Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3932

Appeal MA19-00213

London Police Services Board

June 29, 2020

Summary: The appellant submitted a request to the London Police Services Board under the *Municipal Freedom of Information and Protection of Privacy Act*, seeking records related to several interactions he had with members of the London Police Service. The police granted partial access to the responsive records and the appellant appealed that decision. In this order, in which only one of the responsive records is at issue, the adjudicator orders the police to disclose the record withheld under section 38(a) (discretion to refuse requester's information), in conjunction with sections 8(1)(c) (investigative technique or procedure) and 8(2)(a) (law enforcement report) of the *Act,* because she finds the exemptions do not apply.

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

Orders and Investigation Reports Considered: Orders MO-3547, PO-3013, and PO-3848.

OVERVIEW:

[1] This order addresses the issues arising from an individual's request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the London Police Services Board (the police) for records related to several interactions the individual had with the police. Although this was a three-part request, only the third part remains relevant, and it was for access to:

> Statement given to police regarding [a specified incident] in October 2018. Requesting all available records containing personal information.

[2] The police issued a decision granting partial access to the records identified as responsive to all three parts of the request. The police withheld portions under section 38(a) (discretion to refuse requester's own personal information), in conjunction with the law enforcement exemptions in sections 8(1)(c), 8(1)(l) and 8(2)(a), and the discretionary personal privacy exemption in section 38(b). The police also withheld information as non-responsive to the request.

[3] The requester, now appellant, appealed the police's access decision to this office. During the mediation stage of the appeal, discussions between the parties about the nature of the records, the exemptions applied and the information severed as not responsive to the request, resulted in the appellant narrowing the scope of his request. Additionally, based on the appellant's further questions, the police conducted another search and located a new record relating to the matter identified in the third part of the request. The police issued a supplementary decision granting partial access to it. The police confirmed their previous decision in all other respects.

[4] The appellant decided to pursue access only to a portion of the general occurrence report relating to the incident reported in October 2018. Accordingly, the rest of the records were removed from the scope of this appeal and are not at issue in this order.

[5] As the appeal could not be resolved by further mediation, it proceeded to the adjudication stage of the appeal process. I began my inquiry by sending a Notice of Inquiry to the police to invite their representations on the issues and to clarify the exemption relied on to deny access to the record.[1] After receiving the police's initial representations, I sent them a supplementary Notice of Inquiry to seek additional submissions regarding the denial of access to the record, given certain issues raised by their initial ones.

[6] I received the police's supplementary representations and decided that it was not necessary to seek representations from the appellant in order to determine the issues on appeal.

[7] In this order, I do not uphold the police's decision to deny access to the record and I order it disclosed to the appellant.

RECORDS:

[8] At issue in this appeal are pages 8, 9 and 10 of a specific General Occurrence Report.[2] Although these pages form part of the General Occurrence report, they are a

[1] The mediator's report identified the remaining law enforcement exemption as section 8(1)(a), which the police did not challenge upon receipt of the report, but the record itself is marked as being withheld under section 38(a), in conjunction with section 8(2)(a).

[2] The records are also identified by police as "FOI Pages 15, 16 and 17" as part of the larger group of records identified as response to the three-part request.

stand-alone record consisting of a standardized questionnaire, as I explain in this order.

ISSUES:

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

B. Is the record exempt under the discretionary exemption in section 38(a), in conjunction with section 8(1)(c) or 8(2)(a)?

DISCUSSION:

Preliminary matter

[9] The police asserted that portions of their initial representations are confidential, but revised this position in response to the supplementary Notice of Inquiry.[3] Although the police agreed to share their full position on the law enforcement exemption, they maintained their assertion of confidentiality over a portion related to the exercise of discretion. I concluded that it was unnecessary to determine the confidentiality of this particular portion of the police's representations, because I have not upheld the police's reliance on the section 38(a) exemption and do not, therefore, have to review the police's exercise of discretion under it.

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

[10] The police claim that section 38(a) applies, together with the law enforcement exemption in sections 8(1)(c) and 8(2)(a). Although the police did not deny access to the record under the personal privacy exemption in section 38(b), they made submissions about withholding the "personal information" of individuals other than the appellant.

[11] In order to determine which sections of the *Act* may apply, including sections 38(a) and 38(b), it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. As defined in section 2(1) of the *Act*, "'personal information' means recorded information about an identifiable individual" that fits within list of examples described in paragraphs (a) to (h). The list of examples of personal information under section 2(1) is not exhaustive and information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[4]

[12] Exceptions to the definition of personal information for business identity

[3] The confidentiality criteria are set out in Practice Direction 7 and section 7 of the IPC's *Code of Procedure.*
[4] Order 11.

information or information about individuals long-deceased are founds in sections 2(2), (2.1) and (2.2).[5]

[13] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[6]

[14] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[7]

Representations

[15] The police submit that the occurrence report relates to a police investigation in which police spoke to the appellant and other individuals. The police submit that the records at issue contain the personal information of identifiable individuals, including the appellant. They say that "information such as addresses, telephone numbers, dates of birth, gender, places of employment and statements were collected … [and it] is reasonable to expect that an individual may be identified if the information is disclosed."

[16] The police also submit that "personal information includes information that is provided to an institution that is implicitly or explicitly of a private or confidential nature. This information was obtained in confidence."

Findings

[17] The police assert that the records contain the personal information of the appellant and other identifiable individuals, but I disagree. This submission fails to distinguish between the three-page record at issue in this appeal and the records identified as responsive initially that may, in fact, contain personal information about others. However, as stated, the appellant seeks access only to part of the general occurrence report, a part that itself constitutes a three-page record. The remaining portions of the occurrence report and other responsive records are not at issue.

[18] I have reviewed the record, and I find that the information it contains is the personal information of the appellant, including his name, contact information, and opinions about him according to paragraphs (a), (d) and (g) of the definition in section 2(1).[8]

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[5] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual. See, for example, Orders MO-1550-F and PO-2225.
[6] Orders P-1409, R-980015, PO-2225 and MO-2344.
[7] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).
[8] These parts of the personal information definition in section 2(1) state, in full: (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family

[19] Apart from the appellant's personal information, I find that the record does not contain "recorded information about an identifiable individual" as contemplated by the opening words of the definition of personal information in section 2(1). The police officer may have considered information that was provided by another individual, but neither that claim by the police nor my review of the record itself satisfies me that its disclosure could reasonably be expected to identify any individual other than the appellant.

[20] As the record at issue contains only the personal information of the appellant and not that of any other individual, I confirm and find that the section 38(b) personal privacy exemption does not apply to it, because its disclosure would not result in an unjustified invasion of the personal privacy of another individual.

[21] I will now review the police's claim that section 38(a), in conjunction with sections 8(1)(c) and 8(2)(a), applies to the record.

B. Is the record exempt under the discretionary exemption in section 38(a), in conjunction with sections 8(1)(c) or 8(2)(a)?

[22] The police initially claimed only that section 8(2)(a) (in conjunction with section 38(a)) applies to the record. However, in their initial representations, the police also provided submissions claiming the record is exempt under section 38(a), in conjunction with section 8(1)(c). As this exemption had not previously been raised by the police in relation to the record, I sought supplementary representations from them regarding the claim, which they provided.

[23] Section 36(1) gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right. Section 38(a) reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if section 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

[24] 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.[9]

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

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status of the individual; (d) the address, telephone number, fingerprints or blood type of the individual; and (g) the views or opinions of another individual about the individual.

[9] Order M-352.

[26] As noted, the police rely on section 38(a) in conjunction with sections 8(1)(c) and 8(2)(a), which state:

> (1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
>
> (2) A head may refuse to disclose a record,
>
> > (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law.

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

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

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

- a police investigation into a possible violation of the *Criminal Code.*[10]
- a children's aid society investigation under the *Child and Family Services Act.*[11]

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

- an internal investigation by the institution under the *Training Schools Act* where the institution lacked the authority to enforce or regulate compliance with any law.[12]

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[10] Orders M-202 and PO-2085.
[11] Order MO-1416.
[12] Order P-352, upheld on judicial review in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (1993), 102 D.L.R. (4th) 602, reversed on other grounds (1994), 107 D.L.R. (4th) 454 (C.A.).

- a Coroner's investigation or inquest under the *Coroner's Act*, which lacked the power to impose sanctions.[13]

[30] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[14]

[31] However, 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.[15] 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.[16]

Representations

[32] At issue in this order is a three-page "Brief Mental Health Screener" (BMHS) completed on the appellant. The police explain that the BMHS is a questionnaire administered by police as part of responding to concerns about an individual's mental health.

[33] The police argue that section 8(2)(a) applies to the record, because it is a "report that was created by the investigating officer in the course of a law enforcement investigation." The police submit that in the course of responding to the call for service regarding an alleged assault, the appellant made a statement which caused the responding officer to consider his obligations under the *Mental Health Act.*[17] The police claim that the record was created by the responding officer in order to properly discharge their duties in accordance with that Act.[18]

[34] The police submit that the record in question is a report, and that the report was prepared in the course of a law enforcement investigation by police, which is a law enforcement agency. According to the police, section 8(2)(a) applies because the record represents "a formal statement or account of the results of the collation and consideration of information" as held in numerous orders, such as Order MO-3547. The police submit that:

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[13] Order P-1117.
[14] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[15] Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.
[16] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[17] R.S.O. 1990, c. M.7
[18] The police also describe their power of apprehension under section 17 of the *Mental Health Act*.

> … the records in issue reflect exactly that, a conclusion drawn from the collation and analysis of information. While the application of the tool itself by the investigating officer may be characterized as 'mere observations or recordings of fact', the concluding report utilizes those facts and analyzes them into a risk of harm report. That report is then utilized by police to properly discharge their duties in accordance with section 17 of the *Mental Health Act*.

[35] Regarding the claim for exemption under section 8(1)(c), the police submit that BMHS is a record that was created by the investigating officer in the course of the law enforcement investigation. The police clarify that their concern "is not with the disclosure of the interRai Brief Mental Health-Screener ('screening tool') itself, but rather with the report that results from the application of the tool."

[36] The police submit that the BMHS tool was developed to assist front-line police officers in identifying and responding when there are concerns with an individual's mental health. They explain that:

> The BMHS tool utilizes logic rules based on scientific research to quickly flag risks in harm to self, others and self care. Officers are guided through a series of clinical questions based on responses from the individual, their caregivers, bystanders or the officer's direct observations. After all of the questions are completed the responses are analyzed and the risk of harm is presented in a concluding report.

[37] In response to the question posed in the Notice of Inquiry as to whether the technique or procedure in question is investigative in nature for the purpose of section 8(1)(c), the police submit that it is, because the BMHS is applied in order to create a report which assists the officer in discharging their investigative duties under the *MHA*. The police say that establishing the necessary grounds (for apprehension) under the *MHA* requires the officer to investigate the full circumstances and this requires the use of the BMHS to "create a report which is then analyzed to determine areas of risk to the individual and others." The police submit that past orders, such as Orders PO-3013 and PO-3848, have upheld section 8(1)(c) (or section 14(1)(c), the equivalent provision in the provincial *Act*) to exempt "similar tools and resultant reports" because disclosure of such records could reveal investigative techniques currently in use in law enforcement.

[38] The police acknowledge that the BMHS tool is itself generally available to the public, but maintain that the report that is generated by the application of the screening tool is not. The police explain that the report is individualized on a case-by-case basis and contains highly sensitive information gathered through the BMHS's use "at the intersection of law enforcement and health care." The police assert that:

> The information provided by third parties in the completion of the report is sometimes provided in confidence. The disclosure of the report to the Appellant would undermine the confidence with which that information was provided. If the public cannot trust that the police will maintain the

> confidence with which the information was provided in order to generate the report utilizing the tool, that public may reconsider their desire to provide that information, which would in turn, would hinder or compromise its effective utilization.

Analysis and findings

[39] For the reasons provided below, I find that neither section 8(2)(a) nor section 8(1)(c) applies to the record at issue.

[40] The police rely on Order MO-3547 in denying access to the record under section 8(2)(a), but this order does not support their position in this appeal. In that order, Adjudicator Diane Smith explained her finding that section 8(2)(a) did not apply to a two-page questionnaire as follows:

> The police rely on section 8(2)(a) (law enforcement report) for pages 58 to 59. I find that these pages do not constitute a report within the meaning of section 8(2)(a). Pages 58 and 59 are two pages of a form that contains questions. The form requires the answers to questions to be checked off concerning the appellant. The form has 19 questions and only five questions have been answered on this form.
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> I find that the questions answered on the form that comprises pages 58 and 59 are mere observations or recordings of fact, and do not constitute a formal statement or account of the results of the collation and consideration of information.

[41] I agree with Adjudicator Smith's finding and reach a similar conclusion here.

[42] The screening tool at issue in this appeal, the BMHS, is a questionnaire administered by police as part of responding to concerns about an individual's mental health. As the police have explained, the tool is used to discharge their duties under the *Mental Health Act* and it consists of a series of questions that require selection of the most appropriate response in the circumstances. On my review of the record, I conclude that the information entered consists merely of observations or recordings of fact about the appellant and the situation he was experiencing on that particular day. The "facts" in the completed BMHS may have assisted the police in determining the risk of harm to the appellant or others, as their representations suggest, but those facts are the appellant's personal information in the form of the views or opinions of the police officer about him. On my consideration of it, I am not satisfied that the BMHS completed on the appellant constitutes a formal statement or account of the results of the collation and consideration of information for the purpose of section 8(2)(a) of the *Act.* I find that the exemption does not apply to the record.

[43] As the police observe, this office has also previously considered the issue of whether this type of screening tool may be withheld under section 8(1)(c). Establishing the application of section 8(1)(c) requires both that the withheld information be an

"investigative" technique or procedure and that its disclosure could reasonably be expected to hinder or compromise the tool's effective utilization. The exemption normally will not apply where the technique or procedure is generally known to the public.[19]

[44] In the Notice of Inquiry, I asked the police to comment on whether the BMHS qualifies as an "investigative" technique or procedure when the possible outcome would be detention (voluntary or not) under the *Mental Health Act*.[20] However, based on my analysis of section 8(1)(c), below, I make no finding on whether the BMHS is "investigative" in nature, because it is not necessary for me to do so to find that the exemption does not apply.

[45] The police rely on Order PO-3848 to support their claim of section 8(1)(c). In that order, Adjudicator Justine Wai upheld the section 14(1)(c) exemption claim by the Ministry of Community Safety and Correctional Services to the same record that is at issue here. Adjudicator Wai considered the ministry's reliance on the denial of access to a domestic violence screening tool under section 14(1)(c) that was upheld in Order PO-3013. Central to the finding in both of these orders, however, is that the adjudicator accepted the evidence of the institution that the information and questions in the screening tool were not publicly available. That is not the case before me, and I find those two orders distinguishable on that basis. I specifically noted in the supplementary Notice of Inquiry that the BMHS is available to the public online for a fee.[21] The police responded that their concern was not with the disclosure of the screening tool itself, which they admitted is available online, but rather with "the report that results from the application of the tool," because it purportedly contains confidential personal information. However, as I found above, the record at issue contains no personal information other than the appellant's personal information.

[46] In my view, although the police argue that the record resulting from the application of the BMHS is confidential, they do not provide a reasoned basis under the *Act* for withholding it. Section 8(1)(c) protects "investigative techniques or procedures" not "investigative information."[22] As I noted above in my analysis of section 8(2)(a), the completed BMHS contains the appellant's personal information, namely opinions about him formed by the exercise of the police officer's professional judgment of their interaction. It is not the personal information of the police officer, nor does it reveal

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[19] Orders P-170, P-1487, MO-2347-I and PO-2751.

[20] The question was based, in part, on a long line of cases from this office finding that information gathered when police conduct a "wellbeing check" that may result in an apprehension under section 17 of the *Mental Health Act* does not fit within section 14(3)(b) of the *Act* (personal information compiled as part of an investigation into a possible violation of law). This is because the individual whose behaviour is being evaluated under the *MHA* is not considered to be involved in any activity related to a possible breach of the *Criminal Code* or any other law. See Orders MO-1384, MO-1428 and MO-3465. See also Orders PO-3325 and PO-3662 considering "wellbeing checks" and section 21(3)(b), the provincial equivalent to section 14(3(b).

[21] I also provided the relevant website reference.

[22] Order MO-3451.

something of a personal nature about him. Therefore, the information in the completed BMHS, including the box that has been checked off based on information provided by another individual who is not identifiable, does not satisfy section 8(1)(c). The evidence provided by the police about the potential for harm with the record's disclosure does not rise above the merely possible or speculative, as required to establish the application of section 8(1)(c), and I find that it does not apply.

[47] In summary, I find that the BMHS completed on the appellant contains only his personal information and cannot be withheld under section 38(b). I also find that the police have not established that either of section 8(1)(c) or section 8(2)(a) applies to the record. Accordingly, I find that section 38(a) does not apply, and I will order the police to disclose the record to the appellant.

[48] As I am not upholding the police's decision to deny access to the record, it is not necessary for me to review the police's exercise of discretion in withholding it.

ORDER:

I order the police to disclose the record to the appellant by **August 5, 2020**, but not before **July 30, 2020**.

Original signed by: June 29, 2020
Daphne Loukidelis
Adjudicator