Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4253

Appeal MA20-00212

Halton Regional Police Services Board

September 21, 2022

Summary: The appellant made an access request to the Halton Regional Police Service (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records about himself related to two police investigations. The police issued an access decision granting partial access to the records responsive to the request, which were records associated with two police occurrence reports. Access to the withheld information was denied pursuant to the discretionary exemptions in section 38(b) (personal privacy), as well as sections 8 (law enforcement) and 12 (solicitor-client privilege) with 38(a) (discretion to refuse requester's own personal information). The police also claimed the application of the exclusion in section 52(3) (labour relations and employment records) for some of the records. The appellant claimed that the police had not conducted a reasonable search for responsive records.

In this order, the adjudicator does not uphold the police's decision that the exclusion in section 52(3) applies, but does uphold their application of the exemptions at section 38(b), and section 38(a), read with sections 8(1) or 12, and finds that all of the responsive information at issue is exempt. She also finds that the police conducted a reasonable search for responsive records and that the information that police marked as non-responsive to the request was not responsive to the request.

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), 12, 17, 38(a), 38(b), and 52(3)3.

OVERVIEW:

[1] The appellant was the subject of two investigations by the Halton Regional Police Service (the police). As a result of the incidents that gave rise to these investigations, the appellant advised the police that he intended to initiate a disciplinary complaint against a police officer and to initiate civil proceedings.

[2] The appellant also submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) to the police for all records related to him dated from March 20, 2020 until April 27, 2020.

[3] The police issued an access decision granting partial access to the records responsive to the request, which were records associated with two police occurrence reports. Access to the withheld information was denied pursuant to the discretionary exemption in section 38(b) (personal privacy), as well as sections 8 (law enforcement) and 12 (solicitor-client privilege), in conjunction with 38(a) (discretion to refuse requester's own personal information). The police also claimed the application of the exclusion in section 52(3)3 (labour relations and employment records) for some of the records.

[4] The appellant appealed the police's decision to the Information and Privacy Commissioner of Ontario (the IPC) and a mediator was appointed to attempt a resolution of this appeal.

[5] During the course of mediation, the mediator noted that certain information had been withheld from the officers' notebooks on the basis that it was not responsive to the request – it was deemed "non-responsive."

[6] Following further discussions, the appellant advised the mediator that he wished to pursue access to the withheld information, including the information deemed non-responsive, at the next stage of the process. The appellant also believed that further records responsive to his request exist at the police. Accordingly, reasonable search is also at issue.

[7] As no further mediation was possible, this appeal proceeded to adjudication, where an adjudicator may conduct an inquiry. I decided to conduct an inquiry. I sought and received the police's representations, which I shared with the appellant, less the confidential information which was not shared in accordance with the IPC's *Code of Procedure* and *Practice Direction 7*.[1] The appellant provided representations in response.

[8] In this order, I do not uphold the police's decision that the exclusion in section 52(3)3 applies to some of the records. However, I do uphold their decision to withhold

[1] Although I will not be referring to the police's confidential representations in this order, I will be considering them in arriving at my determinations on this order.

all of the responsive information at issue on the basis that it is exempt under section 38(b), and section 38(a), read with sections 8(1)(c) or 12. I also uphold the police's decision to withhold information on the basis that it is non-responsive and I find that the police conducted a reasonable search for records.

RECORDS:

[9] At issue are portions of police reports, police officer notes, and emails, as set out in the following chart:

Record #	Description of record	Pages of records	Exemptions or exclusion applied by the police
1	Report for occurrence #1	7-8	8(1)(e) & (l) 14(3)(b) 38(a) & (b)
5	Report for occurrence #2	9-15	8(1)(e) & (l) 12 14(3)(b) 38(a) & (b)
6	Notebooks for occurrence #2	16-36	8(1)(e) & (l) 12 14(3)(b) 38(a) & (b) Non-responsive
9	emails	37-404	8(1)(c) 8(1)(e) 8(1)(l) 12 14(3)(b) 38(a) & (b) 52(3)3

ISSUES:

A. What is the scope of the request? What records are responsive to the request?

B. Does the section 52(3)3 labour relations and employment records exclusion exclude the records from the *Act*?

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. Does the discretionary exemption at section 38(a) (discretion to refuse access to requester's own personal information) read with the section 12 solicitor-client privilege exemption apply to the information at issue?

F. Does the discretionary exemption at section 38(a) (discretion to refuse access to requester's own personal information) read with the section 8 law enforcement exemption apply to the information at issue?

G. Did the police exercise their discretion under sections 38(a) and 38(b)? If so, should I uphold the exercise of discretion?

H. Did the police conduct a reasonable search for records?

DISCUSSION:

Issue A: What is the scope of the request? What records are responsive to the request?

[10] The police withheld some portions of the police officers' handwritten notes as not being responsive to the appellant's request.

[11] 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).

[12] 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]

[13] To be considered responsive to the request, records must "reasonably relate" to the request.[3]

Representations

[14] The police refer to the wording of the request and indicate that they interpreted the appellant's access request as requesting all records pertaining to the appellant.

[15] They state that it was determined by the police that the appellant was involved in two police occurrences. They state that they then collected all information pertaining to these incidents and located records, including police occurrence reports, investigating officers' notebook entries, witness statements and emails.

[16] The appellant did not provide representations on this issue or any of the issues in this appeal. Instead, his representations focus on his disagreement with how the police conducted the investigations that are the subject matter of the records.

Findings

[17] The appellant's detailed request sought records about himself from March 20, 2020 until April 27, 2020. Specifically, this request was for:

> … any and all record(s), note(s), memo(s), report(s), call record(s), call recording(s), witness and/or complainant interview(s), and email(s) pertaining in reference to [the appellant], including any and all name variations thereof, including but not limited to [the appellant]; and/or referencing [the appellant's] e-mail address [email address] or his telephone numbers [#s], from March 2020 through to the present date of search.

[18] I find that the appellant's request provided sufficient detail to identify the records responsive to the request of the appellant as being records about himself for the requested time period. I find that the police properly interpreted the request as being a request for records about the appellant.

[19] Having reviewed the records, I also find that the police properly determined that the portions of the records that they marked as not responsive to the request are not reasonably related to the appellant's request. These portions of the records, found in the police handwritten notes, are about other individuals or matters totally unrelated to the appellant or the incidents in question. Therefore, I uphold the police's determination that the portions of the handwritten notes they have marked as non-responsive are not

---

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

responsive to the appellant’s request, and their decision to withhold these portions on that basis.

Issue B: Does the section 52(3)3 labour relations and employment records exclusion exclude the records from the *Act*?

[20] The police claim that certain of the records (emails) are excluded from the application of the *Act* by reason of section 52(3)3. Section 52(3)3 states:

> Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> > 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[21] If section 52(3) applies to the records, and none of the exceptions found in section 52(4) applies, the records are excluded from the scope of the *Act*.

[22] For the collection, preparation, maintenance or use of a record to be “in relation to” the subjects mentioned in paragraph 1, 2 or 3 of this section, it must be reasonable to conclude that there is “some connection” between them.[4]

[23] The "some connection" standard must involve a connection that is relevant to the statutory scheme and purpose understood in their proper context. For example, the relationship between labour relations and accounting documents that detail an institution’s expenditures on legal and other services in collective bargaining negotiations is not enough to meet the "some connection" standard.[5]

[24] If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date.[6]

[25] The exclusion in section 52(3) does not exclude all records concerning the actions or inactions of an employee simply because this conduct may give rise to a civil action in which the Crown may be held vicariously liable for torts caused by its employees.[7]

---

[4] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).
[5] Order MO-3664, *Brockville (City) v. Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 (Div. Ct.).
[6] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507.
[7] *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).

[26] The type of records excluded from the *Act* by section 52(3) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions.[8]

Representations

[27] The police state that the information in the emails pertains to an investigation of a complaint made by the appellant to the Office of the Independent Review director (the OIRPD) regarding a named police officer.

[28] The police state:

- the emails were prepared by the institution;
- the information contained in the emails pertains to a discussion between the police's legal counsel and [a named police officer] pertaining to an OIRPD complaint that has been lodged by the appellant; this information is intertwined with information claimed to be exempt under section 12 (the solicitor-client privilege exemption) because it consists of legal counsel's provision of legal advice to the officer pertaining to a complaint which is related [to the police acting] in an employer capacity.
- the information pertains to an employment-related matter as the complaint was made to the OIPRD which is a regulatory agency investigating public complaints against police officers during the course of their duties.

[29] The police submit that the information at issue may determine whether the officer violated the Code of Conduct set out in the Regulations under the *Police Services Act* (the *PSA*). Further, the police explain that under the *PSA*, sanctions may be imposed on a police officer following such an investigation and a subsequent decision taken by the Chief of Police. They state:

> The withheld information may be documented in an employee's personnel file communications that relate to an employee's conduct, both positive and negative. These communications may be used by the institution for recommending promotion or reclassification of an employee. The records at issue deal with internal police communications related to an identified individual who is employed by the institution. There is a legitimate interest in this employment-related matter involving the employee and it has not been withheld merely due to curiosity or concern.

[30] The appellant did not address this issue in his representations.

---

[8] *Ministry of Correctional Services*, cited above.

Findings

[31] The police have claimed section 52(3)3 for certain emails found at pages 56 to 68, 82, 84 to 98, 165 to 166, and 307 to 340 of the records.

[32] For section 52(3)3 to apply, the institution must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or use was in relation to meetings, consultations, discussions or communications; and
3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

Part 1: collected, prepared, maintained or used

[33] All of the records at issue are emails sent internally within the police or externally from or to the police. It is clear from the records that they were collected, prepared, maintained and used by the police. Therefore, I find that part 1 of the test has been met.

Part 2: meetings, consultations, discussions or communications

[34] All of the emails at issue were collected, prepared, maintained or used in relation to meetings, consultations, discussions or communications about the appellant's communications with the police or with various other entities that had been brought to the attention of the police. Therefore, I find that part 2 of the test has been met.

Part 3: labour relations or employment-related matters in which the institution has an interest

[35] The phrase "labour relations or employment-related matters" has been found to apply in the context of:

- a job competition[9]
- an employee's dismissal[10]
- a grievance under a collective agreement[11]
- disciplinary proceedings under the *Police Services Act*[12]

---

[9] Orders M-830 and PO-2123.
[10] Order MO-1654-I.
[11] Orders M-832 and PO-1769.

- a "voluntary exit program"[13]
- a review of "workload and working relationships"[14]
- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act*.[15]

[36] The phrase "labour relations or employment-related matters" has been found *not* to apply in the context of:

- an organizational or operational review[16]
- litigation in which the institution may be found vicariously liable for the actions of its employee.[17]

[37] The phrase "in which the institution has an interest" means more than a "mere curiosity or concern", and refers to matters involving the institution's own workforce.[18]

[38] The records are excluded only if the meetings, consultations, discussions or communications are about labour relations or "employment-related" matters in which the institution has an interest. Matters related to the actions of employees, for which an institution may be responsible are not employment-related matters for the purpose of section 52(3).[19]

[39] The police have not made record-specific representations on part 3 of the test under section 52(3)3.

[40] I have reviewed the emails for which section 52(3)3 has been claimed, and find that they relate to the possibility that the appellant may commence a civil action against the police and the implications that this may have for involved police officer. In my view, these are not employment-related matters. As I noted above, matters that are related to the actions of employees, for which an institution may be responsible are not employment-related matters for the purpose of section 52(3).[20]

[41] Some of the records at issue mention that the appellant has filed an OIRPD

---

[12] Order MO-1433-F.
[13] Order M-1074.
[14] Order PO-2057.
[15] *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.
[16] Orders M-941 and P-1369.
[17] Orders PO-1722, PO-1905 and *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.
[18] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.
[19] *Ministry of Correctional Services*, cited above.
[20] *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).

complaint against a police officer. However, they only mention that. The records do not discuss the details of this complaint, nor are they (as claimed by the police) records that may determine whether, or lead to a finding, that the police officer violated the Code of Conduct set out in the Regulations under the *Police Services Act* and possible sanctions that may be imposed.

[42] As indicated above, the type of records excluded from the *Act* by section 52(3) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment- related matters are separate and distinct from matters related to employees' actions.[21] At most, the emails at issue pertain to employees' actions but do not pertain to employment matters in which the police are acting as an employer.

[43] Therefore, I find that part 3 of the test under section 52(3)3 has not been met and the emails at issue found at pages 56 to 68, 82, 84 to 98, 165 to 166, and 307 to 340 are not excluded from the *Act*.

[44] I will consider whether these emails are exempt as the police have claimed the application of exemptions to them in the alternative to their section 52(3) argument.

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

[45] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> > (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
> >
> > (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
> >
> > (c) any identifying number, symbol or other particular assigned to the individual,
> >
> > (d) the address, telephone number, fingerprints or blood type of the individual,

---

[21] *Ministry of Correctional Services*, cited above.

> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

[46] 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.[22]

[47] 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.[23]

[48] 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.[24]

[49] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[25]

Representations

[50] The police state that the appellant specifically requested records that included information that would contain personal information including, but not limited to, the other individuals' names, addresses, dates of birth, and statements. They state that the records contain the names, addresses, telephone numbers and opinions or views of these individuals.

[51] The appellant did not address this issue in his representations.

---

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

Findings

[52] Having reviewed the records, I find that all of the records contain the personal information of the appellant, as the records are all about the appellant's interaction with the police, including police investigations related to the appellant's conduct.

[53] The records also contain the personal information of other individuals, namely those who had interactions with the appellant or with the police about the investigations.

[54] Although some of the information in the records is about other individuals acting in their official or business capacity, it is my view that the information at issue reveals something of a personal nature about these other individuals concerning their interactions with the police and their personal circumstances. Therefore, this information is "personal information" within the meaning of the *Act*.

[55] The personal information of the appellant and the other individuals in the records includes their home addresses, personal telephone numbers, dates of birth, and their general opinions or views and descriptions of their personal circumstances. This type of information reveals something of a personal nature about these individuals and, in some cases, is personal information as described in paragraphs (a), (d), (e), and (h) of the definition of personal information in section 2(1) of the *Act*.

[56] As all of the records contain the personal information of the appellant, as well as other identifiable individuals, it is necessary to consider the police's exemption claims under section 38. I will first address the police's claim that the personal privacy exemption in section 38(b) applies to the personal information of the other individuals.

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

[57] The police have claimed the application of section 38(b) to portions of the police occurrence reports, police officers' notes, and emails in the records.

[58] 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.

[59] 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.[26]

[60] Sections 14(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy. If the information fits within any of paragraphs (a) to (e) of section 14(1) or paragraphs (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). The information does not fit within these paragraphs.

[61] Sections 14(2) and (3) also help in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 38(b). If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 38(b). Section 14(2) lists other factors that assist in making the determination.

[62] Also, section 14(4) lists situations that would not be an unjustified invasion of personal privacy.

[63] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), the IPC considers, and weighs, the factors and presumptions in sections 14(2) and 14(3) and balances the interests of the parties.[27]

Section 14(3)(b)

Representations

[64] The police rely on 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.

[65] They state that the records for which section 38(b) has been claimed include the personal information of the appellant, which is intermingled with that of other identifiable individuals. They state that this personal information was compiled and is identifiable as part of an investigation into a possible violation of law. They state:

> The institution was investigating two incidents; the first a complaint made by the LCBO [the Liquor Control Board of Ontario] organization [against the appellant] regarding unwanted communication and continued

---

[26] See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 38(b).
[27] Order MO-2954.

> harassment of [a] singled out [LCBO] employees [the first incident] and secondly a potential breach [by the appellant] of the state of emergency order issued by the Government to prohibit gatherings of people who do not reside in an immediate household (specifically about the appellant protesting outside the LCBO's director's home in [place]) [the second incident];
>
> [T]he initial allegations may have led to charges under the Criminal Code of Canada or another Provincial Statute…
>
> Following the investigation[s], officers determined that there were no grounds to support an offence (criminal or other), and the appellant received a direction not to contact certain individuals however this does not change the fact that the occurrence was still investigated in regard to a possible violation of law, therefore section 14(3)(b) applies to the records.

[66] The appellant does not address the police's representations directly but does not appear to dispute that two police investigations did occur.

Findings

[67] The police's position is that the records were compiled as part of police investigations in possible violations of law by the appellant.

[68] Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.[28] The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.[29]

[69] Section 14(3)(b) does not apply if the records were created after the completion of an investigation into a possible violation of law.[30]

[70] Based on my review of the records at issue for which section 38(b), I find that they were compiled and are identifiable as part of two investigations into possible violations of law by the appellant as outlined by the police in their representations. These violations concern potential breaches of the law by the appellant.

[71] I find that the presumption in section 14(3)(b) applies to the information at issue for which section 38(b) has been claimed and it weighs in favour of privacy protection.

---

[28] Orders P-242 and MO-2235.
[29] Orders MO-2213, PO-1849 and PO-2608.
[30] Orders M-734, M-841, M-1086, PO-1819 and MO-2019.

Section 14(2)

[72] Section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.[31]

[73] The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2).[32]

[74] Neither the police nor the appellant raised the application of the listed factors in section 14(2) or the application of any unlisted factors to the records, even though they were asked whether there were any relevant factors or circumstances that should be considered by me in my determination under section 38(b).

[75] Based on my review of the information at issue, I have considered the section 14(2) factors and do not find that any are relevant to my determination of whether disclosure of the information at issue would result in an unjustified invasion of personal privacy of the other individuals.

Balancing the interests

[76] As set out above, in determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), I must consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.[33]

[77] In this appeal, the presumption against disclosure in section 14(3)(b) applies and weighs in favour of privacy protection. No factors favouring disclosure have been raised by the parties, nor have I found on my own review that any apply. Weighing the interests of the parties, together with the presumption at section 38(b), I find that disclosure of the information at issue would constitute an unjustified invasion of the personal privacy of individuals other than the appellant. I, therefore, find that the information at issue is exempt under the discretionary section 38(b) exemption. I will review the police's exercise of discretion to withhold this information below at Issue G.

Issue E: Does the discretionary exemption at section 38(a) (discretion to refuse access to requester's own personal information) read with the section 12 solicitor-client privilege exemption apply to the information at issue?

[78] I have found above that section 38(b) applies to the information for which this was claimed. Much of the information for which section 38(a), read with section 12,

---

[31] Order P-239.
[32] Order P-99.
[33] Order MO-2954.

was claimed is information that is information for which the police also claimed section 38(b).

[79] There is, however, some remaining information at issue for which the police claim only the exemption at section 38(a), read with section 12. This information is found in the emails on pages 63, 310, 311, and 327 of the records.

[80] As I noted above, section 36(1) gives individuals a general right of access to their own personal information held by an institution, and section 38 provides a number of exemptions from this right.

[81] 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.

[82] Section 38(a) of the *Act* ("may" refuse to disclose) 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.[34]

[83] In this case, the institution relies on section 38(a) in conjunction with section 12. Section 12 states as follows:

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

[84] Section 12 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 ("prepared by or for counsel employed or retained by an institution…") is a statutory privilege. The institution must establish that one or the other (or both) branches apply. As explained below, it is only necessary to consider the Branch 1 solicitor-client communication privilege to determine the issues in this appeal.

Representations

[85] The police submit that the records are emails that are subject to the common law solicitor-client communication privilege and that this information is exempt under branch 1 of the section 12 exemption.

---

[34] Order M-352.

[86] The police state that this information is exempt from disclosure on the basis that it constitutes a part of the "continuum of communications" passing between legal counsel and their clients, the police staff. They state that the information at issue addresses a problem and the response counsel gave to staff that contained counsel's legal advice on this problem.

[87] The police submit that the records contain written communications of a confidential nature prepared by the legal advisors and that the contents of the emails relate directly to the giving of legal advice. They state that the written advice was provided in confidence, and was treated by them as a confidential privileged communication.

[88] The appellant did not address this issue in his representations.

Findings

[89] To establish that information is exempt under section 12, it is only necessary to establish one type of privilege. I will consider first whether the common law solicitor-client communication privilege ("subject to solicitor-client privilege") in branch 1 applies.

[90] The rationale for the common law solicitor-client communication privilege is to ensure that a client may freely confide in their lawyer on a legal matter.[35] This privilege protects direct communications of a confidential nature between lawyer and client, or their agents or employees, made for the purpose of obtaining or giving legal advice.[36] The privilege covers not only the legal advice itself and the request for advice, but also communications between the lawyer and client aimed at keeping both informed so that advice can be sought and given.[37]

[91] Confidentiality is an essential component of solicitor-client communication privilege. The institution must demonstrate that the communication was made in confidence, either expressly or by implication.[38] The privilege does not cover communications between a lawyer and a party on the other side of a transaction.[39]

[92] I have considered the police's representations and reviewed the emails at issue.

[93] The emails at issue are emails exchanged between the police's staff and the police's legal counsel. From my review of their contents, I am satisfied that these records are direct communications of a confidential nature between a lawyer employed by the police and their client, the police staff, made for the purpose of obtaining or giving legal advice. As a result, they are solicitor-client communication privileged

---

[35] Orders PO-2441, MO-2166 and MO-1925.
[36] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[37] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.); *Canada (Ministry of Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104.
[38] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[39] *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

(branch 1) communications and are, therefore, subject to section 12. I have no information before to suggest that this privilege has been lost through waiver. Having found that branch 1 solicitor-client communication privilege applies to the information at issue, it is not necessary to consider the other types of privilege that may apply.

[94] In summary, I find that the emails on pages 63, 310, 311, and 327 of the records are exempt under the discretionary exemption at section 38(a), read with section 12, as they contain confidential solicitor-client communication privileged information. I will consider the police's exercise of discretion to withhold this information below at Issue G.

Issue F: Does the discretionary exemption at section 38(a) (discretion to refuse access to requester's own personal information) read with the section 8 law enforcement exemption apply to the information at issue?

[95] In this appeal, the police claim the application of sections 8(1)(c), (e), and (l).[40] Sections 8(1)(c), (e), and (l) read:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
> >
> > (e) endanger the life or physical safety of a law enforcement officer or any other person;
> >
> > (l) facilitate the commission of an unlawful act or hamper the control of crime.

[96] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[41]

[97] It is not enough, however, 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.[42] The institution must provide detailed evidence about the potential for harm. It must also 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

---

[40] Although the police relied on section 8(1)(d) (disclose the identity of a confidential source of information) in their access decision, they did not provide representations on this exemption, nor did they identify this exemption in their index of records or on the records themselves. Given the discretionary nature of the exemption, I will not consider it further.

[41] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

[42] Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

evidence is needed will depend on the type of issue and seriousness of the consequences.[43]

[98] The only information remaining at issue is that for which the police claim the application of section 38(a), read with the law enforcement exemption (section 8), is found in the emails and attachments in record 9. All of this information is information for which the police have claimed the application of section 8(1)(c).

Section 8(1)(c): reveal investigative techniques and procedures

[99] I will consider first whether section 38(a), read with section 8(1)(c), applies to the information for which it has been claimed. This exemption is claimed for the entirety of the remaining information at issue in the records.

Representations

[100] The police provided extensive record-specific representations on this exemption, both confidential and non-confidential. In their non-confidential representations, the police state that section 8(1)(c) applies to the information at issue because disclosure would reveal investigative techniques and, if made public, could compromise the safety of law enforcement officers. They state that these techniques are designed to assist the police for the purpose of a law enforcement investigation and if they were widely known, those taking part in criminal activity would circumvent the procedures in place, which would in turn cause damage to the police's reputation.

[101] An example of an investigative technique used in the information at issue is the police's liaising with other police agencies to search and extract information from law enforcement specific databases, such as the Police Information Portal (the PIP). The police submit that disclosure of this information could be expected to compromise the effective use of these databases, as these databases are regularly used by police to assist in determining how police will communicate and interact with members of the public, how police communicate with other police/investigative agencies concerning investigative matters, and how to proceed with a police investigation into a potential violation of the law.

[102] The police state that a technique in the records details the process used to investigate an alleged threat and that the disclosure of this information could reasonably be expected to hinder the function of the technique. They state that the records also contain a technique which, if known in the public domain, could impede current and future investigations.

[103] The police state that the revelation of one of the databases mentioned in the records, namely CPIC, is not the issue, but if the technique of how it was used were to

---

[43] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

become common knowledge, police activity could be more easily tracked by criminals and could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. They also state that the information that has been extracted from this database could compromise an investigation.

[104] The police submit that:

> …the need to safeguard investigative techniques and procedures is important in maintaining their effectiveness and upholding the ability to successfully carryout our mandate. It is a very real concern that by allowing the investigative techniques such as the ones mentioned above becoming common knowledge a skilled and resourceful person (or group) could work to intercept the processes and thereby gain access into the databases mentioned by defeating the security systems. Once access is gained information can be used for criminal activity. Unauthorized access to the CPIC system for example has the potential to compromise investigations and other law enforcement activities and the privacy and safety of individuals. The release of certain CPIC access/transmission codes has the potential to compromise the ongoing security of the CPIC system and facilitate unauthorized access to the CPIC system.

[105] The appellant states that he has a hard time believing that the information at issue contains details to the process and techniques that are in any way proprietary. He does not address the records at issue in this appeal; instead he refers to information he has received through another access request that he submits demonstrates that the police engaged in illegal activity. In that matter, he states that the Crown concluded the police had no jurisdiction to conduct an investigation.

Findings re section 8(1)(c)

[106] For section 8(1)(c) to apply, the institution must show that disclosing the investigative technique or procedure to the public could reasonably be expected to interfere with its effective use. The exemption normally will not apply where the technique or procedure is generally known to the public.[44]

[107] The technique or procedure must be "investigative"; that is, it must be related to investigations. The exemption will not apply to techniques or procedures related to "enforcing" the law.[45]

[108] Based on my review of the records at issue and the police's representations, especially their confidential record-specific representations, I agree with the police that disclosure of the information for which section 8(1)(c) has been claimed could reasonably be expected to reveal the confidential techniques and procedures used by

---

[44] Orders P-170, P-1487, MO-2347-I and PO-2751.
[45] Orders PO-2034 and P-1340.

the police to investigate an alleged threat and other potentially criminal matters and that the disclosure of this information could reasonably be expected to hinder the function of the technique in current and future investigations.

[109] I accept the police's evidence that in the circumstances of this appeal, disclosure of the information at issue could reasonably be expected to reveal police techniques that are designed to assist the police for the purpose of a law enforcement investigation and further that if they were known, those taking part in criminal activity could be expected to circumvent the procedures in place, which would in turn could reasonably be expected to interfere with their use.

[110] In making these findings, I acknowledge that the appellant disputes that the police have jurisdiction to conduct an investigation. Nevertheless, this does not address whether, under section 8(1)(c), disclosure of the information at issue could reasonably be expected to reveal investigative techniques and procedures currently in use or likely to be used in law enforcement.

[111] In summary, I find that the investigative techniques or procedures set out in the records for which section 8(1)(c) has been claimed are currently in use by the police and that they are not generally known to the public. Disclosure of these techniques or procedures could reasonably be expected to interfere with their effective use.

[112] Accordingly, I find that section 38(a), read with section 8(1)(c), applies to exempt the information in the records for which it has been claimed. I will next review the police's exercise of discretion.

[113] All of the information for which the sections 8(1)(e) or 8(1)(l) exemptions have been claimed is information for which the exemptions at sections 38(b) and/or 38(a), read with 8(1)(c), have been claimed and which I have upheld. Therefore, it is not necessary to also consider whether this information is also exempt under sections 38(a), read with 8(1)(e) or (l), and I decline to do so.

[114] As a result of these findings, I have now found that all of the information at issue in the records is exempt by reason of section 38(b), or section 38(a), read with sections 8(1)(c) or 12. I will now consider whether the police exercised their discretion in a proper manner with respect to the information that I have found to be exempt.

Issue G: Did the police exercise their discretion under sections 38(a) and 38(b)? If so, should I uphold the exercise of discretion?

[115] I have found that section 38(b) or 38(a) (with sections 8(1)(c) or 12) apply to all of the information at issue in the records.

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

institution failed to do so.

[117] In addition, I 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.

[118] In either case, I may send the matter back to the institution for an exercise of discretion based on proper considerations.[46] I may not, however, substitute my own discretion for that of the institution.[47]

[119] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[48]

- 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

---

[46] Order MO-1573.
[47] Section 43(2).
[48] 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.

Representations

[120] The police state that they did use their discretion to release to the appellant some information that they believe was exempt under a discretionary exemption.

[121] Regarding their decision not to disclose the rest, the police state that in exercising their discretion under section 38(a), they took into account the following relevant considerations:

- The exemptions from the right of access were limited and specific
- The relationship between the appellant and any affected persons
- The nature of the information and the extent to which it is significant and/or sensitive to the institution, the appellant, or any affected persons.

[122] And, in exercising their discretion under section 38(b), they took into account the following relevant considerations:

- The appellant has a right to access his own personal information
- The exemptions from the right of access were limited and specific
- The privacy of individuals should be protected
- The wording of the exemption and the interests it seeks to protect
- Whether the appellant is seeking his own personal information
- The relationship between the appellant and the affected persons
- The age of the information
- The nature of the information and the extent to which it is significant and/or sensitive to the appellant and any affected person.

[123] The police state that due to the specific nature of the information withheld on the basis of the section 38(b) exemption, the personal information of the affected persons is so inextricably intertwined that it would not be possible to sever the personal information of the affected persons from the police reports, investigating officer's

notebook entries and emails in a way that would allow only the disclosure of the appellant's personal information.

[124] The appellant did not address this issue in his representations.

Findings

[125] Based on my review of the police's representations and the information that I have found to be exempt under sections 38(a) and 38(b), I find that the police exercised their discretion in a proper manner, taking into account relevant considerations and not taking into account irrelevant considerations.

[126] I am satisfied that the police balanced the appellant's interests in the disclosure of the records with the importance of the personal privacy, solicitor-client privilege and law enforcement exemptions. I also note that the police disclosed portions of the records at issue to the appellant and that the appellant has not, in my view, provided a sympathetic or compelling need to receive the information at issue.

[127] Accordingly, I am upholding the police's exercise of discretion not to disclose the information at issue in the records that I have found to be exempt by reason of sections 38(b), or 38(a) (with sections 8(1)(c) or 12).

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

[128] 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.[49] 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.

[129] 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.[50] To be responsive, a record must be "reasonably related" to the request.[51]

[130] 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.[52]

[131] A further search may be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all

[49] Orders P-85, P-221 and PO-1954-I.
[50] Orders P-624 and PO-2559.
[51] Order PO-2554.
[52] Orders M-909, PO-2469 and PO-2592.

of the responsive records within its custody or control.[53]

[132] 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.[54]

Representations

[133] The police provided detailed representations to explain the process undertaken to search for records. They explain that they have a two-step process in place to conduct searches for records requested under the *Act*. Firstly, a Freedom of Information (FOI) clerk intakes the request and collects all records and secondly a FOI analyst verifies the information collected and processes the request.

[134] The police state that a search of the appellant's name and date of birth was conducted on the Niche Records Management system and two occurrences were located and the police occurrence reports were extracted from the database. Then an email was sent to all dispatched officers for notebook entries related to both occurrences and an email was sent to the Information Technology Services to retrieve any and all emails involving the appellant.

[135] The appellant did not provide representations on this issue.

Findings

[136] Based on my review of the records located by the police and the police's representations about their search, I find that they have provided sufficient evidence to show that the police have made a reasonable effort to identify and locate responsive records. In my view, the police have used a logical and comprehensive approach to identify records and have thereby demonstrated that they have made a reasonable effort to identify and locate all of the responsive records within their custody or control.

[137] I considered whether the appellant has established that there is a reasonable basis to believe that additional records exist. Although the appellant did not address this issue specifically, I considered the entirety of his representations in making this assessment. I find that he has not provided a reasonable basis for me to conclude that additional responsive records exist.

[138] I am satisfied that the search carried out for responsive records by the police was reasonable in the circumstances and I uphold it.

---

[53] Order MO-2185.
[54] Order MO-2246.

ORDER:

1. I do not uphold the police's decision that the section 52(3)3 applies to the emails at issue found at pages 56 to 68, 82, 84 to 98, 165 to 166, and 307 to 340 of the records.
2. I uphold the police's decision that all of the information at issue in the records is exempt by reason of sections 38(b), or 38(a), read with sections 8(1)(c) or 12).
3. I uphold the police's decision that the information in the records that they have marked as not responsive to the request is non-responsive.
4. I uphold the police's search for records.

Original Signed by:	September 21, 2022

Diane Smith
Adjudicator