

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-3794

Appeal MA18-449

Waterloo Regional Police Services

Board June 26, 2019

**Summary:** The Waterloo Regional Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a copy of a specific written procedure. The police provided partial access to the record but withheld some information pursuant sections 8(1)(c), 8(1)(e) and 8(1)(l) of the *Act*. In this order, the adjudicator upholds the police's decision that sections 8(1)(e) and 8(1)(l) apply to the information at issue and finds that they appropriately exercised their discretion to withhold that information.

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

### BACKGROUND:

[1] The Waterloo Regional Police Services Board (the police) received an access request from a reporter under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following records:

I am requesting a copy of written procedures established by Waterloo Regional Police for suspect apprehension pursuits. This procedure is required by Ontario Regulation 266/10. It sets out tactics that may be used to follow or stop a fleeing motor vehicle. The release must include written procedures for considering and conducting rolling blocks.

[2] The police issued a decision granting the requester partial access to a 16-page written procedure identified by the police as 2014-143-G and titled "Procedure of the

Waterloo Regional Police Service Suspect Apprehension Pursuits” (the Procedure). The police denied the requester access to some of the information in the Procedure pursuant to the discretionary exemptions at sections 8(1)(c) (reveal investigative techniques and procedures), (e) (endanger life or safety) and (l) (facilitate commission of an unlawful act) of the *Act*.

[3] The requester, now appellant, appealed the police’s decision. During mediation, the mediator had discussions with the appellant and the police and the police issued a revised decision granting the appellant access to additional portions of the Procedure. The police continued to deny access to the remaining information pursuant to sections 8(1) (c), (e) and (l) of the *Act*.

[4] The police disclosed additional information to the appellant on two further occasions during the course of mediation. They continued to deny some of the information pursuant to sections 8(1) (c), (e) and (l) of the *Act*.

[5] The appellant continued to seek access to the remaining portions of the Procedure and further mediation was not possible. The matter was transferred to the adjudication stage of the appeals process, where an adjudicator may conduct a written inquiry under the *Act*.

[6] I began this inquiry by seeking representations from the police in response to the issues and questions set out in a Notice of Inquiry. The police provided representations, which were shared in part with the appellant along with a Notice of Inquiry. Some parts of the police’s representations were not shared with the appellant because they met the confidentiality criteria in *Practice Direction Number 7*. The appellant provided representations in response.

[7] In this order, I uphold the police’s decision that sections 8(1)(e) and 8(1)(l) apply to the remaining information at issue in the Procedure and find that they appropriately exercised their discretion to withhold that information.

## **DISCUSSION:**

[8] The sole issue in this appeal is whether the remaining portions of the Procedure are exempt under section 8(1) of the *Act*.

[9] The police claim that the discretionary exemptions in section 8(1)(e) and 8(1)(l) apply to portions of pages 3, 5 to 8 and 10 to 13 of the Procedure.<sup>1</sup> These provisions state:

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<sup>1</sup> The police withdrew their claim that section 8(1)(c) applies to the information at issue in their representations and as such, I will not consider that section.

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

(e) endanger the life or physical safety of a law enforcement officer or any other person; ...

(i) facilitate the commission of an unlawful act or hamper the control of crime.

[10] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.<sup>2</sup>

[11] 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.<sup>3</sup> 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.<sup>4</sup>

### **The police's representations**

[12] The police say the appellant in this matter is a member of the media who has published information and articles about a particular incident where two individuals involved in a motor vehicle pursuit with the police were killed. The police say that the appellant advised them that he wants access to the Procedure so that he can accurately describe the tactics employed by the officers.

[13] The police submit that they rely on the Procedure to govern how officers respond to incidents and to keep officers accountable. They say that the Procedure outlines rules, roles and responsibilities relating to specific techniques and that there are pieces of information in the Procedure that, if revealed, would significantly compromise the ability of the police to ensure public safety. The police say that revealing some of the information about the tactics would interfere with the ability of the police to safely end pursuits and apprehend suspects and as a result, would significantly impact the safety of police officers and the public.

[14] Specifically with regard to section 8(1)(e), the police say that the information

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<sup>2</sup> *Ontario (Attorney General) v. Fineberg* (1994), 1994 CanLII 10563 (ON SC), 19 O.R. (3d) 197 (Div. Ct.).

<sup>3</sup> Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

<sup>4</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

they have severed relates to procedures, tactics and/or strategies used by officers in different types of specific situations that rely on the element of surprise to prevent dangerous mobile occurrences. The police say that if the withheld information is disclosed it would create conditions that impose a risk to the safety of individuals, including police officers, suspect drivers and members of the public because offenders could use the information to defeat the procedures, tactics and/or strategies used by police to prevent or end pursuits.

[15] With regard to section 8(1)(l), the police say that there are several portions of the procedure that, if disclosed, would provide the public with information about how to actively evade apprehension during a police pursuit. The police say that although the section 8(1)(1) exemption has more commonly been applied to police operational codes, Order MO-3393 found that other types of police information could also reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime.

[16] The police provided additional details and explanations regarding the information at issue in support of their argument that sections 8(1)(e) and 8(1)(l) apply. However, I cannot be more specific about the police's representations without revealing the contents of the withheld information in the Procedure.

[17] In support of their representations, the police provided an affidavit from a Sergeant in their Professional Development Branch. The Sergeant is the "Police Vehicle Operations Coordinator." He is responsible for statistical analysis of police vehicle-related incidents and for training other members of the police service. He is also responsible for safe driving, remedial training and instructing on suspect apprehension pursuits and is the person that would be called upon to provide any feedback or input regarding the Procedure.

[18] The Sergeant says that he helped the police determine which parts of the record, if revealed, would result in safety issues to individuals and the public. He says that he made his assessments based on his years of police experience and specialized training in suspect apprehension pursuits.

[19] The Sergeant says that the "underlying theme" to the police's representations is that revealing the portions of the Procedure that have been severed would result in those individuals who flee the police in motor vehicles being able to evade pursuit or arrest and/or result in substantial danger to police officers, drivers or occupants of fleeing vehicles and the general public.

[20] The Sergeant also says that the Procedure has been protected during criminal proceedings by relying upon a defence counsel's implied undertaking not to use disclosed records outside of that criminal proceeding, by ensuring those portions relevant to the facts of the criminal matter are vetted, and/or by seeking an order of the Court. He also says that there are protections regarding access, use, and disclosure for this type of record in civil court matters as well.

[21] Finally, the Sergeant attests that the techniques sought to be protected under sections 8(1)(e) and 8(1)(l) are essential to police responses to potential vehicle pursuits and that

Most importantly, it is essential to keep these alternatives protected because they avoid the much more dangerous suspect apprehension pursuit and, if the techniques are well known, criminals could take steps to avoid them and or lessen their effectiveness putting them, officers and the public in danger.

[22] The Sergeant's affidavit also included a table that sets out more than ten examples of "Suspect Apprehension Pursuit Alternatives" the police used over the past two years. While I cannot reveal the content of the table, I confirm that it relates to the information in the Procedure.

### **The appellant's representations**

[23] With regard to section 8(1)(e), the appellant says that the procedures that guide and terminate police pursuits should be a matter of public record because people need to understand how, and under what conditions, the police choose to engage in and/or terminate pursuits. The appellant asserts that the best way to do this is to measure incidents and outcomes against established procedures.<sup>5</sup>

[24] The appellant says that it is not clear to him how disclosing the Procedure would endanger a police officer or the public. He says that he expects that police training determines officer safety on the ground, not the disclosure of a policy. The appellant poses a question about whether officers are adequately trained in driving techniques and the use of equipment and asserts that public safety issues relate to money, or hours spent on training, not the disclosure of a policy.

[25] With regard to section 8(1)(l), the appellant says that he cannot see the connection between disclosing the Procedure and the commission of a crime. Specifically, he says:

When the apprehension procedures are triggered, a suspect has presumably chosen to evade police. I don't think it is reasonable to see that person's decision as being influenced by details around procedure for police chases, beyond what is already known to the public.

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<sup>5</sup> I note that the appellant appears to be making an argument that disclosure of the information at issue is in the public interest. I have not addressed this argument because section 16 of the *Act* does not apply to the discretionary law enforcement exemptions at section 8(1).

My expectation is that it is police who have the training and expertise to pursue or abandon a pursuit, to end the interaction safely, and it is police whose conduct must be measured against procedure. Police are arguing that the disclosure of records influences decisions made by the public. I think they have it backwards. The disclosure of records gives the public a way to hold officers accountable for their decisions.

### **Findings and Analysis**

[26] I am satisfied that the disclosure of the information that the police withheld pursuant to sections 8(1)(e) and 8(1)(l) could reasonably be expected to endanger the life or physical safety of a person or a law enforcement officer and that it could also reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime.

[27] Based on my review of the withheld information in the Procedure, I accept the police's representations and the Sergeant's affidavit evidence that if the information they withheld were known by an individual evading (or planning to evade) the police, it could be used to anticipate the steps the police may take in different scenarios and allow them to alter their behavior so as not to be caught.

[28] I am persuaded by my review of the evidence before me that if the information were used in this manner, it is reasonable to expect the physical safety of police officers and/or members of the public would be at risk. In my view, if individuals being pursued by police are able to anticipate their next steps, it is reasonable to expect that the police's ability to avoid, or safely and quickly end a motor vehicle pursuit will be affected.

[29] I further accept that the police's assertion that the disclosure of the withheld portions of the Procedure may extend (or cause) otherwise avoidable motor vehicle pursuits and thereby could reasonably be expected to facilitate unlawful acts or hamper the control of crime.

[30] In coming to this decision, I have considered the appellant's representation that it is not reasonable to expect that a person's decision to evade police would be influenced by details around procedure for police chases. I disagree. While I cannot reveal the contents of the information that has been withheld, I am satisfied that there are specific details that would assist an individual who was either evading, or planning to evade, the police to do so by allowing that person to anticipate what the police may or may not do in specific circumstances. I cannot say more than that without revealing the information at issue.

[31] Accordingly, I find that sections 8(1)(e) and 8(1)(l) apply to the information at issue in the Procedure and that information is exempt, subject to my review of the police's exercise of discretion.

### **Exercise of Discretion**

[32] The section 8(1) exemptions are discretionary and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[33] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[34] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>6</sup> This office may not, however, substitute its own discretion for that of the institution.

[35] The police submit that they have applied the section 8(1) exemptions in a limited manner. They say that they have granted access to as much of the Procedure as possible, denying only those portions of the record that may create a safety risk to police officers or the public, or that would interfere in the ability of officers to apprehend suspects during police pursuits.

[36] The police say they did not take into account any irrelevant factors and maintain that their redactions were made in accordance with the *Act*.

[37] The appellant says that he does not accuse the police of bad faith, but notes that they have revised their position and released additional information twice and have abandoned their claim that section 8(1)(c) applies to the information at issue. The appellant disagrees that the police have sought to give him access to as much of the Procedure as possible and says they have sought to keep it secret. He says that it is only through his persistence that the police have complied with the legislation and disclosed more information.

[38] I do not agree with the appellant that the fact that the police released additional information during mediation indicates that they have exercised their discretion improperly. The evidence before me in this inquiry is that the police have considered whether additional information could be disclosed to the appellant. There is no evidence to suggest that they made any of their decisions in bad faith, or for an improper

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<sup>6</sup> Order MO-1573.

purpose. I also see no evidence that the police took into account irrelevant considerations or failed to take into account relevant ones. I therefore uphold the police's exercise of discretion.

**ORDER:**

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

Original Signed by: \_\_\_\_\_  
Meganne Cameron  
Adjudicator

\_\_\_\_\_ June 26, 2019