

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4322

Appeal MA21-00363

The Corporation of the Town of LaSalle

January 26, 2023

Summary: The Corporation of the Town of LaSalle (the town) received a request for information related to its bid submitted to Amherstburg Police Service board's request for proposal for dispatching services. Ultimately, the town issued a decision disclosing some information but withholding severed portions of a record under section 8(1)(g) and (i) (law enforcement). In this order, the adjudicator upholds the town's decision and dismisses the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, C. M.56, as amended, section 8(1).

Cases Considered: *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, [2014] 1 S.C.R. 674.

OVERVIEW:

[1] The Corporation of the Town of LaSalle (the town) received a request (transferred to it from LaSalle Police Services), under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for access to:

...an electronic copy of the bid LaSalle Police Service submitted in response to Amherstburg Police Service Board's request for proposal dispatching service and any correspondence to the Amherstburg Police Service Board pertaining to the same subject.

[2] The town issued a decision along with a records index to the requester granting full access to 5 of the 6 responsive records, and partial access to the remaining record. The town denied access to certain portions of the remaining record under sections 8(1)(i), 8(1)(g) (law enforcement), 11(a) (economic and other interests), and 14(1) (personal privacy) of the *Act* and released the records to the requester.

[3] The requester (now appellant) appealed the town's decision to the Information and Privacy Commissioner of Ontario (the IPC). The IPC assigned a mediator to explore resolution of the matter.

[4] The mediator communicated with the town and the appellant about the appeal. The appellant informed the mediator she was not interested in pages 6, 9, 10, 15, 17, 21, 22, 56, 62, 64, 65, and 66 of the record. Accordingly, these pages are no longer at issue in the appeal.

[5] The mediator discussed the town's exemption claims to information on the remaining pages 4, 5, 12, 19, 26, 27, 52, 53, 55, 58, 63, 67, 69, and 70. The town subsequently informed the mediator it was no longer claiming sections 11(a) and 14(1) to information it had redacted on pages 4, 19, 27, 58, 63, 67, 69, and 70 and released these pages to the appellant. Accordingly, pages 4, 19, 27, 58, 63, 67, 69, and 70 are no longer at issue in the appeal.

[6] The town maintained its claims that sections 8(1)(i) and 8(1)(g) applied to pages 5, 12, 26, 52, 53, and 55 and the mediator shared this information with the appellant. The appellant informed the mediator that she wished to appeal the town's decision to claim section 8(1)(i) and 8(1)(g) on pages 5, 12, 26, 52, 53, and 55. Accordingly, these pages and the town's claim of section 8(1)(i) and 8(1)(g) are the only remaining issues in the appeal.

[7] As no further mediation was possible, the appeal was transferred to adjudication and the original adjudicator assigned to this appeal commenced an inquiry and sent a Notice of Inquiry inviting the town to provide representations. The town's representations were shared with the appellant who provided her own representations in response. All representations were shared in accordance with the IPC's *Code of Procedure*. Subsequently, I was assigned to this appeal to continue with the adjudication. Having reviewed the parties' representations, I determined I did not need to hear from the parties further before making my decision.

[8] In this order, I uphold the town's decision and dismiss the appeal.

RECORD:

[9] The information at issue is the severances at pages 5, 12, 26, 52, 53 and 55 of the town's police service proposal for dispatch services.

ISSUES:

- A. Does the discretionary exemption at sections 8(1)(g) and 8(1)(i) related to law enforcement activities apply to the information at issue?
- B. Did the institution exercise its discretion under section 8(1)? If so, should the IPC uphold the exercise of discretion?

DISCUSSION:

Issue A: Does the discretionary exemption at sections 8(1)(g) and 8(1)(i) related to law enforcement activities apply to the information at issue?

[10] Section 8 contains several exemptions from a requester's right of access, mostly related to the context of law enforcement. In this appeal, the town has claimed that the withheld information in the record is exempt from disclosure under sections 8(1)(g) and (i). Sections 8(1)(g) and (i) state:

(1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,

(g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;

(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;

[11] The term "law enforcement"¹ is defined in section 2(1):

"law enforcement" means,

(a) policing,

(b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or

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

[12] The IPC has found that "law enforcement" includes a police investigation into a possible violation of the Criminal Code [add footnote].

- a police investigation into a possible violation of the *Criminal Code*,²

¹ The term "law enforcement" appears in many, but not all, parts of section 8.

[13] Many of the exemptions listed in section 8 apply where a certain event or harm “could reasonably be expected to” result from disclosure of the record.

[14] The law enforcement exemption must be approached in a sensitive manner, because it is hard to predict future events in the law enforcement context, and so care must be taken not to harm ongoing law enforcement investigations.³

[15] However, the exemption does not apply just because a continuing law enforcement matter exists,⁴ and parties resisting disclosure of a record cannot simply assert that the harms under section 8 are obvious based on the record. They must provide detailed evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred from the records themselves and/or the surrounding circumstances, parties should not assume that the harms under section 8 are self-evident and can be proven simply by repeating the description of harms in the *Act*.⁵

[16] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.⁶ However, they do not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the information.⁷

[17] For section 8(1)(g) to apply, there must be a reasonable basis for concluding that disclosure of the information at issue could be expected to interfere with the gathering of or reveal law enforcement intelligence information.

[18] The term “intelligence information” has been defined in the caselaw as:

Information gathered by a law enforcement agency in a covert manner with respect to ongoing efforts devoted to the detection and prosecution of crime or the prevention of possible violations of law. It is distinct from information compiled and identifiable as part of the investigation of a specific occurrence.⁸

[19] For section 8(1)(i) to apply, there must be a reasonable basis for concluding that disclosure of the information at issue could be expected to endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure

² Orders M-202 and PO-2085.

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

⁴ Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

⁵ Orders MO-2363 and PO-2435.

⁶ *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

⁷ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616.

⁸ Orders M-202, MO-1261, MO-1583 and PO-2751; see also Order PO-2455, confirmed in *Ontario (Community Safety and Correctional Services)*, 2007 CanLII 46174 (ON SCDC).

established for the protection of items, for which protection is reasonably required.

[20] Although this exemption is found in a section of the *Act* that deals primarily with law enforcement matters, it is not restricted to law enforcement situations. It can cover any building, vehicle, system or procedure that requires protection, even if those things are not connected to law enforcement.⁹

Representations

[21] The town submits that the discretionary exemptions at section 8(1)(i) is applicable to the information at issue. It submits that in addition to providing dispatching services for its own policing operations, the town's police department provides emergency dispatching services for the town's fire service and public works and Kingsville's fire service. The town submits that the information at issue refers to the secondary location for these policing and dispatching services. It submits that in the event communication is lost at the primary location for any reason, including but not limited to natural disaster, catastrophe, or an act of violence, dispatching services are moved to a secure secondary location.

[22] The town submits that section 1 of the *Police Services Act*, provides that police services in Ontario shall be provided in accordance with a set of six (6) principles, the first of which is, "[t]he need to ensure the safety and security of all persons and property in Ontario." It submits that in order to deliver these services, there must be secure channels of communication and officers must have confidence that the dispatch communication services upon which they rely will not be compromised. The town submits that the secondary dispatching site is equipped with all necessary infrastructure and equipment to provide continuity of services in the event that the primary location is compromised. It submits that if the secondary location is also breached, policing services in the town would be compromised, as too would other emergency services in the town and in Kingsville.

[23] The town submits that it is not suggesting that the appellant intends to make use of the information in any manner which would harm its police service, its communication infrastructure, or the secondary dispatch site, but submits that once the information is disclosed, the town and the police service have no control over that information and how it may be disseminated once the information is in the public domain.

[24] The town submits that in addition to endangering the security of the building where the services are provided, the disclosure of the location of the secondary dispatch site could also endanger the communication systems that the town's policing services heavily rely upon as they carry out their mandate to ensure the safety of the community.

⁹ Orders P-900 and PO-2461.

[25] The town submits that unlike its primary policing dispatch location, located in its policing building, the secondary dispatch site is located in a building which is only "manned" during daytime hours. It submits that this creates an inherent vulnerability ensuring the securing of the building and communication infrastructure. The town refers to the submitted affidavit where the affiant affirmed that by releasing the location of the secondary site, the fact of it being "unmanned" during the evenings and overnight will be readily apparent and put the building and communications equipment at risk.

[26] In the provided affidavit, sworn by the town's Chief of Police, the affiant affirms that the location is not public knowledge and such information being made public would endanger the building within which that service is housed. The affiant affirms that the details of the secondary dispatch location, including its location, is not information that is widely known or shared even amongst members of the town's police service. The secondary dispatch site is only used in the event of an emergency and the town submits that for that reason the location of the site should be withheld from release.

[27] The town submits that the secondary dispatch site contains critical infrastructure and equipment to maintain the continuity of operations for police services in the event of an emergency. It submits that if an individual breached the building and accessed the secondary dispatch equipment, they could interfere with the radio communications as between the primary dispatch site and the officers in field thereby putting those officers in jeopardy.

[28] The appellant provided representations in this appeal. She submits that section 8(1) does not apply as it is related to law enforcement and dispatch services do not meet the definition of law enforcement in the definition of that term in section 2(1) of the *Act*. She refers to section 11(1) of the *Comprehensive Ontario Police Services Act* where the policing function is described as:

11 (1) Adequate and effective policing means all of the following functions provided in accordance with the standards set out in the regulations, including the standards with respect to the avoidance of conflicts of interest, and with the requirements of the *Canadian Charter of Rights and Freedoms* and the *Human Rights Code*:

1. Crime prevention.
2. Law enforcement.
3. Maintaining the public peace.
4. Emergency response.
5. Assistance to victims of crime.

6. Any other prescribed policing functions.

[29] The appellant submits that civilian dispatchers/communicators do not perform policing functions.

[30] The appellant submits that the town of Amherstburg issued a request for proposals (the RFP) for "dispatch services" and the record at issue consists of the town's proposal for dispatch services in response. The appellant submits that the town of Amherstburg issued an RFP for "policing services" at a later date and that the town did not submit a proposal. The appellant submits that as the RFP and the provisional legislation note, dispatch services are distinct from police services.

[31] The appellant submits that the town only speculates and has not provided "detailed and convincing" evidence about the risk of harm if the withheld information is disclosed. The appellant relies on Orders MO-1832 and MO-2363 for this premise.

[32] The appellant submits that section 8(1)(i) does not apply in this appeal. She submits that the town's police have existed since 1924 and its primary location is public knowledge without incidents of harm cited. She submits that the location of the back-up location would not result in harm and would be just as secure as the primary location.

Analysis and finding

[33] After considering the representations of the parties and reviewing the severed portions of the pages at issue, I find that section 8(1)(i) applies to exempt this information from disclosure.

[34] The appellant submits that the town must provide "detailed and convincing" evidence to support its section 8(1) claim. As I stated above, the law on the standard of proof is clear. In *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*,¹⁰ the Supreme Court of Canada addressed the meaning of the phrase "could reasonably be expected to" in two exemptions under the *Act*, and found that it requires a reasonable expectation of probable harm. In addition, the Court observed that "the reasonable expectation of probable harm formulation... should be used whenever the 'could reasonably be expected to' language is used in access to information statutes."

[35] In order to meet that standard, the Court explained that:

As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence well beyond or considerably above a mere possibility of harm in order to reach that middle ground; paras. 197 and 199. This inquiry of course is contextual and how much

¹⁰ 2014 SCC 31, [2014] 1 S.C.R. 674.

evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and inherent probabilities or improbabilities or the seriousness of the allegations or consequences...

[36] I agree with and adopt this principle for the purposes of this appeal.

[37] In the circumstances of this appeal, based on my review of the records and the parties' representations, I am satisfied that all of the withheld information at issue qualifies for exemption under section 8(1)(i) of the *Act*.

[38] The fact that the town's RFP related to dispatch services and not police services does not negate the fact that the town's dispatch services is its police dispatch service. In my view, this is clearly related to policing services. In any event, section 8(1)(i) refers to information that could reasonably be expected to "endanger the security of a building" and does not refer to the security of a "law enforcement building." As noted above, although this exemption deals primarily with law enforcement matters, it is not restricted to law enforcement situations (including the security of a building).

[39] After considering the representations and reviewing the information at issue, I find that there is a reasonable basis to conclude the disclosure of the information could be expected to endanger the security of a building. The information that is severed from the record refers to the secondary location of policing and dispatching services and plays a crucial role in backing up the primary location for police and dispatching services. Importantly, according to the affidavit sworn by the town's police chief, the town takes efforts to ensure that the location of the secondary site is not public knowledge, including amongst members of its own police force.

[40] While the appellant suggests that the primary location has been secure since its inception, she does not address the town's submission that there is no one in attendance at the secondary location in the evenings and overnight, whereas, this would not be the case with the primary location. I accept that this type of service, left unattended, creates an inherent vulnerability to ensuring the building and the communication infrastructure's security.

[41] As a result, I find that the exemption at section 8(1)(i) applies to all of the severed information and I uphold the town's decision to withhold this information, subject to my findings concerning the town's exercise of discretion. Since I have found that all of the information is exempt under section 8(1)(i), I will not also discuss whether the same information is exempt under section 8(1)(g).

Issue B: Did the institution exercise its discretion under section 8(1)? If so, should the IPC uphold the exercise of discretion?

[42] The section 8(1)(i) exemption is discretionary,¹¹ meaning that the institution can

¹¹ These sections state that the institution "may" refuse to disclose information.

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.

[43] 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.

[44] In either case, I may send the matter back to the institution for an exercise of discretion based on proper considerations.¹² I cannot, however, substitute my own discretion for that of the institution.¹³

[45] Some examples of relevant considerations are listed below. However, not all of these will necessarily be relevant, and additional considerations may be relevant:¹⁴

- 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,
- the relationship between the requester and any affected persons,
- whether disclosure will increase public confidence in the operation of the institution,

¹² Order MO-1573.

¹³ Section 43(2).

¹⁴ 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, and
- the historic practice of the institution with respect to similar information.

[46] The town submits that it exercised its discretion appropriately. It submits that it considered the purpose of the legislation, being that there is a right of access to information under the control of institutions, with the principles that: information should be available to the public, and the exemptions from the right of access should be limited and specific.

[47] The town submits that it balanced the right of access against potential harms that could result from disclosure of this information and considered that this information, or the existence of this information, is not widely known by those within and external to the police service. The town submits that it also considered the purpose of the request, the nature of the information requested, and the town's historic practice in disclosing this information. The town submits that in responding to the request, these considerations were at the forefront. The town submits that, ultimately, it determined that the information at issue fits within the section 8(1) exemption and exercised its discretion to withhold that information from release.

[48] The appellant submits that the town did not exercise its discretion and took into account irrelevant considerations. She submits that the town's consideration of how the information would be used by her is an irrelevant consideration

[49] The appellant also submits that the town also considered "potential harms" but did not include any "detailed and convincing" evidence to establish a "reasonable expectation of harm." She submits that the town fails to take into account relevant considerations like the age of the information, the record is almost 5 years old and it represents what LaSalle proposed in 2017.

[50] The appellant also notes that another proponent to the RFP Dispatch, a police service, did not hesitate to disclose its back-up location, a requirement of the RFP, a public document.

Finding

[51] Based on the information I have found exempt under the discretionary exemption and the town's representations, I find that it has properly exercised its discretion. I am satisfied the town properly considered the interests sought to be protected and the wording of the exemption claimed. I find the town also considered its historic practice with respect to similar information as well as the nature of the information and the extent to which it is sensitive to the town. I find the town has not exercised its discretion in bad faith.

[52] After reviewing the town's representations, it is clear that it did not take any position with regard to the appellant's intention to use the information but noted that disclosure to the appellant resulted in the town no longer having any control over that information and whom it may be disseminated to. In my view, the town did not consider the appellant's use of the information as a relevant factor in its exercise of discretion.

[53] The appellant's submission concerning the age of the record is irrelevant in this appeal. There is no evidence, or suggestion that the town has disclosed the location of this site in the past five years. Also, with regard to the appellant's submission that another police service provided the location of its back-up service, I find that how another institution responded to the appellant's request is not relevant in this appeal.

[54] Accordingly, I uphold the board's exercise of discretion.

ORDER:

The appeal is dismissed.

Original Signed By: _____

Alec Fadel
Adjudicator

January 26, 2023