Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3758

Appeal MA16-502

Waterloo Regional Police Services Board

April 25, 2019

Summary: The Waterloo Regional Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information stemming from a concern that the appellant had regarding signage in a courthouse. The police identified responsive records and disclosed portions of them to the appellant, relying on section 38(a) (discretion to refuse requester's own information) in conjunction with sections 8(1)(c) (reveal investigative techniques and procedures), 8(1)(g) (intelligence information), 8(1)(l) (facilitate commission of an unlawful act) and 12 (solicitor-client privilege), as well as section 38(b) (personal privacy) to deny access to the portion they withheld. The appellant appealed the police's access decision and at mediation also took issue with the reasonableness of the police's search for responsive records. In this order, the adjudicator upholds the reasonableness of the police's search for responsive records and the application of section 38(a), in conjunction with sections 8(1)(g) and 12, as well as section 38(b). The appeal is dismissed.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 2(1) (definition of "personal information"), 8(1)(g), 12, 14(2)(a), 14(3)(g), 17, 38(a) and 38(b).

Order Considered: Order M-202.

Case Considered: *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815.

OVERVIEW:

[1] The Waterloo Regional Police Services Board (the police or WPRS) received a request from the appellant under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) for access to a copy of all "correspondence, memo's, documents, letters, emails sent, received by" a named Staff Sergeant where the appellant was "mentioned and/or referred to" during a specified period of time. The request stems from a concern that the appellant had regarding signage in a courthouse.

[2] The police identified responsive records and granted partial access to them. The police initially relied on sections 8(1)(c) (reveal investigative techniques and procedures), 8(1)(g) (intelligence information), 8(1)(l) (facilitate commission of an unlawful act) and 12 (solicitor-client privilege) of the *Act* to deny access to the portion they withheld. In their decision letter, the police also wrote:

> Some of the records included did not originate with the [police], and as such, we are unable to make decisions regarding these records. Due to our current backlog, we were not aware of this issue until the legislated time period for transfer of the request to another agency had passed. Another consideration would have been to submit a time extension for a consultation; however the timeline for this had also elapsed. As such, the relevant records have been marked "Not WRPS Record". You may wish to make a request directly to the other agency in order to pursue a decision regarding these records, if you have not done so already.
>
> It is also of note that we experienced some technical difficulties in printing. You will notice that pages 216 and 220 are supposed to be image files which were attached to emails sent by you, however in these cases, due to computer error, the image did not print.

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

[4] In the course of mediation, the appellant alleged that additional responsive records ought to exist and took issue with the police's records retention policy. After the mediator relayed the appellant's concerns to the police, they advised that they would reconsider their position on the custody and control of those records initially identified in their decision as "Not WRPS Records". The police then issued a revised decision letter granting partial access to those records. The police relied on section 38(a) (discretion to refuse requester's own information) in conjunction with sections 8(1)(c), 8(1)(g), 8(1)(l) and 12 as well as section 38(b) (personal privacy) to deny access to the portion they withheld. Accompanying the revised decision letter was an Index of Records indicating the information that remained at issue as well as the exemptions the police claimed were applicable. During mediation, the police also provided the appellant with information regarding their search and their retention policies.

[5] Mediation did not resolve the appeal and it was moved to the adjudication stage

of the appeals process where an adjudicator conducts an inquiry under the *Act*.

[6] I commenced my inquiry by seeking representations from the police on the facts and issues set out in a Notice of Inquiry. The police provided responding representations. The appellant also provided unsolicited material to this office. The police asked that portions of their representations be withheld due to confidentiality concerns. I then sent a Notice of Inquiry to the appellant along with a copy of the police's non-confidential representations[1]. The appellant provided responding representations which were shared with the police for reply. The police provided reply representations. The appellant also provided a further email to this office.

[7] In this order, I uphold the reasonableness of the police's search for responsive records and the application of section 38(a), in conjunction with sections 8(1)(g) and 12, as well as section 38(b). The appeal is dismissed.

RECORDS:

[8] At issue in this appeal are all or portions of email exchanges as set out in the Index of Records that accompanied the police's revised decision letter.

ISSUES:

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

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

C. Does the discretionary exemption at section 38(a) in conjunction with section 12 (solicitor-client privilege) apply to the information at issue?

D. Does the discretionary exemption at section 38(a) in conjunction with the law enforcement exemptions at sections 8(1)(c), 8(1)(g) and/or 8(1)(l) apply to the information in page 418 of the records?

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

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

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[1] The confidential representations met the criteria for withholding in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

DISCUSSION:

Preliminary matter

[9] The appellant filed extensive and detailed material to explain the background and basis for his access request and to set out his concerns about the conduct of the police, the Ministry of the Attorney General and a member of the judiciary regarding matters involving him. However, my powers and the scope of this inquiry only extend to the application of the *Act*, and many of the concerns expressed by the appellant are outside my power to address. To the extent that his material related to the matters at issue in this appeal, I have considered them in making my determinations in this appeal. To the extent that his submissions set out allegations relating to potential privacy breaches, the issues before me are access to the withheld information and the ministry's search for records. Accordingly, I cannot make a determination regarding any alleged privacy breaches.[2]

Issue A: Did the institution conduct a reasonable search for records?

[10] 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.[3] 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.

[11] 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.[4] To be responsive, a record must be "reasonably related" to the request.[5]

[12] 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.[6] 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.[7] 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

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[2] If the appellant wishes to pursue these allegations, he may file a privacy complaint with the IPC.
[3] Orders P-85, P-221 and PO-1954-I.
[4] Orders P-624 and PO-2559.
[5] Order PO-2554.
[6] Orders M-909, PO-2469 and PO-2592.
[7] Order MO-2185.

concluding that such records exist.[8]

The police's representations

[13] In their representations, the police set out the steps they took to respond to the appellant's access request. They submit that two police officers, including the one named in the request, were emailed memorandums requesting that they conduct a search for responsive records. The police submit that a total of 100 minutes was expended by the two officers to conduct the searches and compile the requested documents. They state that the responsive records they located were forwarded to their Access to Information Unit for processing.

[14] The police submit that after the appellant raised his concern at mediation regarding the reasonableness of their initial search, an email was sent to the officers to instruct them to review their records for any further responsive materials. No additional responsive records were found.

[15] The police explain that at mediation the appellant also raised a concern about an email that references the purging of a record pertaining to courthouse signage. The police submit that they provided clarification of what that meant during the mediation as follows:

> … In the email the term "file" was used in reference to a printed copy of an email which is found several times within the records, including page 33. The paper copy of this email was placed on the officer's desk, serving as a reminder of the outstanding issue. After confirming that the sign had been changed and thus the issue resolved, the paper copy of this record was purged, however the electronic record was retained in accordance with the retention schedule of the [police].

[16] With respect to whether that purged record can be located, the police submit that:

> A further search of the email server is possible, however this type of search requires four to six hours of computer programming time and 48 hours of run time to conduct. As the specific mailboxes indicated by the appellant were thoroughly searched and both named officers confirmed they provided all relevant records, the institution did not proceed with conducting this search.
>
> Given the specific nature of the request, that being records sent or received by named officers, the institution has no reason to believe

[8] Order MO-2246.

> additional records responsive to this request would exist and as such the institution did not conduct any external searches for records.

[17] In support of their position the police provided an affidavit of their Access to Information Analyst attesting to the reasonableness of their search efforts. With respect to the email that references the purging of a record pertaining to courthouse signage, she deposes that:

> … After confirming that the sign had been changed and thus the issue resolved, the paper copy of this record was "purged", however, the electronic record was retained in accordance with the retention schedule of the institution. I conducted a search with this officer of his email account and confirmed its retention by viewing it and […], it has been included in the responsive records several times.

The appellant's representations

[18] The appellant takes the position that the record was purged for an improper purpose to conceal wrongful conduct. The appellant also takes issue with the police's record retention processes, submitting that:

> The [police] do not back up their records. The [police], through an FOI [request] I filed confirmed this to me. The [police] have no system in place to prevent officers from either accidently purging records/evidence or to prevent "rogue" officers from maliciously misusing their power to purge records/evidence. This may be both a violation of the *Police Services Act*, and the *Evidence Act* and perhaps, while not a violation of the *Municipal Freedom of Information and Privacy Act* (*MFIPPA*), it may be a violation of its spirit. As per the [police's] FOI response regarding a backup system the [police] informed me they do not have any system to prevent evidence from being purged either accidently or deliberately. This is shocking as a standalone issue!

[19] In support of his position that records are missing from the searches conducted by the police, the appellant submits that his reading of page 207 of the records he received indicates that a named staff sergeant conducted an investigation into his membership in a group and that according to an email on the same date from a named Inspector, the Inspector was aware that someone had directed the named staff sergeant to carry out the investigation. He submits that there must be a record instructing the named staff sergeant to conduct that investigation as it is a "serious endeavor".

[20] He also submits that in coming to the conclusion that the appellant was not a member of a specified group, the use of the name of the specific group leads to an inference that the named Inspector must have generated some type of record.

[21] The appellant also takes the position that it is public knowledge that the police sometimes rely on the Police Information Portal (PIP) to search for/or gather reports other Police agencies may have on the person in question. He submits that if the police used PIP, that information should be disclosed.

[22] In addition, in a section of his representations headed "Internet", he also asserts that another methodology that is public knowledge is that an internet search can be conducted to obtain information. He submits that any records related to that type of search, or obtained from social media about him, should be disclosed to him.

[23] Finally, the appellant takes the position that based on the records he received, the police have "extensive" records relating to him. He submits that he should have the right to have these records removed, but can not avail himself of that right as he has not been provided access to all of them.

The police's reply representations

[24] With regard to the appellant's submissions concerning missing records, the police submit that thorough searches were conducted and no further responsive records exist. The police submit that as this did not involve a police records check records from the Police Information Portal would not have been responsive. Finally, the police submit that no responsive records exist of the type discussed in the section of the appellant's representations entitled "Internet". Regarding the appellant's concern about records held by the police in relation to him, the police state that, but for this ongoing appeal, the records at issue would have been purged pursuant to their Records Retention Schedule.

[25] The police submit that a thorough search was conducted and that no further responsive records exist.

Analysis and finding

[26] Although the appellant takes issue with the reasonableness of the police's search for responsive records, in my view he has failed to provide sufficient evidence to challenge the evidence or submissions they provided in support of the reasonableness of their search.

[27] In that regard, I find that the police have provided a sufficient explanation for why no further responsive records exist, including the absence of any social media or internet searches and PIP records, and for why there is no paper copy of the record pertaining to courthouse signage.

[28] In all the circumstances, I am satisfied that the police's representations and the affidavit it filed in support of its position demonstrate that its search for responsive records is in compliance with its obligations under the *Act*. Accordingly, I conclude that the police conducted a reasonable search for responsive records.

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

[29] 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;

[30] 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.[9]

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

> (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.

[32] 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.[10] 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.[11] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[12]

The police's representations

[33] The police numbered the pages of the package of records at issue and submit that one line on page 18, which is also found in pages 42, 48, 60, 247, 255, 374, 382 and 388 of the records, contains the personal information of an identifiable individual other than the appellant as defined in section 2(1) of the *Act*.

The appellant's representations

[34] The appellant submits that the body of the emails refer to him and asserts that the police improperly responded to his request by only providing "heavily redacted records".

[35] The appellant submits that he can only speculate about the content of the withheld information, however he suspects that it may be an individual's name plus an

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[9] Order 11.
[10] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[11] Orders P-1409, R-980015, PO-2225 and MO-2344.
[12] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

adjective describing the person. The appellant submits that if this is the case, the person's name could be un-redacted and the adjective left in place.

[36] The appellant further submits that names of individuals do not qualify for exemption "if the person is an employee of the police, the Judiciary or Government as there is precedent that such names are not redacted." The appellant does not refer to a specific precedent in support of his submission, which I treat as a submission that the information at issue relates to an individual in a professional, official or business capacity.

Analysis and finding

[37] I am satisfied that all of the records at issue contain the personal information of the appellant as defined at section 2(1) of the *Act*.

[38] In my view, with limited exceptions, all of the information in the records remaining at issue relates to the individuals mentioned in them, other than the appellant, in a professional, official or business capacity rather than a personal capacity. I further find that, except with respect to a limited number of pages of records, disclosing the information in them would not reveal something of a personal nature about the individuals.

[39] The limited exceptions relate to the information in the one line on page 18 which is also found in pages 42, 48, 60, 247, 255, 374, 382 and 388 of the records. Although this information was generated in the course of an identifiable individual's employment, disclosing it would reveal something personal about them. Accordingly, I find that this information qualifies as the personal information of the identifiable individual.

Issue C: Does the discretionary exemption at section 38(a) in conjunction with section 12 (solicitor-client privilege) apply to the information at issue?

[40] 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.

[41] 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, 9.1, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

[42] 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.[13]

[43] 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.

[44] In this case, the police rely on section 38(a) in conjunction with sections 8(1)(c), 8(1)(g), 8(1)(l) and/or 12.

[45] I will address the possible application of section 12 first.

[46] Section 12 states as follows:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

[47] Section 12 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 ("prepared by or for counsel employed or retained by an institution…") is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privilege

[48] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege.

Solicitor-client communication privilege

[49] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.[14] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[15] The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.[16]

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[13] Order M-352.
[14] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[15] Orders MO-1925, MO-2166 and PO-2441.
[16] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

[50] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.[17] The privilege does not cover communications between a solicitor and a party on the other side of a transaction.[18]

Loss of privilege

[51] Under the common law, solicitor-client privilege may be waived. An express waiver of privilege will occur where the holder of the privilege

- knows of the existence of the privilege, and
- voluntarily demonstrates an intention to waive the privilege.[19]

[52] An implied waiver of solicitor-client privilege may also occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.[20]

[53] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[21] However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.[22]

Branch 2: statutory privileges

[54] Branch 2 is a statutory privilege that applies where the records were prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital "for use in giving legal advice or in contemplation of or for use in litigation." The statutory exemption and common law privileges, although not identical, exist for similar reasons.

The police's representations

[55] The police submit that the information for which section 12 is claimed consists of email correspondence to and from the solicitor employed by the police in which legal advice is being sought or provided. The police submit that the communications were made in confidence, by way of secure email and the emails from their solicitor contain the following notation:

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[17] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[18] *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).
[19] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).
[20] *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.
[21] J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).
[22] *General Accident Assurance Co. v. Chrusz,* cited above; Orders MO-1678 and PO-3167.

> Please note: This email may contain confidential and/or privileged information. This email or any part of it cannot be shown or distributed in any way (including being referenced in correspondence) to any person not employed by the Waterloo Regional Police Services ("WRPS") except where privilege has been explicitly waived in advance.

[56] The police further submit that "although to date there has been no litigation regarding this matter, typically the purpose of seeking legal advice is to prepare for possible litigation."

[57] The police take the position that no waiver of privilege has occurred.

Appellant's representations

[58] The appellant acknowledges that the police presumably have had correspondence with their lawyers regarding the courthouse signage. He submits, however, that the exemption is being used for an improper purpose, "to shield from purview conduct that the police engaged in vindictive conduct such as creating a misleading record that […] warrants being investigated."

Analysis and findings

[59] At this stage of the anaysis, I am to determine whether the withheld information is subject to section 12 of the *Act*. The allegation regarding the police using the exemption for an improper purpose is addressed in the section on the exercise of discretion, below.

[60] I find that the disclosure of the information for which section 12 is claimed would reveal communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice and aimed at keeping both informed so that advice can be sought and given, or would reveal the substance of the confidential communication or legal opinion provided, and/or would qualify as a record prepared by or for counsel employed or retained by an institution for use in giving legal advice. As such, the information is subject to solicitor-client communication privilege. In light of this conclusion, it is not necessary to determine whether this information is also subject to litigation privilege. On the facts before me, I am satisfied that no waiver of privilege has occurred with respect to this information. As a result, I find that section 12 applies to this information.

[61] Accordingly, I find that this information qualifies for exemption under section 38(a) in conjunction with section 12 of the *Act*.

Issue D: Does the discretionary exemption at section 38(a) in conjunction with the law enforcement exemptions at sections 8(1)(c), 8(1)(g) and/or 8(1)(l) apply to the information in page 418 of the records?

[62] The police claim that page 418 of the records is subject to exemption under sections 8(1)(c), 8(1)(g) and 8(1)(l), in conjunction with section 38(a) of the *Act*.

[63] Sections 8(1)(c), 8(1)(g) and 8(1)(l) read:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
> >
> > (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.

[64] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[23]

[65] 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.[24] 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.[25]

The police's representations

[66] The police submit that with respect to section 8(1)(c), the withheld law enforcement investigative technique in question is currently in use in law enforcement.

[67] Relying on Order MO-2424, the police submit that the withheld law enforcement

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[23] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[24] Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.
[25] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

investigative technique is not generally known to the public and that the disclosure of this technique would most certainly compromise its effective utilization.

[68] With respect to section 8(1)(g), the police rely on their submissions in support of the application of section 8(1)(c) and submit that disclosing the withheld information would interfere with the gathering of information. The police rely on Order MO-1431 in support of their position. The police add that the disclosure of the information would interfere with gathering of information as well as reveal law enforcement intelligence information. They submit that future prevention would be adversely affected by the release of this information.

[69] With respect to the application of section 8(1)(l), the police submit that disclosing the information would hamper the control of crime.

[70] The police provide confidential representations in support of their position on the application of the law enforcement exemptions which, because of their nature, could not be shared with the appellant.

Appellant's representations

[71] The appellant states that it is not appropriate to withhold the entirety of page 418. The appellant submits that it is common knowledge that the police have "massive surveillance power and when questionable conduct of such extensive surveillance is hidden behind MFIPPA, accountability of the police is lost."

Analysis and finding

[72] The purpose of section 8(1)(g) is to provide an institution with the discretion to preclude access to records in circumstances where disclosure would interfere with the gathering of or reveal law enforcement intelligence information.

[73] In Order M-202, former Adjudicator Asfaw Siefe had the occasion to consider six of the exemptions contained in section 8(1) of the *Act*. He stated with respect to 8(1)(g):

> In my view, in order for a record to qualify for exemption under section 8(1)(g) of the *Act*, the Police must establish that disclosure of the record could reasonably be expected to:
>
> > (a) interfere with the gathering of law enforcement intelligence information respecting organizations or persons, or
> >
> > (b) reveal law enforcement intelligence information respecting organizations or persons.
>
> …

> The Williams Commission in its report entitled *Public Government for Private People, the Report of the Commission on Freedom of Information and Protection of Privacy/1980*, Volume II at pages 298-99, states:
>
> > Speaking very broadly, intelligence information may be distinguished from investigatory information by virtue of the fact that the former is generally unrelated to the investigation of the occurrence of specific offences. For example, authorities may engage in surveillance of the activities of persons whom they suspect may be involved in criminal activity in the expectation that the information gathered will be useful in future investigations. In this sense, intelligence information may be derived from investigations of previous incidents which may or may not have resulted in trial and conviction of the individual under surveillance. Such information may be gathered through observation of the conduct of associates of known criminals or through similar surveillance activities.
>
> In my view, for the purposes of section 8(1)(g) of the *Act*, "intelligence" information may be described as 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 violation of law, and is distinct from information which is compiled and identifiable as part of the investigation of a specific occurrence.[26]

[74] I agree.

[75] As explained in the definition quoted above, what can distinguish intelligence information from investigatory information is that intelligence information is generally unrelated to the occurrence of a specific event. While the appellant focuses on a discrete event this may not be the focus of the gatherer of intelligence information.

[76] In my view, the police have provided sufficient evidence to establish that the information on page 418 contains intelligence information, and that the disclosure of page 418 could reasonably be expected to interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons. Accordingly, I conclude that page 418 qualifies for exemption under section 38(a) in conjunction with section 8(1)(g) of the *Act*.

[77] In light of my conclusion that section 8(1)(g) applies to the information, it is not

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[26] See also Orders MO-1261, MO-1583 and PO-2751.

necessary for me to also consider whether the information qualifies for exemption under sections 8(1)(c) and/or 8(1)(l), in conjunction with section 38(a).

Issue E: Does the discretionary exemption at section 38(b) (personal privacy) apply to the information at issue?

[78] The police claim that the one line on pages 18, 42, 48, 60, 247, 255, 374, 382, and 388 of the records, which I found above to be the personal information of an identifiable individual, qualifies for exemption under section 38(b) of the *Act*.

[79] 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.[27] 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 exemption.[28]

[80] 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.[29] 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).

[81] The police submit that information falls within the scope of the presumption at section 14(3)(g) and that there are no section 14(2) factors in favour of withholding or disclosing the information that are applicable. The appellant does not refer to any factors in favour of disclosure, however the tenor of his representations appears to raise the possible application of the factor at section 14(2)(a) of the *Act*.

[82] Those sections read:

> (2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

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[27] See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 38(b).
[28] Orders M-444 and MO-1323.
[29] Order MO-2954.

> (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;
>
> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> (g) consists of personal recommendations or evaluations, character references or personnel evaluations;

The police's representations

[83] The police submit in their confidential representations, which as a result of their nature could not be shared with the appellant, that information in the line at issue falls within the scope of the presumption at section 14(3)(g) because it is in the nature of an evaluation of the individual. They further submit that there are no section 14(2) factors that are applicable. The police add that the information withheld was not provided by the appellant, nor was he present when it was provided and that the appellant does not know the information in the records at issue. Accordingly, the police take the position that it would not be absurd to withhold the information from the appellant.

The appellant's representations

[84] The appellant submits that the exemption at section 38(b) of the *Act* does not apply "if the person is an employee of the police the Judiciary or Government as there is precedent that such names are not redacted". The appellant also takes issue with the conduct of the police and asserts that the information is being withheld in order to conceal improper conduct of the police and the Ministry of the Attorney General.

Analysis and Finding

[85] Although the police attempt to characterize the information within the line as being an "evaluation", I find that it does not meet the threshold required by section 14(3)(g), which covers assessments made according to measurable standards, implying an evaluation in a more formal way.[30] Accordingly, I find that the section 14(3)(g) presumption does not apply to this information.

[86] Section 14(2)(a) contemplates disclosure in order to subject the activities of the government (as opposed to the views or actions of private individuals) to public scrutiny.[31] Simple adherence to established internal procedures will often be inadequate, and institutions should consider the broader interests of public accountability in considering whether disclosure is desirable for the purpose outlined in

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[30] Orders PO-1756 and PO-2176.
[31] Order P-1134.

section 14(2)(a).[32] On the evidence and materials before me I am not satisfied that releasing the withheld personal information could be desirable for ensuring public confidence in the integrity of the institution. Although the appellant has asserted a broad impact regarding the courthouse signage and his concerns regrading the conduct of the police, releasing the information in that line will not assist in ensuring *public* confidence in the integrity of the police. In all the circumstances of this case, I am not satisfied, on the evidence before me, that this factor applies. Accordingly, I find that the factor in section 14(2)(a) does not apply to the line of information at issue.

[87] In the absence of any factors favouring disclosure, and given the nature of the information at issue, and balancing all the interests, I find that disclosure of the personal information at issue would constitute an unjustified invasion of that individual's personal privacy.

[88] The appellant did not supply this information nor is he otherwise aware of it. I find that the absurd result principle does not apply in the circumstances of this appeal. As a result, and subject to my review of the police's exercise of discretion, I find that section 38(b) applies to the line of information at issue.

Issue F: Did the institution exercise its discretion under sections 38(a) and/or 38(b)? If so, should this office uphold the exercise of discretion?

[89] The section 38(a) and 38(b) exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[90] 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.

[91] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[33] This office may not, however, substitute its own discretion for that of the institution.[34]

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[32] Order P-256.
[33] Order MO-1573.
[34] Section 43(2).

The appellant's representations

[92] The appellant suspects that the police did not act in good faith and questions the police's motivation in creating record 418. He further alleges that, through the withholding of information, the police were wrongfully concealing their creation of a record that wrongfully maligned him as being a member of a certain group. He states that this was only remedied after the mediator got involved and after the police determined that he was not a member of the group. However, he asserts that the police "nonetheless abused their authority to create the false record [that the appellant] is a [member of a group] despite knowing [the appellant] is not a [member of a group]".

[93] He submits that by embarking on an investigation of his alleged membership in a specified group the police falsely left an impression that an investigation was warranted and that information in record 418 will adversely impact him in his life and in his employment opportunities.

[94] The appellant submits that broader principles are at stake if a complaint about police conduct results in an individual being labelled as a member of a group and "secret" records are created and "distributed to persons unknown."

The police's representations

[95] The police submit that they exercised their discretion to refuse access to the withheld information in good faith as contemplated under the *Act*. They submit that they only considered relevant factors and did not take into account any irrelevant factors.

[96] They submit that they properly exercised their discretion under section 38(a) by withholding limited information pursuant to section 8 of the *Act*. They submit that the appellant was provided a description of the record on page 418, which they say advised him that the record confirms that the police found no evidence that the appellant is a member of a specified group. The police take the position that through this disclosure in mediation, the police balanced the appellant's right to his own personal information while still maintaining confidentiality with respect to a law enforcement technique that is currently in use.

[97] The police further submit that in exercising their discretion the following considerations were deemed relevant and were carefully considered:

> The purposes of the *Act*, including the principle 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 redactions made to the records using the personal privacy exemptions were very limited and serve only to protect the privacy of the affected party.
> >
> > 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.
> >
> > The relationship between the requester and any affected persons.
> >
> > The appellant was described as harassing the affected party and as such the protection of that individual's privacy is vital.
> >
> > 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.

[98] The police further assert that they applied the exemptions in a limited way and the appellant was given access to several emails that described the police's actions regarding the appellant's concern about courthouse signage. The police submit that they sought to disclose as much of the information as possible, denying portions of the record only to protect the privacy of an affected party, safeguard the use of a particular police technique and to maintain solicitor-client privilege.

[99] With respect to the information on page 418, the police confirm in reply that "[t]here is no third party information contained in the record on page 418" and that this record was not provided to any individuals outside of the police.

Analysis and finding

[100] An institution's exercise of discretion must be made in full appreciation of the

facts of the case, and upon proper application of the applicable principles of law.[35] It is my responsibility to ensure that this exercise of discretion is in accordance with the *Act*. If I conclude that discretion has not been exercised properly, I can order the institution to reconsider the exercise of discretion.[36]

[101] I have considered the arguments of the appellant for the exercise of discretion in his favour. However, I find that there is no evidence before me to establish that the police exercised their discretion in bad faith, or for an improper purpose, or took into account irrelevant considerations, or that the police were withholding the information for a collateral or improper purpose. I note that a great deal of information relating to the events involving the appellant was disclosed to him.

[102] With respect to other relevant considerations, I am satisfied that the police took into account the wording of the exemptions and the interests that they seek to protect, the context in which the information was collected, their historic practice with respect to similar information, the reason for the request, why the appellant wished to obtain the information and his arguments on why it should be disclosed. It should be noted that with respect to the application of section 12 by the police, the Supreme Court of Canada has stressed the categorical nature of the solicitor-client privilege when discussing the exercise of discretion in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*.[37]

[103] In all the circumstances, and for the reasons set out above, I uphold the police's exercise of discretion.

[104] I have also considered whether the information that I have found to be subject to sections 38(a) or 38(b) can be severed and portions of the withheld information be provided to the appellant. In my view, in light of the appellant's familiarity with underlying matters in the records at issue, I am satisfied that the records cannot be severed without disclosing information that I have found to fall within the scope of section 38(a) or 38(b). Furthermore, as identified in previous orders, an institution is not required to sever the record and disclose portions where to do so would reveal only "disconnected snippets," or "worthless" or "meaningless" information.[38]

ORDER:

1. I uphold the reasonableness of the police's search for responsive records.

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[35] Order MO-1287-I.
[36] Order P-58.
[37] 2010 SCC 23, [2010] 1 S.C.R. 815 at paragraph 75.
[38] See Order PO-1663, *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)*, (1997), 192 O.A.C. 71 (Div. Ct.).

2. I uphold the police's application of section 38(a), in conjunction with sections 8(1)(g) and 12, and section 38(b).

3. The appeal is dismissed.

Original signed by
Steven Faughnan
Adjudicator

April 25, 2019