Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3815

Appeal MA18-111

Waterloo Regional Police Services Board

August 8, 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 all records related to a specified incident involving the appellant. The police located handwritten officer's notes in response, and disclosed portions of the record to the appellant. Information was withheld on the basis that some of it was not responsive to the request, and some was exempt under a number of law enforcement exemptions at section 8(1) of the *Act*, as well as section 38(a) (discretion to refuse a requester's own personal information), and sections 14(1) and 38(b) (personal privacy). At mediation, an affected party consented to their personal information being disclosed. As a result, the police issued a revised decision, granting some further disclosure, but maintaining their reliance on section 38(a) in conjunction with the law enforcement exemptions at sections 8(1)(a) (law enforcement matter), 8(1)(c) (reveal investigative techniques and procedures), and 8(1)(l) (facilitate commission of an unlawful act) for the withheld information. In addition, the appellant added the issue of reasonable search to the appeal. During adjudication, the police added issue of the possible application of the exemption at section 9 (relations with other governments) to the scope of the appeal. In this order, the adjudicator finds that the information withheld is exempt under section 38(a) in conjunction with section 8(1)(l). The adjudicator also upholds the reasonableness of the police's search.

Statute Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 4(1), 8(1)(l), 17, and 38(a).

Order Considered: Order MO-3590.

OVERVIEW:

[1] 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:

> All documents (including any occurrence reports, officer's notes, communications, witness statements) that contain information, directly or indirectly, about or related to me, including but not limited to: irregular traffic stop that occurred on [a specified date].

[2] The police issued a decision providing partial access to the records. Access to the withheld information was denied under the exemptions found in the following sections of the *Act*:

- sections 8(1)(a) (law enforcement matter), 8(1)(c) (reveal investigative techniques and procedures), 8(1)(l) (facilitate commission of an unlawful act);
- section 14(1) (personal privacy), taking into consideration the factor at 14(2)(h) (information supplied in confidence) and the presumption at section 14(3)(b) (investigation into possible violation of law);
- section 38(a) (discretion to refuse requester's own information); and
- section 38(b) (personal privacy)

[3] The police also noted that the "incident was deemed to be non-reportable (NR). There was no report generated as a result of the call to police."

[4] The requester, now the appellant, appealed the police's decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC, or this office).

[5] Mediation at the IPC led to:

- the written consent of an affected party, a supplementary access decision disclosing additional information to the appellant, and the removal of the personal privacy exemptions at sections 14(1) and 38(b) from the appeal;
- the addition of two issues to the appeal: responsiveness of portions of the record and the reasonableness of the police's search; and
- a secondary search conducted by the police, and the issuance of a supplemental decision stating that additional responsive records were not located, and clarifying that language in the previous decision letter about a call to the police was standard language, but that in the traffic stop in question, there was no call to police and no report generated as a result.

[6] Since further mediation could not resolve the remaining issues, the appeal moved to the adjudication stage, where an adjudicator conducts a written inquiry.

[7] I began an inquiry under the *Act* by sending out a Notice of Inquiry, setting out the facts and issues on appeal, to the police. I sought and received written representations from the police on the issues set out in the Notice of Inquiry, and an issue added by the police: the possible application of the discretionary exemption at section 9 (relations with other governments). Portions of the police's representations were not shared with the appellant because these representations met the confidentiality criteria of the IPC's *Practice Direction 7*. However, the non-confidential portions of the police's representations were shared with the appellant. The appellant provided representations in response, which were shared with the police in their entirety. The police provided reply representations, which were also fully shared with the appellant. After receiving the appellant's sur-reply representations, I determined that it was not necessary to seek further representations from the parties.

[8] The appellant asked, through sur-reply representations, that the police provide this office with a full copy of the information at issue so that I could assess whether the police were "forthcoming" in stating that they released all of the information that they could. Since the police provided the IPC with an unredacted copy of the record at issue when the appeal was filed, I have had access to the unredacted version of the pages at issue from the outset of the adjudication process. My findings in this order are based on my review of the unredacted copy of the record and the parties' representations.

[9] For the reasons that follow, I uphold the access decision of the police because I find that the discretionary exemption at section 38(a) in conjunction with the law enforcement exemption at section 8(1)(l) applies to the responsive information at issue. In addition, I uphold the reasonableness of the police's search for responsive records.

RECORDS:

[10] The record at issue is comprised of the information withheld on two pages of police notes (pages 4 and 5 of the record).

ISSUES:

Preliminary issue: Are the police required to answer the questions put to them by the appellant?

A. What is the scope of the request? Which portions of the record are responsive to the request?

B. Does the record 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 the section 8(1)(l) exemption apply to the information at issue on page 5 of the record?

D. Did the police exercise their discretion under section 38(a)? If so, should this office uphold the exercise of discretion?

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

DISCUSSION:

Preliminary issue: Are the police required to answer the questions put to them by the appellant?

[11] The appellant's representations include a number of questions related to the traffic stop that is the subject matter of the request. The police submit that they are not required to answer these questions through this appeal under the *Act*, and I agree.

[12] The questions posed do not form a part of the request made under the *Act*.

[13] But even if they had, the police would not necessarily be compelled to answer them through a freedom of information request, as the IPC has stated in past orders:

> Taken together, Orders 17, MO-2096, MO-2285, and MO-2957 establish that a 'right to information' does not require an institution to provide an answer to a specific question; rather, the institution must consider what records in its possession might contain information that would partly or fully answer the questions asked in a request.[1]

[14] For these reasons, the questions contained in the appellant's representations will not be addressed further in this order. This order will only deal with the portions of the appellant's representations that are relevant to the police's access decision that is under appeal and the reasonableness of their search for responsive records, not any underlying issues or unanswered questions related to the traffic stop.

Issue A: What is the scope of the request? Which portions of the record are responsive to the request?

[15] The police withheld information on both pages 4 and 5 as not responsive to the request, and for the reasons that follow, I uphold that decision.

[16] Section 17 of the *Act* imposes certain obligations on requesters and institutions

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[1] Order MO-3590, para. 28.

when submitting and responding to requests for access to records. What is relevant to this appeal is that a requester must make a request in writing to the institution that the person believes has custody or control of the record;[2] and must provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record.[3] In addition, if the request does not sufficiently describe the record sought, the institution must inform the applicant of the defect and offer assistance in reformulating the request so that it can comply with the requirements of section 17(1).[4]

[17] 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.[5]

[18] To be considered responsive to the request, records must "reasonably relate" to the request.[6]

[19] I have reviewed a complete copy of pages 4 and 5 of the record at issue. On the basis of my review, I find that all of the information identified by the police as "not responsive" to the request concerns matters such as involvement in other people's cases. Examining the officer's notes, it is clear from the times noted in the margins that they were taken throughout the day as records of the activities of that particular officer. Based on my review of the record, I find that the information withheld on pages 4 and 5 as "not responsive" does not reasonably relate to the subject matter of the appellant's request. Therefore, I uphold the decision of the police to withhold it.

[20] As a result, the discussion below only concerns the small portion of information withheld on page 5 that I find is responsive to the request.

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

[21] The police refused to grant access to the responsive information at issue on page 5 of the record on the basis of the exemption at section 38(a) (discretion to refuse requester's personal information) of the *Act*, in conjunction with the a number of discretionary exemptions. Section 38(a) is the appropriate exemption to consider if the record at issue contains the personal information of the appellant.

[22] In this case, it is undisputed that the record contains the personal information of the appellant.

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[2] Section 17(1)(a) of the *Act*.
[3] Section 17(1)(b) of the *Act*.
[4] Section 17(2) of the *Act*.
[5] Orders P-134 and P-880.
[6] Orders P-880 and PO-2661.

[23] Since the record contains the personal information of the appellant, I must assess any right of access to it under Part II of the *Act*, under the discretionary exemption at section 38(a), in conjunction with one of the exemptions claimed by the police.

Issue C: Does the discretionary exemption at section 38(a) in conjunction with the section 8(1)(l) exemption apply to the information at issue?

[24] For the reasons set out below, I find that the responsive information withheld on page 5 of the record is exempt from disclosure by reason of section 38(a) (discretion to refuse requester's own information) in conjunction with the law enforcement exemption at section 8(1)(l) (facilitate commission of an unlawful act).

[25] Section 36(1) gives individuals a general right of access to their own personal information held by an institution.

[26] Section 38 provides a number of exemptions from this right.

[27] Section 38(a) allows an institution to refuse to disclose to a requester their personal information if one of the exemptions listed at sections 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

[28] 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.[7] If 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. I will discuss this separately below, under Issue D.

[29] The police rely on section 38(a) in conjunction with a number of discretionary exemptions, including the law enforcement exemption at section 8(1)(l). Section 8(1)(l) allows the police to withhold information if disclosure could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime.

[30] The term "law enforcement" is defined in section 2(1) of the *Act* as follows:

> "law enforcement" means,
>
> (a) policing,

[7] Order M-352.

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

[31] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[8]

[32] 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.[9] The institution must provide detailed 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.[10]

[33] For section 8(1)(l) to apply, the police must establish that disclosure of the records could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime.

[34] The police submit, and I accept, that the use of "ten-codes" by law enforcement is an effective and efficient means of conveying a specific message without publicly identifying its true meaning. The police also argue, and I find, that the word "code" itself implies the intention that the information not be widely disclosed.

[35] The police submit, and I find, that if the public were to learn the ten-codes and their meanings, the effectiveness of these codes would be compromised. Furthermore, the police submit, and I accept, that by encoding certain information, the police are able to communicate with each other without revealing the meaning of the code, and that knowledge of the codes could be used to counter the actions of police personnel responding to situations. This could result in the risk of harm to police personnel and/or members of the public with whom the police engage, such as victims and witnesses.

[36] Turning to the record at issue specifically, the police submit that the withheld coding information referred to in the record, in isolation, does not provide a specific meaning. However, the police submit, and I find, that when read in the context of the record at issue, the corresponding meaning would be revealed, thus compromising the

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

security of the coding information withheld. Though this explanation was shared with the appellant, the appellant's representations do not address it.[11] Considering the evidence before me, I find no reason to depart from the IPC's long-standing approach to law enforcement coding,[12] which the police's position is consistent with.

[37] In detailed confidential representations, the police persuasively explain how disclosure of the record could reasonably be expected to result in the harm contemplated by section 8(1)(l). The police set out specific, confidential uses of the police coding withheld, and explained that these codes are not known to the public. The police also explained how knowledge of these confidential codes and their police functions could be used in specified ways to facilitate crime or hamper its control. I cannot elaborate on this further without revealing the contents of the record or the nature of the confidential uses. However, I accept the evidence of the police about the confidential uses of this coding, and understand its connection to the other information at issue. I find that use of the confidential police coding and the information appearing with it in the record can reasonably be expected to facilitate the commission of crime or hamper the control of crime.

[38] I also find that the record cannot be further severed without disclosing the confidential police coding and/or its confidential uses described in the police's confidential representations.

[39] In conclusion, as mentioned, evidence in the context of law enforcement exemptions should generally be approached with particular sensitivity, recognizing the difficulty of predicting future events in a law enforcement context. I do not find a reason to depart from that approach in this case. I understand and accept both the police's shared and confidential explanations for their position, and find that they support a conclusion that disclosure of the record could reasonably be expected to result in the harms contemplated by the law enforcement exemption at section 8(1)(l).

[40] Accordingly, subject to my findings on the exercise of discretion, I find that the information at issue would be exempt under the law enforcement exemption at section 8(1)(l), and the police were allowed to refuse to disclose it to the appellant under section 38(a). Given this finding, I do not have to consider the possible application of the other exemptions claimed in conjunction with section 38(a).

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[11] Rather, the appellant's representations focus on the circumstances of the traffic stop itself, including alleged improper police conduct, and other law enforcement exemptions claimed (though the police's representations in relation to those were almost completely redacted). As my jurisdiction is limited to determining whether the appellant has a right of access to the information withheld in the record under the *Act*, I do not have the legal authority to comment on any alleged police conduct at, or in relation to, the traffic stop in question.

[12] See, for example, Orders M-393, M-757, M-781, MO-1428, PO-1665, PO-1777, PO-1877, PO-2209, PO-2339 and PO-2409.

Issue D: Did the police exercise their discretion under section 38(a)? If so, should this office uphold the exercise of discretion?

[41] On the basis of the following, I find that the police properly exercised their discretion in this case.

[42] The section 38(a) 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.

[43] 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.

[44] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[13] This office may not, however, substitute its own discretion for that of the institution.[14]

[45] Where access is denied under section 38(a), the police must demonstrate that, in exercising their discretion, they considered whether a record should be released to the requester because the record contains his or her personal information.

[46] Here, the police submit that they carefully considered the following factors, which they deemed relevant in exercising its discretion to withhold the information at issue:

- information should be available to the public and exemptions from the right of access under the *Act* should be limited and specific;
- individuals should have a right of access to their own personal information;
- the privacy of individuals should be protected;
- the wording of the exemption and the interests it seeks to protect;
- whether the requester is seeking their own personal information;

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[13] Order MO-1573.
[14] Section 43(2).

- whether the requester has a sympathetic and compelling need to receive the information;
- the relationship between the appellant and any affected parties;
- 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 party;
- the age of the information; and
- the historic practice of the institution with respect to similar information.

[47] Since I have reviewed the full record at issue as well as the confidential and non-confidential representations of the police, I find that the above-noted factors were proper and relevant considerations, and I am satisfied that the police exercised their discretion in good faith and not in bad faith. I find that by partially disclosing the record, the police balanced the right of an individual to have access to her own personal information with the need to protect information that has confidential uses by law enforcement. Examining both parties' representations, I find that there is no evidence before me that the police took into consideration any irrelevant factors, or exercised their discretion in bad faith, in refusing to disclose the information at issue. Therefore, I uphold the exercise of discretion by the police to do so.

Issue E: Did the police conduct a reasonable search for records?

[48] For the reasons that follow, I uphold the reasonableness of the police's search for responsive records.

[49] 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.[15] 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.

[50] 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.[16]

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[15] Orders P-85, P-221 and PO-1954-I.
[16] Orders P-624 and PO-2559.

To be responsive, a record must be "reasonably related" to the request.[17]

[51] 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.[18]

[52] 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.[19]

[53] 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.[20]

The police's evidence

[54] The police were asked to provide evidence of their search efforts through an affidavit signed by the employee who conducted the search, and did so. Their representations also contained answers to the questions put to them in the Notice of Inquiry on the issue of reasonable search.

[55] The employee who conducted the search is the Access to Information Analyst (the analyst) in the Access to Information Office of the police. The analyst's affidavit states that she has worked on hundreds of access requests, and has received both general and specific training in the police environment, including sessions involving or put on by the IPC, as it relates to access to information under the *Act*. I accept this evidence, and find that the analyst who conducted the search is an experienced employee who was knowledgeable about how to find responsive records.

[56] The police's representations state that they did not seek further clarification from the appellant because the request was worded very specifically. They also chose to respond to the request literally because it is so specific and clear. Given the wording of the request, I find that it was reasonable not to seek clarification about the request and to respond to it literally.

[57] The analyst's affidavit sets out the steps she took to identify responsive records. Once the file was opened, she conducted a search of the Records Management System (RMS) of the police for the appellant's name. I find that the RMS was a reasonable location for the analyst to search for responsive records, given the nature of the

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[17] Order PO-2554.
[18] Orders M-909, PO-2469 and PO-2592.
[19] Order MO-2185.
[20] Order MO-2246.

request, as was the decision to search by the appellant's name.

[58] As a result of her RMS query, the analyst found one incident involving the appellant; a specified police officer was identified as the involved officer. The analyst then e-mailed that police officer to ask for all records relating to the incident. A week later, the police officer provided the analyst with two pages of notebook entries (which are the pages at issue in this appeal). I find that contacting the police officer involved in the incident was a reasonable step, to involve an experienced employee knowledgeable in the subject matter of the request in a search for responsive records.

[59] During mediation, the appellant raised a concern about reasonable search, so the analyst emailed the same police officer again with the exact wording of the request, and asked that a secondary search be conducted. The police officer's e-mail response (a copy of which was attached to the analyst's affidavit) indicated that no further records exist. The analyst's affidavit states that the police officer advised her that he is certain there are no other responsive records in existence, as he recalled that he was driving his cruiser, "running [queries about] licence plates around him," and then stopping the car that the appellant was in when he received a response to his query about it. Further, the response had to do with the registered owner, who was not in the vehicle at the time. The police officer advised the analyst that the traffic stop concluded, as did his involvement, at that point. I find that this is a sufficient explanation from the police officer involved in the incident that is the subject matter of the request, regarding his search efforts and the results of his search.

[60] The police state that they are not aware of any other records that could exist regarding the incident in question. I find that this is a reasonable conclusion to draw given the police officer's explanation above, and because the police searched locations that would reasonably be expected to have responsive records (the RMS and the involved police officer's notes), and the police's clarification in their access decision that the incident was deemed non-reportable (thus, generating no further report).

[61] In addition, due to the broad nature of the request, the police state that it is possible that other records related to the incident exist, but are not in police's possession, and that the police interpreted the request to be for information held by the police and not any other institution. I accept this submission, since a request under the *Act* to be made to an institution can only be fulfilled if that institution has custody or control of responsive records.[21]

The appellant's evidence

[62] It appears that a note of clarification is necessary regarding the scope of the

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[21] See section 4(1) of the *Act*.

affidavit. The appellant's representations state that the exemptions are a "material part" of the affidavit that is "miss[ing]," and asks whether the law enforcement matter is "suddenly…not relevant to this appeal any longer[.]" However, the IPC generally requests affidavit evidence for the issue of reasonable search, not issues related to exemptions claimed by an institution. The fact that the police chose to provide affidavit evidence about their exercise of discretion in applying section 38(a) in conjunction with other exemptions does not mean that they were required to do so, or lead to the appellant's conclusion that their unsworn substantive claims about the exemptions are no longer valid.

[63] The appellant's representations insufficiently address the evidence submitted by the police about their search. The appellant believes that the police received information before the incident, and asks that the police disclose that information. However, I find the appellant's submissions in this vein to be based on assumptions that the appellant has not established the basis of (for example, that any such information must be in addition to what has been withheld in the record). I find that this is not a basis for believing that additional records exist. Also, the police searched the RMS for the appellant's name, which would be expected to find any records pre-existing the traffic stop, if any existed.

[64] Since I have found that the police provided sufficient evidence that experienced employees, knowledgeable in the subject matter of the request, took reasonable steps to locate responsive records, and that the appellant has not provided a basis for believing that additional records exist, I uphold the reasonableness of the police's search.

ORDER:

I uphold the access decision of the police, and the reasonableness of the police's search, and dismiss this appeal.

August 8, 2019

Marian Sami
Adjudicator