[9] 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;

[10] 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.¹

[11] Sections 2(2), (2.1) and (2.2) also relate to the definition of personal information. These sections state:

(2) Personal information does not include information about an individual who has been dead for more than thirty years.

(2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[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.²

[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

¹ Order 11.

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

of a personal nature about the individual.³

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

[15] The police state that the records consist of police incident reports in which the appellant was involved. These reports also contain personal information, as defined in section 2(1), in relation to other individuals involved in the police incident reports. They state that the personal information consists of the individuals' names, as well as their sex, dates of birth, addresses, phone numbers, occupations, ethnicity, and statements.

[16] The appellant did not provide representations on this issue.

Analysis/Findings

[17] The records all concern the appellant's interaction with the police; therefore, they contain his personal information. They also contain the personal information of other individuals as described by the police's representations. As the records contain the personal information of both the appellant and other individuals, I will consider whether the discretionary personal privacy exemption in section 38(b) applies to the personal information in the records.

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

[18] 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.

[19] 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.

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

[21] 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). The

³ Orders P-1409, R-980015, PO-2225 and MO-2344.

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

information does not fit within these paragraphs.

[22] 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.⁵

[23] If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 38(b). In the circumstances, the police rely on the presumption at paragraph (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.

[24] The police state that the personal information and statements of other involved individuals were supplied by the individuals to whom the information relates in confidence as part of investigations into possible violations of law.

[25] 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.⁶ The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.⁷

[26] The presumption can apply to a variety of investigations, including those relating to by-law enforcement⁸ and violations of environmental laws or occupational health and safety laws.⁹

[27] 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.¹⁰

[28] 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

⁵ Order MO-2954.

⁶ Orders P-242 and MO-2235.

⁷ Orders MO-2213, PO-1849 and PO-2608.

⁸ Order MO-2147.

⁹ Orders PO-1706 and PO-2716.

¹⁰ Order P-239.

14(2).¹¹

[29] The police appear to rely on the factors favouring privacy protection in section 14(2)(f) and (h), which read:

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;

(h) the personal information has been supplied by the individual to whom the information relates in confidence;

[30] They submit that the personal information is highly sensitive and disclosure may unfairly damage the reputation of the person referred to in the record. Accordingly, the police submit that disclosure of the personal information and statements of the other involved individuals would be an unjustified invasion of their privacy.

[31] The police further submit that statements taken in the course of a police investigation are considered confidential. The police explain that statement-taking would be critically compromised if witnesses felt compelled to give that statement in a guarded manner (i.e. by withholding essential facts such as the complete details of an incident, or their full name and address) for fear of an institution favouring release over the protection of their privacy.

[32] The appellant did not address this issue directly. His representations focus on what happened in each incident in the records.

Analysis/Findings

[33] Based on my review of the records, I agree with the police that the records were compiled and are identifiable as part of investigations into possible violations of law. Therefore, the presumption in section 14(3)(b) applies.

[34] The information remaining at issue in the records consists primarily of the personal information of individuals other than the appellant. Taking into account the nature of the interactions between the appellant and the other individuals in the records, I agree with the police that the factor in section 14(2)(f) applies as the information is considered highly sensitive. There is a reasonable expectation of significant personal distress if the information is disclosed.

[35] Given my reasoning below, it is not necessary for me to decide whether the

¹¹ Order P-99.

information was given in confidence and the factor in section 14(2)(h) applies.

[36] In this appeal, the presumption in section 14(3)(b) and the factor favouring privacy protection in section 14(2)(f) applies. Based on my review of the appellant's representations, I find that the appellant has not provided evidence on any factors favouring disclosure. Based on my review of the specific personal information of other individuals in the records and balancing the interest of the parties, I find that the applicable factor and presumption weigh in favour of the privacy protection of the personal information of individuals other than the appellant in the records.

[37] 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).

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

[38] 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.

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

[40] Where access is denied under section 38(a), the police 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.

[41] In this case, the institution relies on sections 8(1)(i) and 8(1)(l), which state as follows:

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

(i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;

¹² Order M-352.

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

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

"law enforcement" means,

- (a) policing,
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or
- (c) the conduct of proceedings referred to in clause (b)

[43] The term "law enforcement" has covered the following situations:

- a municipality's investigation into a possible violation of a municipal by-law.¹³
- a police investigation into a possible violation of the *Criminal Code*.¹⁴
- a children's aid society investigation under the *Child and Family Services Act*.¹⁵
- Fire Marshal fire code inspections under the *Fire Protection and Prevention Act, 1997*.¹⁶

[44] This office has stated that "law enforcement" does not apply to the following situations:

- an internal investigation by the institution under the *Training Schools Act* where the institution lacked the authority to enforce or regulate compliance with any law.¹⁷
- a Coroner's investigation or inquest under the *Coroner's Act*, which lacked the power to impose sanctions.¹⁸

[45] Generally, the law enforcement exemption must be approached in a sensitive

¹³ Orders M-16 and MO-1245.

¹⁴ Orders M-202 and PO-2085.

¹⁵ Order MO-1416.

¹⁶ Order MO-1337-I.

¹⁷ Order P-352, upheld on judicial review in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (1993), 102 D.L.R. (4th) 602, reversed on other grounds (1994), 107 D.L.R. (4th) 454 (C.A.).

¹⁸ Order P-1117.

manner, recognizing the difficulty of predicting future events in a law enforcement context.¹⁹

[46] 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.²⁰ The institution 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.²¹

[47] The police state that the information withheld under sections 8(1)(i) and 8(1)(l) consists of police 10-codes and Canadian Police Information Centre (CPIC) codes and personal information relating directly to other involved individuals.

[48] The appellant did not provide representations on this issue.

Analysis/Findings

[49] I have already found the personal information of other individuals in the records subject to section 38(b). Of the information remaining at issue, the police have applied section 8(1)(i) and (l) to the police and CPIC codes on pages 1 to 11 of Record 1 and page 7 of Record 2.

[50] I have previously considered the application of section 8(1)(l) to police code 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)²² 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

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

²⁰ Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

²¹ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

²² Section 8(1)(l) of the *Municipal Freedom of Information and Protection of Privacy Act* (the municipal Act) is the equivalent of section 14(1)(l) of the *Freedom of Information and Protection of Privacy Act*.

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.

[51] I adopt my previous findings in Order MO-2871, as well as the orders cited therein, and find that the "10-codes" and the other police 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).

[52] As I have found the remaining information at issue in the records subject to section 8(1)(l), there is no need for me to also consider whether this information is exempt by reason of section 8(1)(i).

[53] Therefore, subject to my review of the police's exercise of discretion, this information is exempt under section 38(a) in conjunction with section 8(1)(l).

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

[54] The sections 38(a) and (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.

[55] 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.

[56] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.²³ This office may not, however, substitute its own discretion for that of the institution.²⁴

[57] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:²⁵

- 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
- 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.

[58] The police state that access was denied to the information at issue on the basis that releasing this information would constitute an unjustified invasion of another individual's privacy. The police state that they considered whether or not the records could be severed in a way that would allow them to disclose the appellant's personal

²³ Order MO-1573.

²⁴ Section 43(2).

²⁵ Orders P-344 and MO-1573.

information without also disclosing other individuals' personal information.

[59] In reaching their decision to exercise discretion in favour of privacy protection, the police considered the following factors as they apply to the particular circumstances of the request:

- Consent to disclose the information was not forthcoming.
- The personal information is highly sensitive.
- The personal information has been supplied by the individual to whom the information relates in confidence.
- Disclosure may unfairly damage the reputation of any person referred to in the record.

[60] The appellant did not provide representations on this issue.

Analysis/Findings

[61] 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.

[62] 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 police codes in Records 1 and 2 are exempt by reason of section 38(a) in conjunction with section 8(1)(l).

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

[63] 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 17.²⁶ 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.

[64] 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.²⁷

²⁶ Orders P-85, P-221 and PO-1954-I.

²⁷ Orders P-624 and PO-2559.

To be responsive, a record must be "reasonably related" to the request.²⁸

[65] 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.²⁹

[66] 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.³⁰

[67] 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.³¹

[68] The police state that they conducted a thorough search of their records' database searching the appellant's name, phone numbers and addresses provided in the request. They state that the search revealed the records that were released to the appellant. They state that any other responsive records, if they existed, would have been purged from their records database once retention requirements were met. They state that their retention schedule is based on legislation and/or operational requirements.

[69] The appellant did not provide representations on this issue.

Analysis/Findings

[70] As noted above, a requester must provide a reasonable basis for concluding that additional responsive records exist. As the appellant did not provide representations on the search issue, it is not evident from my review of the records that further records exist. Accordingly, based on my review of the records already located by the police and the police's representations, I am upholding the police's search as reasonable.

ORDER:

I uphold the police's decision and dismiss the appeal.

Original Signed by: _____

Diane Smith
Adjudicator

July 9, 2018

²⁸ Order PO-2554.

²⁹ Orders M-909, PO-2469 and PO-2592.

³⁰ Order MO-2185.

³¹ Order MO-2246.