Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER MO-3812-I

Appeal MA13-610-2

Toronto Police Services Board

August 2, 2019

Summary: The Toronto Police Services Board received two requests for access to records relating to the requester and two specified properties. The police granted partial access to the records it identified as responsive, with severances pursuant to the personal privacy exemption at section 38(b), and on the basis that some information in the records was not responsive to the requests. The appellant appealed the police's decision and maintained that additional responsive records exist.

In this interim order, the adjudicator partially upholds the police's decision. She finds that the records contain the personal information of other individuals that is exempt from disclosure under the discretionary personal privacy exemption in section 38(b) with reference to section 14(3)(b). However, she finds that some information that was withheld by the police under section 38(b) is not personal information and therefore cannot be withheld under that exemption. She finds that information withheld as non-responsive is responsive to the appellant's requests, and orders the police to issue an access decision regarding that information. In addition, the adjudicator orders the police to conduct a further search for records responsive to the appellant's requests.

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 "institution" and "personal information"), 14(3)(b), 17(1) and 38(b).

Orders Considered: Order PO-1618.

OVERVIEW:

[1] The requester submitted two access to information requests to the Toronto Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). One request was for "all personal information" and the other request was for "all records" in physical or electronic form, from all locations, in respect of:

1. the requester;

2. the residence at [identified location in Toronto] for the period from January 1, 2001 to February 15, 2013;

3. the residence at [identified location in Hamilton] for the period January 1, 1989 to November 20, 2013 (the Hamilton property).

[2] The police identified responsive records and issued a decision to the requester. In their decision, the police stated:

> [T]he Access and Privacy Section did not combine your two requests, but simply returned one of your $5.00 cheques with the belief you were of the understanding that the Toronto Police Service would not have any records in relation to incidents occurring in Hamilton, Ontario; and by returning your $5.00 cheque you would have submitted a request for information directly to the Hamilton Police Service. As such, this portion of your request was not transferred to the Hamilton Police Service and we will only address the portion of your request dealing with Toronto Police Service records.

[3] The police also advised the requester that it was granting partial access to the records identified as responsive to the request. The police denied access to portions of the responsive records, claiming the discretionary exemption in section 38(b) (personal privacy) of the *Act*, with reference to section 14(3)(b) (investigation into possible violation of law). The police also withheld other information, claiming that it was not responsive to the request.

[4] The requester, now the appellant, appealed the police's decision to this office.

[5] During the mediation stage of the appeal process, the appellant raised concerns that the police did not have jurisdiction to issue a decision as there was no valid designation of a head under the *Act*. The appellant also advised the mediator that he believes that the police did not conduct a reasonable search and that further records should exist. The appellant asked if the police searched a particular database, the Automated Criminal Intelligence Information System (ACIIS) database, for records. The police advised that they do not have access to this database and suggested that a request of this nature could be made to the Royal Canadian Mounted Police (RCMP).

[6] No further mediation was possible and the appeal was transferred to the adjudication stage of the appeal process. An adjudicator initiated the inquiry by inviting the police to provide written representations in response to the issues set out in the Notice of Inquiry. The police provided representations, and the adjudicator shared a complete copy of them with the appellant in accordance with this office's sharing procedures.[1] The appellant was also sent a Notice of Inquiry and invited to provide representations in response. Shortly thereafter, the file was placed on hold pending the resolution of a related appeal.

[7] While the appeal was on hold, the appellant contacted the adjudicator and advised that he no longer wished to pursue the issue regarding the proper designation of a head, as the issue had been resolved in a separate appeal. I assumed conduct of the inquiry when the appeal was re-activated and, given the passage of time, I sent the appellant another copy of the Notice of Inquiry to invite him to provide representations. I received the appellant's representations and these were shared with the police, in their entirety, after matters related to their confidentiality were resolved. Reply and sur-reply representations were sought and received from both parties on the issues of responsiveness and reasonable search, in particular.

[8] The representations submitted by the appellant during my inquiry were lengthy and included not only written submissions, but also multiple appendices and supporting documents. Although I have reviewed the appellant's submissions in their entirety, for the sake of succinctness, I have only summarized below the portions that are directly related to the issues before me.

[9] In addition, the police's reply representations appear to suggest that the appellant's requests are frivolous or vexatious as considered by section 4(1)(b) of the *Act*. However, given that this basis for refusing to process a request was not raised in the police's initial decision letter or in any revised decision issued during the appeal process, I will not consider it in this order.

[10] For the reasons that follow, I partly uphold the police's decision to deny access to the personal information of other individuals under section 38(b). I find that some of the information that the police withheld under section 38(b) does not constitute "personal information" as that term is defined in the *Act*, and I order the police to disclose that information to the appellant. I am not satisfied that the information withheld as non-responsive is, in fact, not responsive to the appellant's request, and I order the police to issue an access decision regarding that information. Finally, I find that the police failed to establish that they conducted a reasonable search for records responsive to the appellant's request, and I order them to conduct an additional search.

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[1] As set out in *Practice Direction Number 7* of the IPC's *Code of Procedure*.

RECORDS:

[11] There are 10 records, consisting of 31 pages, at issue in this appeal. The records at pages 1-6, 7-13, 14-16, 17-18 and 19-21 are police occurrence reports. The records at pages 22-23, 24-25, 26-27, 28-29, and 30-31 are Intergraph Computed Aided Dispatch (ICAD) event details reports.

[12] The police have withheld information on pages 7-12, 14, 15, 17, 19, 28, and 29-31 under section 38(b), and from pages 22, 24, 26, 28, and 30 on the basis that it is not responsive to the appellant's request.

ISSUES:

A. What is the scope of the request and what information is responsive to it?

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

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

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

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

DISCUSSION:

Issue A: What is the scope of the request and what information is responsive to it?

[13] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> > (a) make a request in writing to the institution that the person believes has custody or control of the record;
> >
> > (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; […]
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer

> assistance in reformulating the request so as to comply with subsection (1)

[14] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[2] To be considered responsive to the request, records must "reasonably relate" to the request.[3]

[15] The appellant takes issue with the police withholding information on pages 22, 24, 26, 28, and 30 of the records at issue on the basis that it is not responsive to his request. As he also challenges the adequacy of the search conducted by the police, I will determine the scope of the appellant's request to assist in the determination of both issues.

Representations

The police's representations

[16] The police note that the appellant submitted two overlapping access requests, one for "personal" and the other for "general" records. The police state that the appellant was informed that the general information request pertained to records and occurrences in which he was involved, which negated the "general" classification. Accordingly, the police returned the appellant's "general" request along with his $5.00 application fee.

[17] The police submit that the records responsive to the personal information request are those held by the Toronto Police Service. These records consist of occurrence reports and ICAD event details reports. The police maintain that the requests were unambiguous and did not require any clarification from the appellant.

[18] In addition, in the police's decision letter, they told the appellant that he should submit a request to the Hamilton Police Service for access to records relating to the Hamilton property specified in part 3 of his requests, as "the Toronto Police Service would not records in relation to incidents occurring in Hamilton, Ontario."

[19] The police suggest that the appellant's primary concern is not about the police's interpretation of the requests, but rather whether the police searched the ACIIS database. This issue will be addressed under below, during my analysis regarding whether the police conducted a reasonable search for responsive records.

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[2] Orders P-134 and P-880.
[3] Orders P-880 and PO-2661.

The appellant's representations

[20] The appellant maintains that his two requests were independent of each other: one request was for "all records, physical and electronic, from all locations" (the general information request), and the other was for "all personal information, physical and electronic, from all locations" (the personal information request).

[21] The appellant maintains that the police's position that it would not have any records in relation to incidents occurring in Hamilton is "demonstrably false." He submits that responsive records would include those from within the institution's various program areas, such as joint-force projects.

[22] The appellant also submits that the police have not included email records in the scope of his requests. In support of this position, the appellant provides two email exchanges between himself and the police that he maintains should have been identified as responsive records.

The police's reply

[23] In response, the police submit that it is "simply not feasible" to consider email exchanges as records responsive to every access to information request, given the size of the institution. However, the police explain that when a request specifically includes email records, then they will take the appropriate steps to notify the stakeholders to search the requested email accounts.

The appellant's sur-reply

[24] The appellant maintains that the police's sur-reply representations reflect an access-restrictive point of view.

[25] The appellant disagrees with the police's argument that it is "simply not feasible" to consider email exchanges as being potentially responsive to an access request. He argues that neither the *Act* nor any jurisprudence supports the position that the size of the institution plays a role in determining whether emails are included in the scope of a request. The appellant argues that an institution should not be able to defeat the access objectives under the *Act* "by providing insufficient resources to its freedom of information officers."[4] The appellant notes that this office has confirmed that institutions are obliged not to unilaterally narrow the scope of a request. He argues that limiting access based strictly on "feasibility" has no place under the *Act*.

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[4] *Crocker v British Columbia (Information and Privacy Commissioner)* (1997), 1997 CarswellBC 2561 (BCSC), at 46.s

Analysis and findings

[26] This appeal gives rise to a number of issues regarding the scope of the appellant's requests and responsiveness of information. First, I consider whether the information withheld from pages 22, 24, 26, 28, and 30 is responsive to the appellant's requests. Next, I address the parties' positions regarding whether the scope of the appellant's requests includes email records, general records, and records relating to the identified Hamilton property.

[27] The police withheld information corresponding to the "priority" of the events described on pages 22, 24, 26, 28, and 30, as well as other information on pages 28 and 30, on the basis that it is "not responsive" to the appellant's requests. The police's submissions do not explain the significance of this information or their reasons for determining that it is not responsive. It is not clear to me, based on a review of the records, that this information is not responsive to the appellant's requests. In fact, it appears that the information is, in fact, responsive to the appellant's request because it relates to the incidents involving the appellant that led to the creation of the records. Without evidence from the police that satisfactorily demonstrates how the withheld information is not responsive, I do not uphold the police's decision to deny access to it as non-responsive. Accordingly, I will order the police to issue an access decision with respect to this information.

[28] I find the police's position regarding the exclusion of email records from the scope of a request to be untenable. Requiring requesters to specify that they want their requests to include access to email records, even if their request clearly stipulates that it is for "all records," is, to use the appellant's term, an "access-restrictive" approach. In order to serve the purpose and spirit of the *Act*, institutions are required to adopt a liberal interpretation of requests and to approach any ambiguity in the requester's favour.[5] While requesters are obligated to submit requests that are detailed enough to allow an institution to determine the scope of the information sought, they are not required to describe each and every type of document to which they are seeking access. Moreover, in my view, it is entirely reasonable to expect that a request for "all records" would include emails, given how commonplace email communications are in workplaces today. This is true regardless of whether email records are specifically mentioned in an access request and regardless of the size of the institution. Concerns about the "feasibility" of searching emails can be addressed, in part, by the fee provisions of the *Act*. Accordingly, I find that email records are within the scope of the appellant's requests.

[29] Next, I will consider the police's response to the appellant's "general" records request. There is no evidence before me to suggest that the police conducted a search

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[5] Orders P-134 and P-880.

for general records before deciding to take the position that any records responsive to that request would contain the appellant's personal information, thereby rendering them responsive to the appellant's personal information request. Therefore, it appears that the police unilaterally combined the appellant's two access requests into one request for the purpose of providing an access decision under the *Act*.

[30] Upon reviewing the appeal filed by the appellant with this office, it is clear that he was appealing the police's response to both his personal information and the general records requests, despite the fact that the police only issued an access decision responding to the personal information request. Although this office could have considered the police's response to the appellant's general information request through a "deemed refusal" appeal at an earlier point, I note that sections 43(1) and 43(3) provide this office with the flexibility to "fashion remedies in order to resolve issues in a fair and effective manner in accordance with the fundamental principles of the *Act*."[6] Therefore, it is open to me to find, and I do, that the scope of the appellant's requests include access to his own personal information as well as access to records of a general nature, as described.

[31] Regarding the portion of the appellant's requests relating to the identified Hamilton property, I reject the police's position that the appellant was required to seek records relating to this property from the Hamilton Police Service. The police have not provided sufficient evidence to support the suggestion that they would not have records relating to this property, aside from stating "the Toronto Police Service would not have any records in relation to incidents occurring in Hamilton, Ontario." I accept the appellant's position that it is at least conceivable that the police may have records relating to the Hamilton property due to various program initiatives, such as joint-force projects. The police have not rebutted this idea. There being no satisfactory basis to exclude records relating to the Hamilton property identified in part three of the appellant's requests, I find that records relating to the Hamilton property are within the scope of both requests.

[32] Further, I note that the police's decision letter states, "…this portion of your request [relating to the Hamilton property] was not transferred to the Hamilton Police Service and we will only address the portion of your request dealing with Toronto Police Service records." The police did not search their record holdings for records related to the Hamilton property. In this regard, I find that the police unilaterally narrowed the scope of the appellant's request by excluding records relating to this property.[7]

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[6] Order M-618.

[7] I note that section 18 of the *Act* contains a framework for forwarding or transferring requests to other "institutions," as defined under *MFIPPA* and its provincial equivalent, *FIPPA*. In particular, sections 18(2) and 18(3) state:

[33] To summarize, I have found that email records, records of a general nature, and records relating to the identified Hamilton property are all within the scope of the appellant's requests. I have also found that the police failed to establish that the information withheld as non-responsive is, in fact, not responsive to the appellant's requests, and I will therefore order the police to issue an access decision with respect to that information.

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

[34] 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.[8] 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.

[35] 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.[9] To be responsive, a record must be "reasonably related" to the request.[10]

[36] 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.[11]

[37] 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

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> (2) The head of an institution that receives a request for access to a record that the institution does not have in its custody or under its control shall make reasonable inquiries to determine whether another institution has custody or control of the record, and, if the head determines that another institution has custody or control of the record, the head shall within fifteen days after the request is received,
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> (a) forward the request to the other institution; and
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> (b) give written notice to the person who made the request that it has been forwarded to the other institution.
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> (3) If an institution receives a request for access to a record and the head considers that another institution has a greater interest in the record, the head may transfer the request and, if necessary, the record to the other institution, within fifteen days after the request is received, in which case the head transferring the request shall give written notice of the transfer to the person who made the request.

[8] Orders P-85, P-221 and PO-1954-I.
[9] Orders P-624 and PO-2559.
[10] Order PO-2554.
[11] Orders M-909, PO-2469 and PO-2592.

of the responsive records within its custody or control.[12]

[38] In this appeal, the appellant takes issue with the police's search on the basis that he believes additional responsive records should exist. In particular, the appellant takes issue with the police not searching for records relating to the Hamilton property identified in part three of both requests or, more broadly, not searching for records responsive to his entire general information request.

Representations

The police's representations

[39] The police maintain that they conducted a reasonable search for records responsive to the appellant's requests and that all appropriate action was taken to provide a comprehensive response. The police submit that the appellant's requests were unambiguous, negating the need for clarification. The police explain that in processing the requests, they searched "various, relevant databases."

[40] Regarding the ACIIS database in particular, the police explain that it is the Canadian law enforcement community's national database, which contains criminal information and intelligence on organized and serious crime. The police emphasize that the appellant has no arrest records or any contact with the Toronto Police Service that would suggest that a query of the ACIIS database is warranted.

The appellant's representations

[41] The appellant maintains that the fundamental first step in responding to an access request is for an experienced employee of the institution to identify records that may be relevant to a request. The appellant argues that a reasonable search cannot be conducted where the employee conducting the search either cannot, will not, or is not permitted to conduct the necessary searches. He submits that by vesting the authority to conduct the search in a delegate who may not have access to all of the police's records, the police failed to engage an "experienced employee" to process his requests.

[42] The appellant takes issue with the police's position that it searched "various, relevant databases." He notes that the police could have provided the particulars of the databases it searched, including how it assessed the relevance of those databases. The appellant submits that the police have a "documented capacity" to conduct a broad search through its "Unified Search" database. The appellant also takes issue with the police's assertion that a search of the ACIIS database was not warranted because "the appellant had no arrest records or any contact with the Toronto Police Service." He maintains that this statement is inaccurate, and points to the fact that the police

[12] Order MO-2185.

released records chronicling his contact with them dating back to the 1990's.

[43] The appellant maintains that the police failed to identify the locations where considerable personal information and records of a general nature could reasonably have been found. He argues that responsive records would include those from within the institution and within "the program areas of the institution's delegate." He submits that such program areas include, for example, the Provincial Counter-Terrorism Plan and any related bio-collections, the Hate Crime Extremism Investigative Team, covert operations, "incidental" collections, intelligence gathering, joint-force projects, and virtue-testing initiatives. The appellant claims that all of these programs and activities should be considered areas where records responsive to an "all-records" request could be located.

[44] As evidence that there are records responsive to his requests that have not been identified by the police, the appellant provides copies of some of his email correspondence with the police. One chain of emails pertains to a complaint the appellant filed with the police, which sparked one of the investigations reflected in the records. Another chain of emails pertains to the appellant's concerns regarding the police's proper designation of a head under section 3(2) of the *Act*.[13] The appellant argues that the fact that these two records were not identified and produced in response to his requests provides a reasonable basis for concluding that other responsive records may exist.

[45] The appellant interprets the police's representations as the police admitting to having conducted a criminal investigation involving the appellant. As a result, he submits that the police could reasonably be expected to have surveillance records about him. Therefore, the appellant submits that a reasonable search should include a search for electronic surveillance records.

The police's reply

[46] The police begin by addressing the emails that the appellant provided as evidence to support his position that their search was not reasonable. As mentioned above, the police maintain that, given the size of their institution, it is "simply not feasible" to consider email exchanges as records responsive to every access to information request; and therefore, steps will only be taken to search for email records when a requester specifically indicates that they are interested in obtaining access to emails.

[47] The police submit that one of the email exchanges was between the appellant

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[13] Section 3(2) of *MFIPPA* states: The members elected or appointed to the board, commission or other body that is an institution other than a municipality may designate in writing from among themselves an individual or a committee of the body to act as head of the institution for the purposes of this Act.

and a member of the Toronto Police Services Board. The police argue that this record is not "under the care and control of the Toronto Police Service," and therefore the appellant should submit an access request to the Toronto Police Services Board directly to obtain such records. Regarding the second email exchange, the police submit that it was unnecessary to provide the appellant with a copy of the exchange because it was copied and pasted into a report that was disclosed to him in full. The police submit that by not providing the appellant with records that he already has in his possession, they minimized redundancy and the related costs that would have been incurred by the appellant.

[48] The police also maintain that the email records are not as "readily available" as the appellant believes. They note that the emails were sent over a year prior to the appellant's request.

[49] In response to the appellant's submission regarding databases, the police explain that both the Unified Search and the Intergraph Computer Aided Dispatch databases were queried. With regard to the ACIIS database, the police clarified that when they said the appellant had "no contact" with them, they meant that he had not been arrested or identified as a known offender. The police explain that they do not use the term "contact" to refer to situations where someone is identified as a victim or is involved in a civil matter or a medical complaint. Furthermore, the police explain that they are not able to query the ACIIS database in relation to access to information requests under the *Act*, because the ACIIS database is owned by the Federal Government of Canada.

[50] The police challenge the appellant's conclusion that he was subject to a criminal investigation based on their decision to deny access to some information that was collected during "an investigation into a possible violation of law." The police maintain that the records demonstrate that no crime was perpetrated by the appellant. Therefore, the police maintain that an experienced employee would have no reason to believe that surveillance records would exist.

[51] The police state that given the appellant's familiarity with the *Act*, he "should be aware of the possibility that an oversight may occur when receiving a request such as his." The police also maintain that it is "confounding why the appellant … would not have simply specified the record(s) he wished to access, and knew to be in existence, in his original request."

The appellant's sur-reply

[52] The appellant objects to the police's position that it was unnecessary to provide him access to records that were already in his possession, such as emails. The appellant maintains that the police would have had to assume that he had the emails, as his actual possession of the email records was only established during the inquiry. Moreover, the appellant maintains that the police's argument regarding reduced redundancy and costs is not particularly compelling given the "meager cost" associated

with producing a few extra pages of records.

[53] The appellant argues that the fact that his request was submitted over a year after the emails were generated and may not require a "simple query" to generate responsive records does not excuse the police from their search obligations under the *Act*. He argues that neither the *Act* nor any jurisprudence supports the position that the size of the institution plays a role in determining how a reasonable search is conducted.

[54] The appellant also takes issues with the allegedly contradictory nature of the police's original and reply representations. The appellant interprets the police's original submissions as indicating that the police are able to query the ACIIS database, but they determined that such a query was not warranted given that the appellant has no arrest records or any contact with the Toronto Police Service. The appellant contrasts this position with what is communicated in the police's reply representations, where they state that they are unable to query the ACIIS database.

Analysis and findings

[55] As stated above, the *Act* does not require the police to prove with absolute certainty that further records do not exist. However, the police must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[14] In the circumstances of this appeal, and in the context of my findings about the scope of the appellant's request(s), I am not satisfied that the police have done so. Therefore, for the following reasons, I find that the police have failed to establish that they conducted a reasonable search to identify all of the information responsive to the appellant's requests.

[56] The police were asked to provide details of the searches that they carried out, including who conducted the searches, what places and files were searched, and the results of the searches. Despite these questions, the police provided very few details about the searches that they conducted to find records responsive to the appellant's requests. For example, in their initial response to the Notice of Inquiry, the police simply state that they searched "various relevant databases." It was not until I sought reply representations that the police explained that they conducted a search of the Unified Search and Intergraph Computer Aided Dispatch databases. Even then, however, the police do not explain why these databases were selected to be queried.

[57] As stated, the police's representations did not identify the individual who conducted the searches, nor did they elaborate on that individual's qualifications or experience. As such, I am unable to determine whether "an experienced employee knowledgeable in the subject matter of the request" conducted the search, as required

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[14] Orders P-624 and PO-2559.

by the *Act*. The police also did not address the possibility that records existed at one time, but no longer exist.

[58] There is no indication in the police's decision letters or representations that they conducted a search for records relating to the Hamilton property, which I have found to be within the scope of the appellant's request. Similarly, there is no evidence before me that the police searched for records of a general nature. Accordingly, I am unable to conclude that the police conducted a reasonable search for records responsive to the "general" records request, in its entirety, and part three of both requests regarding the Hamilton property, in particular.

[59] 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.[15] In the circumstances of this appeal, I am satisfied that the appellant has done so.

[60] The appellant provided two email exchanges between the police and himself that were not identified in the police's access decision. In response, the police maintain that one of those email exchanges is between the appellant and a member of the Toronto Police Services Board, and would therefore not be held by the Toronto Police Service. Although the parties were not invited to provide representations on this issue, for the purposes of this appeal, I am satisfied that the provisions of the *Act* specifically address the police's argument. Paragraph (b) of the definition of "institution" under section 2(1) of the *Act* stipulates that "police services boards" are institutions for the purpose of the *Act*. The section does not also include "police services" as enumerated institutions. This means that for a requester seeking access to information from the Toronto Police, there is no distinction between the police service and the police services board. Accordingly, depending on the nature of a request, a search for responsive records may need to include the email accounts of staff at both the Toronto Police Service and the Toronto Police Services Board.[16] In the context of this appeal, the police did not originally consider the need to search Toronto Police Services Board records; however, the need to do so became evident during the inquiry.

[61] With regard to the second email exchange, the police maintain that it was not necessary to provide the appellant with a copy of the emails because the correspondence was copied and pasted into one of the records that was disclosed in full. However, upon reviewing the email exchange and the disclosed record, I note that

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[15] Order MO-2246.

[16] I note that this is consistent with information provided on the Toronto Police Services Board's website, which states: "In cases of a request that may involve records under the care and control of both the Board and the Toronto Police Service, or where there is uncertainty as to who holds the records, representatives of both the Board and the Service will jointly assess the request to provide a response." (http://www.tpsb.ca /about/access-to-information)

the record did not include the entirety of the email correspondence. Accordingly, in only providing access to an excerpt of that email correspondence as it existed in the disclosed record, the police appear not to have identified the complete original record, which included additional pages of responsive information. In the circumstances, I conclude that a reasonable search would have been expected to result in the identification of this complete email as a responsive record, with the correlated requirement to issue a decision respecting access to it.

[62] On this basis, I am satisfied that there may be email accounts of both Toronto Police Service and Toronto Police Services Board staff that contain responsive records and that have not yet been searched.

[63] The appellant also refers to the ACIIS database as a location that has not yet been searched for responsive records. The police explain that they did not search the ACIIS database because there are no incidents leading them to believe that it may contain responsive records, and because the police are not able to query the federally owned database for records responsive to access to information requests. I accept the police's position that the ACIIS database is a federally owned database and that they are unable to query it for records responsive to access to information requests. I also accept the police's position that if the appellant seeks to access records from that database, he should submit an access to information request to the federal body that oversees the database (the RCMP).[17] Accordingly, I find that the fact that the police did not search the ACIIS database does not undermine the reasonableness of their search for responsive records.

[64] In conclusion, I find that the police have failed to demonstrate that they conducted a reasonable search for responsive records, while the appellant has provided a reasonable basis for concluding that additional responsive records may exist within their record holdings. As a result, I will order the police to conduct a further search for records responsive to the entirety of the appellant's requests, as detailed in the provisions of this order and with consideration of my findings on the scope of the appellant's requests, above.

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

[65] In order to determine whether the personal privacy exemption in section 38(b) applies, 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), in part, as follows:

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[17] The RCMP do not fit within the definition of an "institution" for the purpose of section 18(1) of the *Act*; therefore, the forwarding and transferring provisions at sections 18(2) and 18(3) (*supra* footnote 7) are not triggered with respect to any potentially responsive information in the ACIIS database.

> "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,
> >
> > (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,
> >
> > (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[.]

[66] 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.[18]

[67] 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.

[68] 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

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[18] Order 11.

individual.[19]

[69] 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.[20]

[70] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[21]

Representations

[71] The police submit that pages 7-12, 14, 15, 17, 19, 28, and 29-31 contain personal information as defined in the *Act*. The police explain that this information relates to other individuals involved in the various incidents documented in the responsive records, and that it is reasonable that these individuals could be identified if the information were disclosed to the appellant. The police also maintain that none of the other individuals whose information appears in the records were acting in a professional capacity.

[72] The appellant takes issue with the "vague" representations provided by the police, which he says makes it impossible for him to "formulate a reasoned response."

Analysis and findings

[73] I have reviewed the occurrence reports at pages 7-13, 14-16, 17-18, and 19-21 and the ICAD reports at pages 28-29 and 30-31. Based on my review, I am satisfied these records contain the personal information of the appellant, including his name, age, sex, phone number, address, personal views or opinions, and other information. Accordingly, I find that these records contain the appellant's personal information, as that term is defined in paragraphs (a), (d), (e), and (h) of the definition of "personal information" in section 2(1) of the *Act*.

[74] I am also satisfied that these records contain the personal information of other individuals as that term is defined in paragraphs (a), (d), (e), and (h) of the definition of "personal information" in section 2(1) of the *Act*. This includes information relating to the other individuals' names, ages, sexes, phone numbers, addresses, personal views or opinions, and other information relating to those individuals.

[75] Based on my review of the records, I accept the police's submission, and I find,

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

that none of the identifiable individuals were acting in a professional or business capacity.

[76] I am not satisfied, however, that the alphanumerical figures described as "Event #" in the ICAD reports at pages 28-29 and 30-31 constitute personal information under the *Act*. The police's representations do not explain how the event numbers constitute the "personal information" within the meaning of section 2(1), and I am unable to ascertain how the disclosure of these event numbers could reasonably be expected to identify other individuals. Past orders have found that ICAD event numbers do not constitute "personal information."[22] In the circumstances of this appeal, I find that the event numbers in the records are not "personal information" within the meaning of section 2(1) of the *Act* and I will order them disclosed, as no other exemptions have been claimed and no mandatory exemptions apply.

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

[77] 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.

[78] 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.[23]

[79] Sections 14(1) to (4) provide guidance in determining whether disclosure of the information would be an unjustified invasion of personal privacy. If the information fits within any of paragraphs (a) to (e) of section 14(1) or (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).

[80] In determining whether the disclosure of the personal information 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.

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[22] Orders MO-2378 and MO-3117.
[23] See "Issue E" for a more detailed discussion of the institution's discretion under section 38(b).

Representations

[81] The police maintain that records contain information that is exempt from disclosure under section 38(b) with reference to the presumption at section 14(3)(b). The police maintain that none of the exceptions to the personal privacy exemption in sections 14(1) or 14(4) apply. The police also maintain that neither the factors in section 14(2), presumably those weighing in favour of disclosure, nor the "absurd result" principle apply.

[82] The police explain that they conducted investigations involving the appellant and, in doing so, they compiled personal information about the appellant and other identifiable individuals. The police maintain that individuals who provide personal information during an investigation do so with the belief that it will be held in confidence, and therefore disclosing that information would be an unjustified invasion of those individuals' personal privacy. In support of this position, 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.

[83] The police also submit that the individuals supplied their personal information to officers believing there to be a certain degree of confidentiality and, in doing so, trusted that the police would treat the information appropriately.

[84] The appellant argues that the police did not properly consider the factors in section 14(2) or presumptions in section 14(3). As evidence of this, he points to the contradictory nature of the police's submissions, which claim that "section 14(2) does not apply," and then say that the affected parties provided information with the expectation of confidentiality. On this basis, the appellant suggests that the confidentiality expectations of the affected parties "were likely not actually the individuals' expectations."

[85] The appellant maintains that the police have not provided a sufficiently satisfactory explanation to enable him to respond. He requests that I "quash the decision" and "return the matter to the institution for consideration by a different person along with an accompanying order that the institution revisit the issue of the application of section 38(b)."

Analysis and findings

[86] Based on my review of the records and the parties' submissions, I agree with the

police's position that the personal information of other identifiable individuals in the records is exempt from disclosure under section 38(b) of the *Act*.

[87] Specifically, I agree that the personal information contained in the records was compiled and is identifiable as part of several investigations into possible violations of law; therefore, I find that the presumption in section 14(3)(b) applies and weighs in favour of not disclosing the personal information of other individuals.

[88] Because the records contain the appellant's personal information, I must also consider and weigh any applicable section 14(2) factors in balancing the appellant's right of access and the other individuals' privacy interests.

[89] While the police maintain that none of the factors at section 14(2) apply, their representations allude to the relevance of the factor favouring privacy protection in section 14(2)(h). This section states:

> 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,
>
> > the personal information has been supplied by the individual to whom the information relates in confidence

[90] This factor applies if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Thus, section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.[24] In the circumstances of this appeal, there is insufficient evidence in the parties' submissions to substantiate the application of this factor, and I find that it does not apply.

[91] I have also considered whether any other listed or unlisted factors apply. Section 14(2)(f) states that in determining whether disclosure of personal information would constitute in an unjustified invasion of personal privacy, an institution must consider whether the information is "highly sensitive." In order for section 14(2)(f) to apply, there must be a reasonable expectation of significant personal distress if the information is disclosed.[25] Again, in the circumstances before me, there is insufficient evidence to support the application of this factor, and I find that it does not apply.

[92] There is no evidence before me addressing the listed or unlisted factors favouring disclosure, and I find that none apply.

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[24] Order PO-1670.
[25] Orders PO-2518, PO-2617, MO-2262 and MO-2344.

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

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

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

[95] 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.

[96] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[26] This office may not, however, substitute its own discretion for that of the institution.[27]

Representations

[97] The police maintain that in balancing the appellant's right of access with the affected parties' right to privacy protection, they decided to favour protecting the privacy interests of the affected parties rather than granting full access to the records. In doing so, the police say they considered the nature of their law enforcement activities, which typically involve recording information related to unlawful activities, crime prevention, and other undertakings involving members of the public that require assistance or intervention by the police. On this basis, the police submit that their records are not "simple business transaction records in which disclosure of another individual's personal information may not, on balance, be offensive."

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[26] Order MO-1573.
[27] Section 43(2).

[98] In addition, as mentioned above, the police submit that law enforcement investigations imply an element of trust and that individuals who provide personal information to the police during an investigation do so with the belief that it will be held in confidence. Accordingly, the police submit that they did not exercise their discretion in bad faith or for an improper purpose, and they maintain that they took "all irrelevant" and relevant considerations into account.

[99] The appellant cites the principle set out by the Supreme Court of Canada in *Criminal Lawyers' Association v Ontario (Minister of Public Safety and Security)* that discretion:

> […] is to be exercised with respect to the purpose of the exemption at issue and all other relevant interests and considerations, on the basis of the facts and circumstances of the particular case. The decision involves two steps. First, the head must determine whether the exemption applies. If it does, the head must go on to ask whether, **having regard to all relevant interests,** including the public interest in disclosure, disclosure should be made. [emphasis added by the appellant][28]

[100] The appellant states that the police's submission that they took into account "irrelevant" factors demonstrates that they did not exercise their discretion reasonably. The appellant suggests that the police processed his request "with an absence of good faith," by: being inconsistent in their position regarding the police's ability to query the ACIIS database; ascribing motives to his request; and "negating" his general information request without inquiring whether the two requests were identical.

Analysis and findings

[101] Based on the records and submissions before me, I find that the police properly exercised their discretion under section 38(b) to withhold other individuals' personal information. In doing so, I am satisfied that the police considered that the records contain the appellant's own personal information as well as that of other individuals, weighed the appellant's right of access with the other individual's right of privacy, and considered that exemptions from the right of access should be limited and specific.

[102] I am also satisfied that the police considered relevant factors in exercising their discretion. There is no convincing evidence before me that the police did, in fact, consider irrelevant factors. What appears more likely is that the police's reference to considering irrelevant factors was a typographical error and I accept that it should have read that they "did not" consider irrelevant factors.

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[28] 2010 SCC 23, at para 66.

[103] In addition, I do not accept the appellant's position that the police's "changing position" on its ability to search the ACIIS database is sufficient proof for me to infer, and find, that the police exercised their discretion under section 38(b) in bad faith.

[104] Accordingly, I uphold the police's exercise of discretion to withhold the personal information of other individuals under section 38(b) of the *Act*.

ORDER:

1. I order the police to disclose the alphanumerical "Event #" found on pages 28, 29, 30, and 31 of the records at issue by **September 4, 2019**.

2. I order the police to issue an access decision to the appellant regarding the information identified as non-responsive on pages 22, 24, 26, 28 and 30 of the records at issue, treating the date of this order as the date of the access request.

3. I order the police to conduct a further search for records responsive to the appellant's access to information requests, including for records responsive to the "general" records request, records relating to the identified Hamilton property and records held by the Toronto Police Services Board, all of which should include searches for responsive email records.

4. I order the police to issue an access decision to the appellant regarding any records located as a result of the searches ordered in provision 3, in accordance with the *Act*, treating the date of this order as the date of the request.

5. I order the police to provide me with an affidavit sworn by the individual(s) who conduct the searches by **September 4, 2019** describing its search efforts. At a minimum, the affidavit(s) should include the following information:

    a. The names and positions of the individuals who conducted the searches;

    b. Information about the types of files searched, the nature and location of the searches, and the steps taken in conducting the searches;

    c. The results of the search; and

    d. Details of whether additional records could have been destroyed, including information about record maintenance polices and practices and retention schedules.

    The police's affidavits and any accompanying representations may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for submitting and sharing representations is set out in this office's *Practice Direction Number 7*, which is available on the IPC's website. The police

should indicate whether they consent to the sharing of their representations and affidavits with the appellant.

6. I remain seized of this appeal in order to deal with any outstanding issues arising from order provisions 3 and 5.

7. I reserve the right to require the police to provide me with a copy of the records disclosed to the appellant in accordance with order provision 1, and to provide me with a copy of the access decisions referred to in order provisions 2 and 4.

Original signed by | August 2, 2019

Jaime Cardy
Adjudicator