Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4276

Appeal MA19-00667

Toronto Police Services Board

November 18, 2022

Summary: The police received an 11-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to two incidents involving the appellant. The police granted partial access, and relied on the discretionary exemptions at section 38(a), read with 8(1)(l) (facilitate commission of an unlawful act), and section 38(b) (personal privacy) of the *Act* to withhold disclosure. During mediation, the issue of reasonable search was added to the appeal as the appellant believed further records exist. In this order, the adjudicator partially upholds the police's decision. She orders the police to disclose additional information that does not meet the definition of "personal information". The adjudicator also finds that the withheld information under section 38(a), read with section 8(1)(l), is not exempt and orders this information to be disclosed. She finally finds that the police conducted a reasonable search for records.

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)(l), 14(2)(h), 14(3)(b), 38(a) and 38(a).

Orders Considered: Orders MO-2862, MO-3575 and MO-3831-I.

OVERVIEW:

[1] The appellant filed an 11-part request[1] to the Toronto Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records related to his involvement in two incidents in 2011 and 2014.

[2] The police granted the appellant partial access to records identified as responsive. The police claim that disclosure of some of the withheld information would constitute an unjustified invasion of personal privacy under section 38(b). The police also claim that some other withheld information qualifies for exemption under section 38(a), read with section 8(1)(l) (facilitate commission of an unlawful act). Finally, the police claim that some of the withheld portions of the records contain information that is not responsive to the request.

[3] The appellant appealed the police's decision to the Office of the Information and Privacy Commissioner of Ontario (IPC) and a mediator was assigned to explore settlement with the parties.

[4] During mediation, the appellant indicated that he believed that additional records should exist and the police agreed to conduct a further search. The police's further search located an additional responsive record which the appellant was provided full access to. However, the appellant continued to believe that additional records should exist and the police agreed to conduct a further search, but no additional records were located. The police explained that any responsive records in item (i) of the request would have been destroyed in compliance with its retention schedule.

[5] At the end of mediation, the appellant remained unsatisfied with the further searches that took place during mediation. The appellant also confirmed that he wants to pursue access to the information withheld pursuant to the exemptions under sections 38(a) and (b). Accordingly, the only information removed from the scope of this appeal was the information the police identified as not responsive to the request.

[6] As mediation did not resolve the appeal, the appeal was transferred to the adjudication stage of the appeal process in which an adjudicator may conduct an inquiry under the *Act*.

[7] The adjudicator initially assigned to this appeal invited the police and the appellant to provide representations on the issues in this appeal. She received representations from both parties. This appeal was subsequently transferred to me to continue the adjudication. I have reviewed the parties' representations and have decided that I do not require further submissions before making my decision.

[8] In this order, I partially uphold the police's decision. I order the police to disclose

[1] I set out the appellant's complete request below under Issue E relating to my determination of the reasonableness of the police's search.

additional information that did not meet the definition of "personal information". I also find that the withheld information under section 38(a), read with section 8(1)(l), is not exempt and order this information to be disclosed. I finally find that the police conducted a reasonable search for records.

RECORDS:

[9] The withheld information is contained in computer generated police reports, police officers' handwritten notes and email correspondence (the records). The records are identified in the Index of Records created by the police.

ISSUES:

A. Do the records contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

B. Does the discretionary personal privacy exemption at section 38(b) apply to the information at issue?

C. Does the discretionary exemption at section 38(a), read with the section 8(1)(l) exemption, apply to the information at issue?

D. Did the police exercise its discretion under sections 38(a) and/or (b)? If so, should this office uphold the exercise of discretion?

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

DISCUSSION:

A: Do the records contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

[10] In order to decide whether section 38(b) applies, I must first decide whether the records contain "personal information," and if so, to whom this personal information relates.

[11] 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.[2]

[2] 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.

[12] 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.[3]

[13] 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.[4]

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

> "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,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (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.

[15] 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."[5]

[16] It is important to know whose personal information is in the records. If the records contain the requester's own personal information, their access rights are greater than if it does not.[6] Also, if the records contain the personal information of other individuals, one of the personal privacy exemptions might apply.[7]

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[3] Orders P-1409, R-980015, PO-2225 and MO-2344.
[4] Order PO-1880, upheld on judicial review in *Ontario* (*Attorney General*) *v. Pascoe*, [2002] O.J. No. 4300 (C.A.).
[5] Order 11.
[6] Under sections 47(1) and 49 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.
[7] See sections 21(1) and 49(b).

[17] The police submit that the records contain the personal information of involved parties. Specifically, they submit that the records contain the names, addresses, dates of birth, sex and marital or family status of identifiable individuals.

[18] In his representations, the appellant briefly states that he is not seeking other individual's personal information. The appellant was asked to confirm whether he still wished to pursue access to the information withheld under section 38(b) but he did not do so.

[19] I note that the appellant has been granted access to most of the information in the records and the remaining withheld information contains information that would qualify as the personal information of the appellant and other identifiable individuals within the meaning of that term as defined in section 2(1) of the *Act*.

[20] With respect to the withheld information on page 7 of the supplementary record, it contains the personal information of the appellant only. As the section 38(b) personal privacy exemption cannot apply to exempt the appellant's own personal information from disclosure to himself, I will order the police to disclose the withheld information on page 7 of the supplementary record to him in accordance with the highlighted records enclosed with this order.

[21] In addition, I find that the withheld information on page 99 of one of the officers' handwritten notes contains the personal information of the appellant only. As stated earlier, the personal privacy exemptions cannot apply to exempt the appellant's own personal information from disclosure to himself. As such, I will order the police to disclose the withheld information on page 99 of the supplementary record to him in accordance with the highlighted records enclosed with this order. However, as the police also rely on section 38(a), read with section 8(1)(l), to withhold this information, I will consider whether it is exempt under section 38(a) below.

[22] As I have found that the withheld information in the remaining records contains the personal information of the appellant along with other identifiable individuals, I will consider the appellant's access to the records under Part II of the *Act*.

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

[23] 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.

[24] 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

exceptions in sections 14(1)(a) to (e), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b).

[25] 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). Also, section 14(4) lists situations that would not be an unjustified invasion of personal privacy. If any of paragraphs (a) to (d) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b).

[26] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), this office will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.[8]

[27] If any of sections 14(3)(a) to (h) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 38(b). 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.[9] 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).[10]

Analysis and findings

[28] I note that the withheld information does not fit within the exceptions set out in section 14(1)(a) to (e) nor section 14(4) of the *Act*. As such, I will turn to discuss whether any of the factors or presumptions under sections 14(2) and (3) apply.

[29] Although the appellant provided representations, his representations did not address this issue.

[30] The police rely on the presumption in section 14(3)(b) and the factor favouring non-disclosure in section 14(2)(h) to withhold the personal information under section 38(b). Sections 14(2)(h) and 14(3)(b) state:

> (2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
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> > (h) the personal information has been supplied by the individual to whom the information relates in confidence; and

[8] Order MO-2954.
[9] Order P-239.
[10] Order P-99.

> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
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> > (b) 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.

[31] The police submit that they collected and gathered the withheld information for the explicit purpose of aiding a law enforcement investigation into a possible violation of law. They submit that the 2011 incident resulted in charges being laid pursuant to the *Criminal Code of Canada* (the *Code*) against the appellant. They also submit that the 2014 incident did not result in charges being laid but the information was compiled as part of a law enforcement investigation to determine if any offences were committed.

[32] 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.[11] The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.[12]

[33] Based on my review of the records, I find that the presumption at section 14(3)(b) applies to the withheld information. The records concern information about two police investigations relating to a number of offences. The withheld information was compiled and is identifiable as part of the investigations into possible violations of the *Code* which resulted in a charge being laid for one of the two incidents. Although no charges were laid for one of the two incidents, there need only have been an investigation into a possible violation of law for the presumption at section 14(3)(b) to apply.[13] Section 14(3)(b) therefore weighs in favour of non-disclosure of the withheld personal information.

[34] The police also rely on the factor in section 14(2)(h) and Order MO-3897. They submit that police investigations imply an element of trust that the law enforcement agency will act responsibly in the manner in which it deals with recorded personal information.

[35] In order for section 14(2)(h) to apply, both the individual supplying the information and the recipient must have an expectation that the information will be treated confidentially, and that expectation must be reasonable in the circumstances. Thus, section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.[14]

[36] I find that the withheld information in the records has been supplied by the

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[11] Orders P-242 and MO-2235.
[12] Orders MO-2213, PO-1849 and PO-2608.
[13] Orders P-242 and MO-2235.
[14] Order PO-1670.

affected parties in confidence and that the factor in section 14(2)(h), which weighs against disclosure, applies.

[37] Having reviewed the withheld information and considering the factors and presumption in sections 14(2) and (3), I find that disclosure of the withheld information would be an unjustified invasion of the affected parties' personal privacy. Accordingly, I find that the withheld information is exempt under section 38(b) subject to my finding on the police's exercise of discretion.

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

[38] The information withheld under section 38(a), read with section 8(1)(l), can be found on the police officer's handwritten notes at page 99 and email chains at pages 106, 112 and 113 of the records.

[39] Section 38(a) is another exemption from an individual's general right of access to their own personal information. It 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.

[40] Section 38(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.[15]

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

[42] In this case, the police rely on section 38(a), read with section 8(1)(l).

[43] Sections 8(1)(l) reads:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > facilitate the commission of an unlawful act or hamper the control of crime.

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

[15] Order M-352.

context.[16]

[45] It is not enough for an institution to take the position that the harms under section 8 are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter.[17] The institution must provide detailed evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[18]

[46] The police submit that section 38(a), read with section 8(1)(l), applies to the withheld information on pages 99, 106, 112 and 113[19] of the records. The withheld information relates to the appellant's passport and visa information. The police submit that passports are a valued commodity, and, as such, they are subject to various misuses. The police submit that to minimize the incidence of fraud and other criminal activity involving passports, the passport numbers were withheld from the records provided.

[47] In his representations, the appellant did not address the application of section 38(a), read with section 8(1)(l), to the withheld information at issue.

[48] The purpose of the exemption contained in section 8(1)(l) is to provide institutions with the discretion to preclude access to records in circumstances where disclosure of the records could reasonably be expected to lead to the harm set out in that section; namely, facilitating the commission of an unlawful act or hampering the control of crime. The police bear the onus of providing sufficient evidence to substantiate the reasonableness of the expected harm.

[49] In this case, I find that section 8(1)(l) does not apply to the withheld information relating to the passport and visa numbers. The police argue that passports are subject to misuse. However, the passport and visa numbers are known to the appellant as they were in his possession prior to the passport being confiscated by the police. As referred to above, the police are required to provide evidence of how disclosure of this information could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime.

[50] In my view, however, the police have not submitted sufficient evidence required to establish that disclosing the appellant's own passport and visa numbers to him could reasonably be expected to lead to the harms contemplated by section 8(1)(l). The police have not provided me with any corroborating evidence or examples to

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[16] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[17] Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.
[18] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[19] Note that page 116 of the records is a duplicate of page 113.

substantiate their claim that the passport and/or visa numbers themselves will be misused by the appellant or others to facilitate the commission of an unlawful act or hamper the control of crime.

[51] In the absence of such evidence, the police's submissions with respect to the disclosure of the passport and visa numbers are speculative, and evidence amounting to speculation of possible harm is not sufficient to meet the requirements of any of the section 8 exemptions, including section 8(1)(l).[20] I find, therefore, that the police have not established that disclosing the passport and visa numbers could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime, as required by section 8(1)(l). Accordingly, I find that this information is not exempt under section 38(a) and will order it to be disclosed to the appellant.

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

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

[53] In addition, the IPC 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; or
- it fails to take into account relevant considerations.

[54] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.[21] The IPC cannot, however, substitute its own discretion for that of the institution.[22]

[55] Some examples of relevant considerations are listed below. However, not all of these will necessarily be relevant, and additional considerations may be relevant:[23]

- the purposes of the *Act*, including the principles that:
    - information should be available to the public,

[20] *Supra* note 8.
[21] Order MO-1573.
[22] Section 43(2).
[23] Orders P-344 and MO-1573.

  - 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,
- 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.

[56] The police submit that they properly exercised their discretion under section 38(b). They submit that they did not exercise their discretion in bad faith or for an improper purpose. They also submit they took into account all relevant considerations addressed in this appeal, which are the following:

- The information withheld was not personal information solely belonging to the appellant.
- The privacy of the other affected parties should be protected.
- 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 historic practice of the institution with respect to similar information.

[57] In addition, the police submit that they took into account the spirit and intent of the *Act*.

[58] Although the appellant provided representations, his representations did not

address this issue.

[59] Based on my review of the parties' representations and the nature and content of the exempt information, I find that the police properly exercised their discretion to withhold the exempt information of the affected parties pursuant to the discretionary personal privacy exemption at section 38(b) of the *Act*. I note that the police took into account the following relevant considerations: the nature of the information and the extent to which it is significant and sensitive to the law enforcement institution and the wording of the exemption and the interests it seeks to protect. I am satisfied that they did not act in bad faith or for an improper purpose. Accordingly, I uphold the police's exercise of discretion in deciding to withhold the exempt information pursuant to the section 38(b) exemption.

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

[60] The appellant claims that further records responsive to his request should exist. Where a requester claims 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.[24] If I am satisfied 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.

[61] 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 it has made a reasonable effort to identify and locate responsive records.[25] 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 (responsive) to the request.[26]

[62] 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 such records exist.[27]

[63] As stated above, the appellant filed an 11-part request for the following information:

a. Police notes for Officers [X], [Y] from event on 14th February 2011 in relation to an alleged assault at [specified address] at approximately 10pm.

[24] Orders P-85, P-221 and PO-1954-I.
[25] Orders P-624 and PO-2559.
[26] Orders M-909, PO-2469 and PO-2592.
[27] Order MO-2246.

b. Name of supervising Officer on duty of African or West Indian decent at 51 Division on 14th February 2011 when plaintiff was Level 3 "strip" searched and their notes from this date.

c. Surveillance video from the 14th or possibly the 15th February 2011 of the hallway next to the room used to strip search the plaintiff and adjoining processing area for the period of when the plaintiff was search and processed (approximately 11pm).

d. A record of this Level 3 "strip" search made in a memorandum book, Criminal Information Processing System (CIPS) or other relevant record.

e. Phone Meta data from all calls made or received by Officers [A], [B] and [C] in relation to the events from 23 November 2014. This includes the number, incoming/outgoing, time and length of call.

f. Emails to or from Officer [C] regarding passport of [Named Individual] after the seizure on 23rd November 2014.

g. Logs of CIPIC checks against the 1997 Black BMW that [Named Individual] was arrested for stealing on 23rd November 2014.

h. Confirmation Officer [A] attended a hospital prior to 23rd November 2014 with a personal suffering from scabies and associated notes.

i. TPS emails regarding [Named Individual] from the events of 23rd November 2014 to or from Sgt [M].

j. Copy of the letter addressed to Officer [B], delivered on 24th November 2014 by [Named Individual] noting sections of the Police Services Act or similar with words to the effect "Maybe you need a mother".

k. Copy of video surveillance from the lobby of 51 Division on the 24th November 2014 showing the delivery of letters and discussions with staff at the time including the OIC at the time, Sergeant [S].

Representations

[64] In their representations, the police assert that they conducted a reasonable search for responsive records. In support of their assertion, the police provided a sworn affidavit by an analyst in the access and privacy section. The affiant has served in her current role for four years.

[65] The affiant states that once she received and reviewed the request, she searched

all relevant police databases, locating one incident, and ordered the respective police officers' handwritten notes in relation to both incidents outlined in the request. Subsequently, she received responsive email records from the named Sergeant.

[66] The affiant also states that she spoke to an unidentified police officer and was advised that in 2014 the cameras in the lobby were used for livestream viewing. The analyst followed up with this matter by speaking to the divisional planner who confirmed that the camera in the lobby did not record in 2014.

[67] Once the analyst received the written authorization from the registered vehicle owner to conduct a search on the vehicle in relation to item (g) of the request, she sent an email to the information security officer to conduct the relevant CPIC search. Shortly thereafter she received records responsive to item (g).

[68] With respect to item (e) of the request, the analyst states she informed the appellant she required specific phone numbers concerning the metadata being sought. In a subsequent phone call, the appellant advised her that he was unable to provide the specific phone numbers surrounding the metadata being sought and withdrew item (e) from his request.

[69] The analyst further states that she prepared and sent consultations to the Australian Consulate and the Australian Federal Police. Subsequently, she received correspondence from these respective agencies.

[70] In sum, the appellant informed the analyst (during a number of phone calls) that he had withdrawn items (c), (e), and (h) from his request.

[71] In February 2020, the analyst received an email from an IPC mediator advising that the appellant had some concerns regarding a level 3 strip search conducted upon him. Consequently, she sent an email to the Officer-in-Charge (OIC) of the case, seeking further information concerning the documentation of the search. Subsequently, she received a voicemail from the OIC advising that he located a note of a police officer referencing the search. A couple of months later, the analyst received an email from the OIC with attachments of a police officer's handwritten notes and the note referencing the level 3 strip search. Subsequently, she prepared the one page note for disclosure along with a revised decision.

[72] In July 2020, the analyst received an email from another IPC mediator following up on the appellant's concerns regarding the level 3 search. In September 2020, the analyst received another email from IPC mediator outlining further concerns of the appellant. She then emailed the IPC mediator addressing the matters labeled "outstanding issues" and consented to the IPC mediator sharing it with the appellant. In her email she agreed to conduct a further search for item (i) of the request (which were for emails from November 2014 to or from the named Sergeant).

[73] Subsequently, the analyst sent an email to the information security concerning

the matter noted in item (i) requesting an offline search of the named Sergeant's email for the period between November 24, 2014 and April 4, 2018. She then received an email from the information security advising that her search request yielded negative results. She was provided with the explanation that the retention on emails is set from the date the email is sent. The police's system is set on an auto delete after 3.5 years (6 months active then 3 years in Outlook Archive).

[74] In response, the appellant confirms that he has withdrawn items (a), (e), (f) and (h) of his request. However, he states that he was never informed that the metadata was available. As such, he is reinstating item (e). He further states that he does not need to provide to the police the phone numbers as the police should know the phone numbers their officers are using or were using at the time of the incidents. He clarifies that he is not seeking the phone number but simply the metadata from the phones during the time he was under arrest.

[75] The appellant states that he did not withdraw item (c). He clarifies that he accepts the footage may no longer be available but does not accept that the police made reasonable attempts to obtain the footage in a reasonable time frame.

[76] He also states that he is seeking a letter he wrote to a specific police officer (item (j) of his request) which was given to a specific sergeant in November 2014. The appellant argues that the police and the named Sergeant either had a copy of it or knowledge of it. He points out that the police should have asked the named Sergeant for a copy of this letter but there is no record of the police having done so.

[77] The appellant also questions the one page statement of a specific police officer as he believes there is no reason for this police officer to write up a one page statement unless it was to exclude statements from official notes. He argues that he must know the reason for the preparation of this note.

[78] Finally, the appellant states that he accepts that emails in item (i) of his request can no longer be recovered but does not accept that reasonable efforts were made to obtain these emails in a reasonable time frame.

[79] In response, the police state that the appellant was further advised additional information (e.g. phone numbers) was required in order to conduct a reasonable search to fulfill item (e) of his request. They state that the appellant advised the phone numbers could not be provided and withdrew this portion of his request.

[80] The police clarified that in a previous request, the appellant was provided with the footage for item (c) of his request. They reiterate that during a phone call between the assigned analyst and the appellant, the appellant withdrew this portion of his request.

[81] With respect to item (j) of the request, the police respond that the police officer in question conducted a complete search but could not find the letter at issue.

[82] In sum, the police submit that all appropriate and reasonable search efforts were made during the processing of the request. They point out that the legislative requirement is for a 'reasonable' search, not an 'exhaustive' search. They submit that based on the evidence provided they have met this requirement.

[83] Although the appellant provided reply representations, he did not address any of the issues in this appeal. He provided information about the Australian Privacy Principles contained in the *Privacy Act 1988*.

Analysis

[84] As set out above, in appeals involving a claim that additional responsive records exist, the issue to be decided is whether the police have conducted a reasonable search for the records as required by section 17 of the *Act*. In this appeal, if I am satisfied that the police's searches for responsive records were reasonable in the circumstances, the decision will be upheld. If I am not satisfied, I may order that further searches be conducted.

[85] In the circumstances, I am satisfied that the searches by the police for records responsive to the request were reasonable. I make this finding based on a number of reasons.

[86] As previously explained, 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 that are reasonably related to the request. In the circumstances of this appeal, I find that the police have provided sufficient evidence to demonstrate that they made a reasonable effort to identify and locate responsive records within its custody and control. The police conducted searches on all its relevant databases. It also requested police officers involved in the two incidents to provide copies of their handwritten notes. I accept that these searches were conducted by experienced employees who were knowledgeable in the subject matter and they expended a reasonable effort to locate any responsive records.

[87] As set out above, although a requester will rarely be in a position to indicate precisely which records an institution has not identified, he must still provide a reasonable basis for concluding that such records exist. I acknowledge that the appellant believes that additional records ought to exist, in particular he believes that the police did not make reasonable efforts to obtain the emails in question in a reasonable time frame. However, I note that the emails are from 2014. His access request was made in April 2018. As such, those emails would have been automatically deleted by the time his access request was made.

[88] As set out above, the *Act* does not require the police to prove with *absolute* certainty that additional records do not exist, but only to provide sufficient evidence to establish that it made a reasonable effort to locate any responsive records. In this case,

I find that the police have made reasonable efforts to locate all responsive records. In my view, it is not reasonable to require that the police ask the named Sergeant for a copy of the letter in item (j). My understanding is that the appellant gave this letter to another sergeant but it was addressed to a named police officer. That named police officer was asked to search for it and was unable to find it. Although the named Sergeant is aware of this letter due to her discussions with the appellant, it would not likely be in her possession as it was not addressed to her.

[89] Accordingly, I find that the police's search for responsive records was reasonable and dismiss the appeal.

ORDER:

1. I order the police to disclose the withheld information on pages 7, 99, 106, 112, 113 and 116 of the records to the appellant by **December 23, 2022** but not before **December 16, 2022**. I have identified the portions that the police must disclose by highlighting them in brown on the copy of the records provided to the police with this order.

2. I otherwise uphold the police's access decision.

3. I also find that the police conducted a reasonable search for responsive records.

4. In order to verify compliance with this order, I reserve the right to require the police to provide me with a copy of the records disclosed upon request.

Original Signed by: November 18, 2022

Lan An
Adjudicator