Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3830

Appeals MA18-00761 and MA18-00762

Toronto Police Services Board

September 11, 2019

Summary: The Toronto Police Services Board (the police) received two requests under the *Municipal Freedom of Information and Protection of Privacy Act* for information about identifiable individuals or organizations. The police denied access to any responsive information citing the discretionary law enforcement exemption in section 8(3) (refuse to confirm or deny existence of records), in conjunction with section 8(1)(g) (intelligence information).

In this order, the adjudicator finds that section 8(1)(g) would apply to any responsive records and upholds the police's decision to refuse to confirm or deny the existence of responsive records under section 8(3).

Statutes Considered: *Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c. F. 31, as amended, sections 8(1)(g) and 8(3).

OVERVIEW:

[1] The Toronto Police Services Board (TPS or the police) received the following two requests under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*):

> 1. I am seeking records related to activist [name, (the activist)]. Please release any emails that mention [the activist] and were created or received by any of the following people: [ten named individuals]
>
> These records should include any records attached to these emails. Please limit your search to records created between January 1, 2016 and the

> present date [April 30, 2018]. In any instances where emails were exchanged among the listed parties, please omit any duplicate records. Also, please include any records that mention [the activist's] Twitter account, which can be found at [account name]. Finally, please omit any records released to me in response to any other requests.[1]
>
> 2. I am seeking records related to the following groups and individuals: [Two related groups (the groups) and four named individuals]
>
> Please release any records, created by any staff in the Toronto Police Service Intelligence Services that mention any of these parties. This should include any records that mention any of the listed parties' accounts on any social media website. Please limit your search to records created between January 1, 2016 and the present date [April 30, 2018]. Finally, please omit any records released to me in response to any other requests.[2]

[2] In response to both requests, the police stated that they cannot confirm or deny the existence of record(s) in accordance with section 8(3) (law enforcement) of the *Act.*

[3] The requester, now the appellant, appealed the police's decisions to this office, which opened Appeal MA18-00761 to address Request #1 and Appeal MA18-00762 to address Request #2.

[4] As mediation did not resolve the issues, these appeal files proceeded to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry. Representations were sought from, and exchanged between, the appellant and police, in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[5] In this order, I address both appeal files, and find that the law enforcement exemption in section 8(1)(g) (intelligence information) would apply to any responsive records. I uphold the police's decision to refuse to confirm or deny the existence of responsive records under section 8(3).

ISSUES:

Issue A: Does the discretionary law enforcement exemption at section 8(3) apply to the records, if any exist?

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[1] Referred to in this order as Request #1.
[2] Referred to in this order as Request #2.

Issue B: Did the police exercise their discretion under section 8(3)? If so, should this office uphold the exercise of discretion, if any exist?

DISCUSSION:

Issue A: Does the discretionary law enforcement exemption at section 8(3) (refusal to confirm or deny the existence of a record) apply to the records, if any exist?

[6] The police rely on section 8(3), in conjunction with section 8(1)(g). These sections read:

> 8(3) A head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) applies.
>
> 8(1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;

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

> Information gathered by a law enforcement agency in a covert manner with respect to ongoing efforts devoted to the detection and prosecution of crime or the prevention of possible violations of law. It is distinct from information compiled and identifiable as part of the investigation of a specific occurrence.[3]

[8] Section 8(3) acknowledges the fact that in order to carry out their mandates, law enforcement agencies must sometimes have the ability to withhold information in answering requests under the *Act*. However, it is the rare case where disclosure of the mere existence of a record would frustrate an ongoing investigation or intelligence-gathering activity.[4]

[9] For section 8(3) to apply, the institution must demonstrate that:

1. the records (if they exist) would qualify for exemption under sections 8(1) or (2), and

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[3] Orders M-202, MO-1261, MO-1583 and PO-2751; see also Order PO-2455, confirmed in *Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 4233 (Div. Ct.).
[4] Orders P-255 and P-1656.

2. disclosure of the fact that records exist (or do not exist) would itself convey information that could reasonably be expected to compromise the effectiveness of an existing or reasonably contemplated law enforcement activity.[5]

[10] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[6]

[11] 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.[7] 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.[8]

Representations

[12] The police state that in Request #1, the appellant seeks access to emails prepared by TPS personnel, all of whom are currently assigned to the Intelligence Services Unit of the police.

[13] The police state that in Request #2, the appellant seeks access to any records created by any staff in the TPS Intelligence Services Unit regarding the groups and the identifiable individuals named in this request.

[14] The police state that their Intelligence Services Unit is tasked with conducting covert investigations into various organizations and/or persons, with the intent to detect or prevent crime. They submit that any work conducted, prepared or completed by the members of their Intelligence Services Unit can only be for an intelligence information gathering purpose. The police contend that section 8(3) of the *Act* applies to the appellant's request, as the records (emails) being sought, should they exist, would be directly related to intelligence information, as contemplated by section 8(1)(g), thus satisfying part 1 of the two-part test under section 8(3).

[15] The police state that the records at issue (emails), should they exist, would form part of an investigation that is inherently covert, and as such, any revelation that these records exist would reasonably be expected to compromise the effectiveness of an

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[5] Order P-1656.
[6] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[7] Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.
[8] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

existing or reasonably contemplated law enforcement activity, thus meeting part 2 of the aforementioned two-part test above.

[16] The police also state that pursuant to section 8(3), the records at issue, should they exist, would not even be released to the actual named individuals should they have submitted a similar request. The police state that they could also have relied on section 14(5)[9] as the appellant is seeking personal information of other individuals.

[17] In response, the appellant states that many of the presumed responsive records would not have been gathered in a covert manner, and therefore would not fall under the exemption in 8(1)(g), as the police have previously gathered information on the groups and their members, and supporters, which they compiled from public social media accounts.

[18] According to the appellant, this was revealed through material from Twitter and Facebook, prepared by Intelligence Services, released in response to an earlier freedom of information request (the 2016 records) for the same records, albeit for an earlier time frame. He submits that these information gathering methods can hardly be called covert, because police services are already known to use social media as a monitoring tool. The appellant provided examples of social media monitoring by the police and the police's public statements about this type of monitoring.

[19] The appellant states that some of the 2016 records he received from the police demonstrate a sustained police interest in social media posts about the groups, suggesting the existence of at least some records that would fall within the scope of the requests under appeal. He states that the 2016 records reveal a public broadcast as the police's source of information about the activist and the groups. He submits that this other method of gathering information by the police also cannot be considered covert and undercuts the argument that all records created by Intelligence Services are, by default, intelligence.

[20] The appellant also refers to other public information about the police that indicates that they gather information during their investigations and in certain circumstances use this information only for a brief period of time. He states that the police temporarily gather information as it may provide "situational awareness" of a particular event on a particular day. He states that this material is not used for "ongoing efforts," or, as the police claim in their submissions, "an investigation that is inherently covert."

[21] The appellant provided several reasons why he believes that records responsive

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[9] This section reads:

> A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

to the requests in these appeals exist. He stresses that, as he received responsive records in a similar request in 2016 (the 2016 request), he should now receive disclosure of records in the current appeals. He states:

> The individuals named in this appeal are not criminals, and any police operations in question may not be undercover… Just as there are limited ways in which undercover operations can run, there are a limited number of ways in which police can gather information. One of these ways is by monitoring social media, which is a well-known police tactic.
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> I question why [the] police were able to release the 2016 records to me without any risk to law enforcement operations and intelligence gathering, but these two requests, involving many of the same people, require enhanced secrecy.

[22] In reply, the police state that their position is not that the information taken from Twitter and Facebook, and then encapsulated in an email was gathered covertly; rather, it is that certain records, should they exist, created by members of the Intelligence Unit, subsequent to a review of a Tweet or Facebook entry, would fall under section 8(1)(g) of the *Act*.

[23] The police state that their response to the appellant's previous 2016 request did have information about certain individuals, but the records released did not contain information that was not already in the public domain. The police state that in the requests at issue, the appellant is specifically asking for records about named individuals created by members of their Intelligence Unit.

[24] In sur-reply, the appellant repeats his previous argument that section 8(1)(g) is not relevant to much of the information that he is seeking, as the TPS does not gather information from social media in a "covert way" and they do not use it for any "ongoing efforts."

[25] The appellant states that the obvious and sustained police interest in the groups named in the request suggests the creation of additional records similar to those already released to him. He states that if the TPS could release this "public domain" information in response to his previous request, then they should do so here.

[26] He submits that the TPS's previous decision to release this type of material illustrates that doing so neither disclosed any intelligence information nor interfered with the gathering of intelligence information. He states that the obvious difference between his previous request and the two requests currently under appeal is that in the former, he did not ask for material on named individuals directly - the material was simply captured in the records he requested. The appellant submits that if section 8(1)(g) did not apply to the 2016 records, there is no clear reason why it applies here.

Analysis/Findings

[27] As set out above, there are two requests at issue in this order. In Request #1, the appellant seeks records created or received by ten individuals who work in the police's Intelligence Services Unit. In Request #2, the appellant seeks records from the police's Intelligence Services Unit.

[28] The police rely on section 8(3) in conjunction with section 8(1)(g).

[29] In order for section 8(3) to apply in this case, section 8(1)(g) must also apply.

[30] Firstly, I will determine whether section 8(1)(g) will apply, namely whether disclosure of the records, if they exist, could reasonably be expected to interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons.

[31] All the requested records relate to records within the custody or control of the police's Intelligence Services Unit. The uncontested evidence of the police is that their Intelligence Services Unit is tasked with conducting covert investigations into various organizations and/or persons, with the intent to detect or prevent crime.

[32] The police do not indicate that disclosure of the records, if they exist, could reasonably be expected to interfere with the gathering of law enforcement intelligence information. It appears to me that the police's position is that disclosure of the records, if they exist, could reasonably be expected to reveal law enforcement intelligence information.

[33] Intelligence information is information gathered by a law enforcement agency in a covert manner with respect to ongoing efforts devoted to the detection and prosecution of crime or the prevention of possible violations of law. Any responsive records would emanate from the police's Intelligence Services Unit. Based on the police's description of their Intelligence Services Unit and the wording of the appellant's requests, I am satisfied that the responsive information would be intelligence information within the meaning of section 8(1)(g).

[34] Therefore, I find that section 8(1)(g) applies. Any responsive records, which are records of the police's Intelligence Services Unit, could reasonably be expected to reveal law enforcement information respecting organizations or persons, and these records, if they exist, would be gathered by the police with respect to ongoing efforts devoted to the detection and prosecution of crime or the prevention of possible violations of law.

[35] As such, I find that part 1 of the two-part test under section 8(3) is satisfied, because the records, if they exist, would qualify for exemption under section 8(1)(g).

[36] Moving to the second part of the section 8(3) test, I agree with the police that concerning the requests at issue, the responsive records (emails from the police's

Intelligence Services Unit), should they exist, would form part of an investigation that is inherently covert, and as such, any revelation that these records exist (or do not exist) could reasonably be expected to compromise the effectiveness of an existing or reasonably contemplated law enforcement activity.

[37] In the circumstances of the appeals being addressed in this order, and taking into account that the appellant is seeking records about identifiable individuals and groups from the police's Intelligence Services Unit for a specific period of time, I find that any records prepared or completed by the members of the police's Intelligence Services Unit can only be for an intelligence information gathering purpose. Therefore, I find that part 2 of the two-part test under section 8(3) has been met and section 8(3) applies.

[38] In making my finding that section 8(3) applies, I have taken into consideration that the appellant made a request in 2016 for similar records and received some disclosure from the police. The appellant did not provide me with the wording of the 2016 request, but has indicated that in the current requests, as opposed to the 2016 request, he asks for information about named individuals directly.

[39] The appellant indicates that he should receive disclosure now as he received disclosure from his 2016 request. The appellant surmises that there are only certain ways that the police can conduct an investigation related to the requested records and he is aware of these tactics of the police.

[40] Nevertheless, I find that even if the police's investigative tactics may be obvious to the appellant, any records responsive to the request, which names specific individuals and organizations that may be the target of an investigation from the police's Intelligence Services Unit, could reasonably be expected to reveal law enforcement intelligence information respecting these individuals or organizations.

[41] As well, concerning the two requests at issue in this order, based on the wording of these requests, I find that any revelation that these records exist (or do not exist) could reasonably be expected to compromise the effectiveness of an existing or reasonably contemplated law enforcement activity.

[42] As section 8(3) applies, and is a discretionary exemption, I will now consider whether the police exercised their discretion in a proper manner in applying this exemption.

Issue B: Did the police exercise their discretion under section 8(3)? If so, should this office uphold the exercise of discretion, if any exist?

[43] The section 8(3) 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.

[44] 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.

[45] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[10] This office may not, however, substitute its own discretion for that of the institution.[11]

[46] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[12]

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution

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[10] Order MO-1573.
[11] Section 43(2).
[12] Orders P-344 and MO-1573.

- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

[47] The police state that the majority of their records contain information about sensitive law enforcement matters. They state that as a policing agency, certain information must be protected from release in order to control crime and ensure officer safety, and in turn, the safety of the public at large.

[48] The appellant essentially repeats his representations provided under section 8(3). He submits that the police are not acting in good faith. He submits, in particular, that as the police were able to disclose records to him in response to his 2016 request, they are not acting in good faith by not disclosing similar records to him now.

[49] In reply, the police state that no information was disclosed in response to the 2016 request that was not already in the public domain. The police point out that in the current requests, the appellant is specifically asking for records created by members of their Intelligence Services Unit about named individuals. They submit that there is no compelling reason why the appellant should be afforded any entitlement to records of this nature, should they exist, surrounding his request.

[50] In sur-reply, the appellant repeats his earlier submissions. He also submits that he should receive access to any responsive records as he did in 2016, even though his current requests seek more specific information than the information that he sought in 2016.

Analysis/Findings

[51] I find that in denying access under section 8(3) in conjunction with section 8(1)(g), the police exercised their discretion in a proper manner, taking into account relevant considerations and not taking into account irrelevant considerations.

[52] The records requested, if they exist, would contain sensitive law enforcement information about identifiable individuals and organizations. Disclosure of the fact that records exist (or do not exist) would itself convey information that could reasonably be expected to compromise the effectiveness of an existing or reasonably contemplated law enforcement activity.

[53] I am not persuaded that the appellant has established a sympathetic or compelling need to receive the information at issue, if it exists.

[54] Therefore, I am upholding the police's exercise of discretion under section 8(3), in conjunction with section 8(1)(g).

ORDER:

I uphold the police's refusal to confirm or deny the existence of records under section 8(3). I dismiss the appeals.

Original Signed by: September 11, 2019

Diane Smith
Adjudicator