Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4260

Appeal MA20-00157

Ottawa Police Service

September 29, 2022

Summary: The Ottawa Police Service (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* for access to records relating to the appellant and certain of his interactions with the police. The police issued a decision denying access to some responsive records on the basis that they are excluded from the *Act* by operation of section 52(3) (employment or labour relations). The police also denied access to portions of a general occurrence report on the basis of the discretionary exemption in section 38(a) (discretion to refuse requester's own information) with reference to the law enforcement exemptions in sections 8(1)(a) (law enforcement matter) and 8(1)(i) (security). In this order, the adjudicator upholds the police's decision to deny access to the information at issue. She also upholds the police's search as reasonable and dismisses the appeal.

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)(a), 8(1)(i), 17, 38(b) and 52(3)3.

OVERVIEW:

[1] The Ottawa Police Service (the police) received a multi-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information identified by and relating to the appellant and certain interactions with the police:

1. Any and all Video and Audio Recordings of May 30, 2019, [specified address] Police Station Meeting With [named officer]/[named officer]/[the appellant]/[named social worker] re File [number] Around 2:30 Pm maybe 1 hour

2. Any and all Video and Audio Recordings of February 22, 2017 About 6 Pm Incident at Ottawa Police Station [specified address], Involving [the appellant], [named individual], [named officer] And [the appellant], maybe 30 minutes

3. Any systems, computer, paper, data, information that are related in any way to Complaints from [the appellant] to The Office of The Ottawa Chief of Police Or Police Services Board Or Police Professional Standards Office Or Ottawa Police Community Equity Council from 2017 to 2020 date of disclosure

4. Any systems, computer, paper, data, information that are related in any way to Ottawa Police Criminal Investigation File [numbered file] (Excluding Information that originated from [appellant]) from 2017 to 2020 date of disclosure

5. any MOU Or Other Agreement That Describes In Any Way The Working Relationship Between Ottawa Police Mental Health Unit and Ottawa Hospital Mental Health Mobile Crisis Unit or Royal Ottawa Mental Health Centre.

[2] The police searched for and located responsive records and issued a decision granting partial access. With respect to parts 1 and 2 of the request, the police wrote that responsive records no longer exist because video recordings are only maintained for 30 days. The police withheld some information from the responsive records on the basis of the exclusion in section 52(3) (employment or labour relations) of the *Act*. The police also withheld some information on the basis that it is exempt pursuant to the law enforcement exemptions in section 8(1)(a) (law enforcement matter) and 8(1)(i) (security).[1]

[3] The appellant appealed the police's decision to the Information and Privacy Commissioner of Ontario (the IPC). The parties participated in mediation to explore the possibility of resolution. During mediation, the appellant confirmed that he seeks access to all of the withheld records and stated that he believed that additional records should exist (specifically, video recordings and records relating to the Ottawa Police Services Board and the Ottawa Police Community Equity Council). The issue of the reasonableness of the police's search for responsive records was therefore added to the appeal.

[4] Because some of the records appeared to contain the appellant's personal information, the police agreed during mediation that the correct exemption for records that contain the appellant's personal information is section 38(a) (discretion to refuse

[1] The police also wrote that some records "are not proprietary" to them or are "held/housed" by another agency. The question of custody or control, however, is not before me as an issue in this appeal.

the requester's own information). As a result, section 38(a), with reference to the law enforcement exemptions in section 8(1)(a) (law enforcement matter) and 8(1)(i) (security of building, vehicle or system), was added to the appeal.

[5] When the appeal was not resolved in mediation, it was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct a written inquiry.

[6] I conducted an inquiry during which both the police and the appellant were invited to submit representations on the exclusion in section 52(3) of the *Act*, the exemptions claimed by the police to deny access to portions of an occurrence report to which the police granted partial access, and the reasonableness of the police's search.

[7] In this order, I find that records 2 through 7 (defined below), inclusive, are excluded from the *Act* by operation of section 52(3)3. I find that the information at issue in record 1 (also defined below) is exempt from disclosure pursuant to section 38(a), read with the law enforcement exemption in section 8(1)(a). I uphold the police's exercise of discretion to deny access to this information. Finally, I uphold the police's search for responsive records as reasonable.

RECORDS:

There are seven records at issue in this appeal, which are described below. At issue is the information withheld from these seven records as follows:

1. Record withheld in part pursuant to section 38(a), read with sections 8(1)(a) and 8(1)(i):

Record Number	Description	At issue
Record 1	125-page general occurrence report (123-page report plus cover page and index)	Information withheld from pages 6, 7 and 8

2. Records withheld in full on the basis that they are excluded under section 52(3):

Record Number	Description	At issue
Record 2	Correspondence from Ottawa Police Service to named officer	Entire record
Record 3	Internal Ottawa Police Service email	Entire record

Record 4	Email from OIPRD to Ottawa Police Service	Entire record
Record 5	Internal Ottawa Police Service email	Entire record
Record 6	Correspondence from OIPRD to Ottawa Police Service	Entire record
Record 7	Correspondence from Ottawa Police service to OIPRD	Entire record

ISSUES:

A. Does the section 52(3) exclusion for records relating to labour relations or employment matters apply to records 2 through 7?

B. Does record 1 contain "personal information" as defined in section 2(1), and, if so, whose personal information is it?

C. Does the discretionary exemption in section 38(a), read with the law enforcement exemptions in section 8(1)(a) or 8(1)(i) apply to record 1?

D. Should the police's exercise of discretion under section 38(a) be upheld?

E. Should the police's search for responsive records be upheld?

DISCUSSION:

Issue A: Does the section 52(3) exclusion for records relating to labour relations or employment matters apply to records 2 through 7?

[8] The police have taken the position that records 2 through 7 are materials generated as a result of a complaint to the Office of the Independent Police Review Director (OIPRD) and relate to labour relations or employment-related matters that are excluded from the *Act* under section 52(3). Because the police claim that these records are excluded from the *Act*, I must first consider this issue.

[9] Pursuant to section 52 of the *Act*, the *Act* does not apply to certain types of records. A finding that the *Act* does not apply to any of the records at issue in this appeal ends the matter before me because if the *Act* does not apply, then the general right of access in section 4(1) does not apply.

[10] Section 52(3) excludes records concerning certain labour relations or employment matters. Section 52(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:
>
> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
>
> 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[11] 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*. The police submit that none of the exceptions in section 52(4) applies, and having reviewed the records, I find that none do.

[12] The types 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 are at issue. Employment-related matters are separate and distinct from matters related to employees' actions.[2]

[13] The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.[3]

[14] If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not stop applying at a later date.[4]

[15] The IPC takes a "whole record approach" to the exclusions at section 52(3). This means that the record is examined as a whole. The exclusion cannot apply to a portion of the record. Either the entire record is excluded under section 52(3), or it is not. It is worth noting, however, that an institution may still exercise its discretion to disclose records, in whole or in part, outside of the access regime in the *Act*.

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[2] *Ontario* (*Ministry of Correctional Services*) *v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).
[3] Order PO-2157.
[4] *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. 509.

Representations

The police's representations

[16] The police argue that records 2 through 7 pertain to a complaint that was made to the OIPRD about a specific officer, and were collected, prepared, maintained and used by the police as employer. The police submit that records 2 through 7 relate to staff relations because they are about the employee officer's conduct. The police submit that the records are held by the police's Professional Standards Section and are part of the officer's human resources file.

[17] The police submit that the records "pertain entirely to the relationship between the employer…and the employee...," and relate to the officer's employment because there was the potential for disciplinary action if the complaint were determined to be founded. Although the police did not proceed with the complaint, the police submit that they "have a great interest in these labour relations related records" as the employer.

The appellant's representations

[18] The appellant has not addressed the three-part test for exclusion in section 52(3). Rather, the appellant's representations focus on his concerns with the police, including allegations of fraud, allegations of threats to arrest or harm the appellant, complaints that the police have not provided some statements in affidavit form, including regarding matters not related to this appeal, and his dissatisfaction with the description of the issues on appeal, claiming that his concerns about, among other things, fraud and bad faith on the part of the police, are not being adjudicated by the IPC. While I have reviewed the appellant's representations, I have only summarized those portions of his representations that relate to the issues that are properly before me.

Analysis and findings

[19] The police have not specified the paragraphs of section 52(3) on which they rely.[5] Based on my review of the police's representations and records 2 through 7, it appears that the police are relying on paragraph 3 of section 52(3).

[20] As noted above, records 2 through 7 were generated following a complaint to the OIPRD by the appellant against a specific police officer. The records include internal police communications, including with the OIPRD, and correspondence between the police's Professional Standards Section and the named officer about the complaint.

[21] As also noted above, once excluded from the operation of the *Act*, the records

[5] In either their decision or their representations in this appeal.

remain excluded.[6] This means that the section 52(3)3 exclusion still applies even if the investigation that is the subject of the records has been concluded, as is the case here.

[22] For me to find that section 52(3)3 applies, I must be satisfied that:

1. the records were collected, prepared, maintained or used by the police or on their 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 were about labour relations or employment-related matters in which the police have an interest.

Part 1: collected, prepared, maintained or used

[23] The police submit that the records were collected, prepared, maintained and used as part of their consideration of a complaint against an individual police officer which, if successful, could have resulted in disciplinary action. The police submit that the records were collected as part of the complaint against the officer, that the complaint formed part of the officer's human resources file, and that the police as an employer have an interest in an allegation of an officer's misconduct.

[24] In my view, records 2 through 7 were all collected and prepared for the purpose of investigating the appellant's complaint about the officer's alleged misconduct. The collection of the records began with receipt of the complaint itself, and the records were collected, maintained or used by the police as part of communications regarding the complaint against the officer. I therefore find that the first part of the test under section 52(3)3 has been met.

Parts 2 and 3: in relation to meetings, consultations, discussions or communications about labour relations or employment-related matters in which the police have an interest

[25] The remaining parts of the test require a determination of whether the records were collected, prepared, maintained or used by the police in relation to meetings, consultations, discussions or communications about labour relations or employment-related matters in which the police have an interest.

[26] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraphs 1, 2 or 3 of section 52(3), it must be reasonable to conclude that there is "some connection" between them.[7] The "some

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[6] *Ontario* (*Solicitor General*) *v. Ontario* (*Assistant Information and Privacy Commissioner*) (2001), 55 O.R. (3d) 355, leave to appeal refused [2001] S.C.C.A. No. 5067. Also see Order MO-1589-R.

[7] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

connection" standard must involve a connection that is relevant to the statutory scheme and purpose understood in their proper context.[8]

[27] With respect to paragraph 2, I find that the records were collected and used by the police "in relation to meetings, consultations, discussions or communications" about matters arising from allegations involving an employee police officer as the subject of a complaint.

[28] With respect to paragraph 3, there is no dispute that the officer was acting in the course of his duties and that the complaint sought an examination or investigation into the officer's alleged misconduct. The complaint named the officer as the subject of the complaint, and identified meetings at a specific police station as the location of the incidents from which the complaint arose. I am satisfied that the complaint at issue in this appeal, a complaint about alleged misconduct by an employee police officer, is an employment-related matter in which the police have an interest. I explain these conclusions about parts 2 and 3 of the section 52(3)3 test, below.

[29] The term "employment-related matters" (as opposed to labour relations matters, which are not at issue in these appeals) has been held to refer to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.[9] Examples in which the phrase "labour relations or employment-related matters" in section 65(6) has been found to include a job competition,[10] an employee's dismissal,[11] and disciplinary proceedings under the *Police Services Act* (*PSA*).[12]

[30] The *PSA* establishes the authority to receive, manage, and oversee public complaints about the police in Ontario. In my view, complaints before the OIPRD relate to employment-related matters for the purposes of paragraph 3 of section 52(3), especially considering that they may lead to disciplinary proceedings that can affect an officer's employment. As such, I am satisfied that records 2 through 7 were used by the police in relation to communications about employment-related matters involving a police officer in which the police have an interest.

[31] In this regard, and for the purposes of this appeal, I agree with and adopt the findings of former Assistant Commissioner Tom Mitchinson in Order M-835, where he found that the penalties which follow the discipline of police officers pursuant to the *PSA* "can only reasonably be characterized as employment related actions." Although the OIPRD closed the complaint in this case, I am satisfied that the complaint and records connected to it were of interest to the police as an employer.

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[8] Order MO-3663, *Brockville* (*City*) *v. Information and Privacy Commissioner, Ontario,* 2020 ONSC 4413 (Div. Ct.).
[9] *Police Services Act*, R.S.O. 1990, c. P.15. See also Order PO-2157.
[10] Orders M-830 and PO-2123.
[11] Order MO-1654-I.
[12] Order MO-1433-F.

[32] For these reasons, I am satisfied that records 2 through 7 each meet the requirements of paragraph 3 of section 52(3) because:

- they are records that were prepared in order to investigate an allegation of impropriety and/or misconduct on the part of a specific police officer,
- the records were prepared to facilitate discussions and/or communication about the investigation and/or discussions about the OIPRD's decision after it was communicated to the police, and
- the focus of the investigation was an allegation of potential misconduct by an officer in the context of the officer's duties, and was therefore an employment-related matter in which the police had an interest as employer.

[33] I have concluded that all three parts necessary to establish the exclusion in section 52(3)3 have been satisfied. I therefore find that the *Act* does not apply to records 2 through 7 by operation of section 52(3)3 and I uphold the police's decision that records 2 through 7 are excluded from the *Act.*

[34] Because this finding is limited to records 2 through 7, I will next consider the police's decision to deny access to portions of record 1, which is a general occurrence report.

Issue B: Does record 1 contain "personal information" as defined in section 2(1), and, if so, whose personal information is it?

[35] The police withheld portions of record 1 on the basis that they are exempt from disclosure under section 38(a), read with the law enforcement exemptions in section 8(1)(a) and (i). In order to decide whether these exemptions apply, I must first decide whether the record contains "personal information," and if so, to whom this personal information relates.

[36] Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual." Recorded information is information recorded in any format, including paper and electronic records.[13]

[37] Information is "about" the individual when it refers to them in their personal capacity, meaning that it reveals something of a personal nature about them. Generally, information about an individual in their professional, official, or business capacity is not considered to be "about" the individual if it does not reveal something of a personal nature about them.[14]

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[13] The definition of "records" in section 2(1) includes paper records, electronic records, digital photographs, videos and maps. The record before me is a paper record located by searching a police database.

[14] Orders P-1409, R-980015, PO-2225 and MO-2344.

[38] Information is about an "identifiable individual" if it is reasonable to expect that an individual can be identified from the information either by itself or if combined with other information.[15]

[39] Section 2(1) of the *Act* gives a list of examples of personal information. All of the examples are relevant to this appeal and are set out below:

> "personal information" means recorded information about an identifiable individual, including,
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> (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,
>
> (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,
>
> …
>
> (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.

[40] Sections 2(2.1) and (2.2) distinguish personal information from information about an individual in a business or professional capacity. Section 2(2.1) states that: Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or

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[15] Order PO-1880, upheld on judicial review in *Ontario* (*Attorney General*) *v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

official capacity.

[41] To qualify as personal information, the information must be about the individual in a personal capacity. In some situations, even if information relates to an individual in a professional, official or business capacity, it may still be "personal information" if it reveals something of a personal nature about the individual.[16]

[42] The list of examples of personal information under section 2(1) is not a complete list. This means that other kinds of information could also be "personal information."[17]

[43] It is important to know whose personal information is in the record. If the record contains the requester's own personal information, their access rights are greater than if it does not.[18] Also, if the record contains the personal information of other individuals, one of the personal privacy exemptions might apply.[19]

Representations

[44] The police submit that the withheld information contains the appellant's name and that disclosure of this information, even without "other identifiers," could be "linked back to" the appellant. I therefore understand the police to submit that the record contains the appellant's personal information.

[45] The appellant's representations do not address whether record contains personal information.

Analysis and findings

[46] The IPC applies a "record-by-record" analysis to records subject to an access request. Applied to records for access to one's own personal information, the "record-by-record" approach gives requester's a right of access to an entire record, or the withheld portions of records that contain their own personal information, subject to any applicable exemptions. Using this approach, the unit of analysis is the whole record, rather than individual pages, paragraphs, sentences or words contained in it. Where the information at issue is the withheld portion of a record that has been partially released, the whole of the record (including the released portions), must be analyzed in determining a requester's right to access the withheld information.[20]

[47] In other words, I must consider whether the whole record contains the appellant's (or another identifiable individual's personal information), rather than just

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[16] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[17] Order 11.
[18] Under sections 36(1) and 38 of the *Act,* a requester has a right of access to their own personal information, and any exemptions from that right are discretionary, meaning that the institution can still choose to disclose the information even if the exemption applies.
[19] See sections 14(1) and 38(b).
[20] See Orders M-352 and PO-3642.

the portions at issue.

[48] From my review of record 1, I find that it contains the appellant's personal information. The report is a general occurrence report that contains information about the appellant and his complaints to the police about certain organizations. Record 1 contains the appellant's name, address and telephone numbers, and a copy of his driver's license that includes his photo, date of birth and the driver's license number. The record contains the appellant's handwritten statements and other communications he submitted to the police about his concerns and allegations, as well as the appellant's views and opinions on various matters. Finally, the record also contains information about the appellant's health.

[49] Therefore, I find that, collectively, this is the appellant's information that meets the definition of "personal information" as that term is defined in paragraphs (a) through (f), and (h) of section 2(1) of the *Act*.

[50] The parties did not make representations on whether information about police officers (or entities identified by the appellant) in record 1 is personal information. I have considered this and find, based on my review of the record, that this is not personal information of the officers who interacted with the appellant because they did so in a professional capacity.[21]

Issue C: Does the discretionary exemption at section 38(1), read with the law enforcement exemptions in section 8(1)(a) or (i), apply to the information withheld from record 1?

[51] The police claim that the section 38(a) exemption, read with sections 8(1)(a) and (i), applies to exempt certain portions of record 1 at pages 6, 7 and 8. I must therefore consider the application of section 38(a) because I have concluded that record 1 contains the appellant's personal information, and section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 sets out some exemptions from this general right of access to one's own personal information.

[52] Section 38(a) of the *Act* states that an institution may refuse to disclose personal information if section 8 would apply to the disclosure of that information.[22] Section 38(a) is discretionary and recognizes the special nature of requests for one's own personal information, and the desire of the Legislature to give institutions the power to

[21] I also note that the entire record, except for the portions at issue in this appeal, was otherwise disclosed to the appellant.
[22] Section 38(a) states: "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."

grant requesters access to their own personal information.[23]

[53] In this case, the police rely on the law enforcement exemptions in section 8(1)(a) and 8(1)(i) to deny access to the report. These provisions state:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;
>
> …
>
> (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required.

Representations

The police's representations

[54] The police submit that the information withheld form record 1 relates to information obtained via CPIC,[24] which the police submit is an electronic information storage and retrieval system owned and operated by the RCMP,[25] and which provides confidential information to law enforcement agencies.

[55] The police say that the information contained within the CPIC system should be protected and safeguarded, and that, if the information were to be disclosed, the risk of interference in law enforcement matters would be "immense."

The appellant's representations

[56] The appellant has not addressed the section 38(a) exemption, or the law enforcement exemptions in sections 8(1)(a) or (i), in his representations.

Analysis and findings

[57] "Law enforcement" is defined in section 2(1) as:

> (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

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[23] Order M-352.
[24] The Canadian Police Information Centre.
[25] The Royal Canadian Mounted Police, a federal law enforcement agency.

(c) the conduct of proceedings referred to in clause (b).

[58] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[26] 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 a continuing law enforcement matter.[27] How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[28]

Section 8(1)(a): law enforcement matter

[59] The IPC has found that, for section 8(1)(a) to apply, the matter in question must be ongoing or in existence.[29] The exemption does not apply where the matter is completed.[30]

[60] The police's representations contain confidential submissions regarding the application of section 8(1)(a).[31] I have not reproduced or summarized them in this order due to their confidential nature, because to do so would reveal information that I am satisfied, based on the record and the police's representations, is exempt under section 38(a), with reference to section 8(1)(a).

[61] The withheld information contains communication contained in CPIC that suggests an open or other investigation, or matters involving another law enforcement agency. There is no evidence in the records or the representations before me that these matters are concluded. From the record itself, I am satisfied that the withheld information is of current or ongoing interest to another law enforcement agency, and there is no indication that the information relates to a matter that has ended. I therefore find that section 38(a), with reference to section 8(1)(a), applies to exempt the information at issue on pages 6, 7 and 8 of the occurrence report and uphold the police's decision to deny access to the withheld information on this basis.

[62] Because I have found that the information at issue is exempt under section 38(a), with reference to section 8(1)(a), it is not necessary for me to consider the police's claim that the exemption in section 8(1)(i) also applies. I will next consider the police's exercise of their discretion in withholding the information at issue.

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[26] *Ontario* (*Attorney General*) *v. Fineberg* (1994), 1994 CanLII 10563 (ON SC), 19 O.R. (3d) 197 (Div. Ct.).
[27] Order PO-2040 and *Ontario* (*Attorney General*) *v. Fineberg*, cited above.
[28] *Ontario* (*Community Safety and Correctional Services*) *v. Ontario* (*Information and Privacy Commissioner*), 2014 SCC 31 (CanLII) at paras. 52-4.
[29] Order PO-2657.
[30] Orders PO-2085 and MO-1578.
[31] See IPC *Practice Direction 7.*

Issue D: Should the police's exercise of discretion be upheld?

[63] The section 38(b) exemption is discretionary,[32] meaning that the institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, I may determine whether the institution failed to do so.

[64] I may also 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; or
- it fails to take into account relevant considerations.

[65] In either case, I may send the matter back to the institution for an exercise of discretion based on proper considerations.[33] I cannot, however, substitute my own discretion for that of the institution.[34]

[66] Some examples of relevant considerations are listed below. However, not all of these will necessarily be relevant, and additional considerations may be relevant:[35]

- 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, and
    - the privacy of individuals should be protected,
- the wording of the exemption and the interests it seeks to protect,
- whether the requester is seeking their own personal information,
- whether the requester has a sympathetic or compelling need to receive the information,
- whether the requester is an individual or an organization,

[32] These sections state that the institution "may" refuse to disclose information.
[33] Order MO-1573.
[34] Section 43(2).
[35] Orders P-344 and MO-1573.

- the relationship between the requester and any affected persons,
- whether disclosure will increase public confidence in the operation of the institution,
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person,
- the age of the information, and
- the historic practice of the institution with respect to similar information.

Analysis and findings

[67] Although neither the police's nor the appellant's representations expressly addressed the police's exercise of discretion, based on the police's overall representations, their decision, and my review of record 1, I find that the police properly exercised their discretion under section 38(a) to deny access to some limited information contained in it. This information is contained in seven lines on pages 6, 7, and 8 of the 123-pages that were otherwise disclosed to the appellant.

[68] In withholding this information, I find that the police considered that the withheld portions contain the appellant's surname but that they also contain communications relating to law enforcement matters. I find that, in disclosing the majority of record 1, the police considered that it contains the appellant's own personal information, describes his involvement with and complaints to the police, and his concerns about organizations the appellant believes are doing him harm. In denying access to only seven lines of the report, I am satisfied that the police considered the purposes of the *Act*, including that necessary exemptions from the right of access should be limited and specific, and that individuals have a general right of access to their own personal information.[36]

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

[69] The appellant believes that additional records exist that are responsive to his request.

[70] If a requester claims that additional records exist beyond those found by the institution, the issue is whether the institution has conducted a reasonable search for records as required by section 17 of the *Act*.[37] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. Otherwise, it may order the institution to conduct another search for records.

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[36] Section 1(a)(ii) of the *Act*.
[37] Orders P-85, P-221 and PO-19544-I.

[71] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, they still must provide a reasonable basis for concluding that such records exist.[38]

[72] The *Act* does not require the institution to prove with certainty that further records do not exist. However, the institution must provide enough evidence to show that it has made a reasonable effort to identify and locate responsive records;[39] that is, records that are "reasonably related" to the request.[40]

[73] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request makes a reasonable effort to locate records that are reasonably related to the request.[41]

Representations

The police's representations

[74] The police provided an affidavit sworn by their Senior Freedom of Information Analyst (the analyst). According to the affidavit, the police's Records Management System (RMS) was searched, and queries were made to the involved officers and several units within the police services.

[75] The analyst was able to locate record 1 – the occurrence report identified in the request – by searching RMS. According to his affidavit, he reviewed the report and determined that no additional information was missing from the file. The police submit that the appellant attended their front desk on three separate occasions, and that the records he submitted were all attached to record 1. The police submit that no officer notes exist because their front desk agents are all civilian employees who do not take notes (like a police officer would at the scene of an incident and that would later be entered into a report). The police say that the information the appellant was provided was immediately entered into record 1 and therefore forms part of it.

[76] With respect to the request for video relating to the two meetings the appellant had at a specific police station, the police say they contacted their Facilities Management & Security unit, who the police say in the affidavit that no video recordings exist. The police say that, while video recordings may have previously existed, they no longer do because they are subject to a 30-day retention period.

[77] According to the analyst's affidavit, the involved officers were also contacted for additional records, but responded that none existed. Likewise, the office of the Chief of Police and the Professional Standards Section were contacted, and both responded that

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[38] Order MO-2246.
[39] Orders P-624 and PO-2559.
[40] Order PO-2554.
[41] Orders M-909, PO-2469 and PO-2592.

no additional records existed beyond the withheld records 2 through 7.

[78] The police say that, as for the Ottawa Police Community Equity Counsel (CEC), the police are only a partner with the CEC. The police submit that they nevertheless contacted the CEC, but were advised by the then-member of the CEC representing the police that the CEC is facilitated by an outside consulting company and did not have any records. The police also submit that they do not have records of the Police Services Board.

[79] Finally, the police submit that the request was clearly written and did not require clarification, and that the police interpreted it literally.

The appellant's representations

[80] The appellant submits that the police ought to have submitted affidavit evidence on matters relating to some of his concerns (such as retention policies for 911 recordings or that front desk agents are civilians) and that the police failed to demonstrate that videotape recordings could not be retrieved. The appellant did not otherwise address the reasonableness of the police's search in his representations.

Analysis and findings

[81] I am satisfied that the police's search for responsive records was reasonable.

[82] As mentioned above, the police are not required to prove with certainty that further records do not exist in order to satisfy the requirements of the *Act*. They must only show that they made a reasonable effort to locate responsive records. Based on the evidence before me, I find that they have. The police's representations demonstrate that an experienced employee, knowledgeable in the records related to the subject matter of the appellant's request, made reasonable efforts to locate responsive records. The police searched relevant databases for responsive records, and queried relevant individuals and offices, including those specifically identified by the appellant. Where records no longer exist, namely the requested videotapes, the police have provided a reasonable explanation.

[83] The appellant was asked to provide support in his representations for his belief that additional responsive records exist. The appellant did not provide any reasonable basis on which I could conclude that additional records responsive to this access request exist. In the circumstances, I am not satisfied that another search would yield more responsive records.

[84] I therefore find that the police's search for responsive records was reasonable and I uphold it.

ORDER:

I uphold the police's decision and dismiss this appeal.

Original Signed by: September 29, 2022

Jessica Kowalski
Adjudicator