Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2797-I

Appeal MA11-192

Ottawa Police Services Board

October 16, 2012

Summary: The appellant seeks access to records relating to complaints initiated by him. The police located responsive records and disclosed the majority of them to the appellant. The appellant believes that additional records should exist. The police's decision to withhold records under the law enforcement exemption in the *Act* is upheld. However, the police are ordered to conduct a further search of the Chief's and Professional Standards Branch files for responsive records.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 2(1) definition of "personal information", 8(1)(l), 14(1), 38(a) and (b).

Orders and Investigations Reports Considered: PO-3112.

OVERVIEW:

[1] The appellant filed a request to the Ottawa Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to his request for police protection and his complaints about Canadian Security Intelligence Service (CSIS) and Ottawa police officers.

[2] The police located 115 pages of responsive records and granted the appellant access to most of them. The police claim that disclosure of some of the withheld

information would constitute an unjustified invasion of personal privacy under section 38(b) of the *Act* and that other records or portions of the record are exempt under section 38(a), in conjunction with the law enforcement provision at section 8(1)(l).

[3] The appellant appealed the police's decision to this office and a mediator was assigned to the appeal. During mediation, the appellant questioned the reasonableness of the police's search. In response, the police provided a written response to the appellant's questions and conducted a further search for responsive records.

[4] At the end of mediation, the appellant advised that he was not satisfied with the results of the police's further search. The appellant also confirmed that he does not want to pursue access to the personal information of other identifiable individuals contained in the records. However, the appellant indicated that he wishes to pursue access to the information in pages 4, 17, 30, 31, 47, 77 and 89, in their entirety.

[5] The issues remaining in dispute at the end of mediation were transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. During the inquiry process, I invited the representations of the parties by sending them a Notice of Inquiry identifying the relevant facts and issues in the appeal. In response, the police indicated that they would not provide further representations beyond those set out in its decision letter. The appellant provided extensive written and photographic evidence, some of which did not address the issues set out in the Notice. For instance, throughout his representations, the appellant questions the police's decision to "downgrade" his complaints or raise concerns about his mental health. In addition, the appellant submits that the police have concealed, destroyed or altered records. The appellant's submissions on these topics seek remedies that are outside the scope of my jurisdiction and will not be addressed in this order. This order will address only the appellant's submissions which responded to the issues set out in the Notice. At the request of the appellant, a copy of his representations was not provided to the police.

[6] In this order, I uphold the police's decision to withhold records under the law enforcement provisions of the *Act*. I also order the police to conduct a further search for responsive records in the Chief's and Professional Standards Branch files.

RECORDS:

Page Number(s)	**General Description of Record**	**Exemption**	**Withheld entirely or in part?**
4	General Occurrence Hardcopy, December 30, 2010	38(a)/8(1)(l)	Entirely
17	General Occurrence Hardcopy, February 19, 2009	38(a)/ 8(1)(l)	Entirely
30-31	General Occurrence Hardcopy (x2), dated October 4, 2009	38(a)/ 8(1)(l)	Entirely

47	General Occurrence Hardcopy, dated December 2, 2009	38(a)/ 8(1)(l)	Entirely
77	General Occurrence Hardcopy, dated August 29, 2009	38(a)/ 8(1)(l)	Entirely
89	General Occurrence Hardcopy, dated February 10, 2009	38(b)/14(3)(b)	Partial

ISSUES:

A. Did the police conduct a reasonable search?
B. Do the records contain "personal information" as defined in section 2(1)?
C. Does the discretionary exemption at section 38(a), in conjunction with section 8(1)(l), apply to pages 4, 17, 30-31, 47 and 77?
D. Did the police properly exercise their discretion?

DISCUSSION:

A. Did the police conduct a reasonable search?

[7] Throughout his representations, the appellant maintains that there is an ongoing CSIS investigation against him. The appellant advises that no charges have ever been laid, but that the investigation is an ongoing matter and at times involves the participation of the police. The appellant argues that the police should have in their custody and control the following types of general records:

- CSIS investigation records;
- Records and communications exchanged between CSIS and the police; and
- Records from CSIS liaison officers and Ottawa police officers who were seconded to CSIS.

[8] The appellant also advises that additional responsive records should exist in the files of the Police Chief (the Chief), Executive Officer to the Chief, a named staff Sergeant and "all other Ottawa Police officers seconded to CSIS and working at police buildings" files.

[9] In support of his position, the appellant states that "[t]here should be high traffic between the assistant to [the Chief of Police] and the sergeant or corporal tasked to do the work". The appellant also submits that given the Chief is a "senior bureaucrat", his emails would be captured by a secondary or even third level email system for high-level employees that the freedom of information office would not have access to.

[10] The appellant advises that he has received redacted records from CSIS as a result of his access request under the federal *Access to Information Act*. However, he believes that additional CSIS related records are in the custody and control of the police as a result of his requests for "police protection from CSIS".

[11] During mediation, the appellant provided the mediator with an email dated August 21, 2011 describing why he believes that additional records should exist. The appellant advised that numerous documents such as the Chief's master file, records from responding and investigating officers, incident reports, computer screen prints, and internal investigations of police officers should exist.

[12] With the appellant's consent, the mediator provided this email to the police. The police conducted a further search, but did not locate any additional records. The police subsequently responded to the appellant's email on October 18, 2011.

[13] The appellant continued to questioned the police's search efforts after his review of the October 18, 2011 email. The appellant provided the mediator another email, dated October 24, 2011 outlining his concerns relating to the police response. The appellant also provided the mediator with two specific examples of the types of records that he believes should exist:

- Copies of the Office of the Independent Police Review Director's letters to the Chief. The appellant advises that these records were identified as responsive records in a related appeal disposed of in Order PO-3112.

- March 11, 2009 letter the appellant received from a Staff Sergeant at the police's Professional Standards Section. The appellant advises that this record would be responsive to this request but was not identified as such.

[14] In his representations, the appellant states that his access request seeks to obtain records to corroborate CSIS' and the police's collaboration relating to an investigation about him.

[15] The Notice of Inquiry sent to the police, asked them to provide a written summary of all steps taken in response to the request. As stated above, the police did not provide representations in response to the Notice of Inquiry. However, during mediation, the police provided a detailed email response to the appellant's questions concerning the nature and extent of their search.

[16] In response to the appellant's submission that voluminous investigation records should exist, the police respond that "[t]his could be true in circumstances where criminal activities or intelligence information would be suspected or investigated. This is *NOT* the case with this appellant."

[17] The appellant's submissions suggest that the subject-matter of his complaints to the police should have resulted in "an internal police officer, probably a corporal or sergeant who has been tasked to do the actual work". The police responded that "[t]he only officers that would be assigned a file for the appellant would be an investigator

following up on a police report. We have no reason to keep files for the appellant in this manner".

[18] The police also advise that they do not deal with national security issues though they may have officers seconded to this task with other agencies. The police advise that in such cases, the agencies who employ Ottawa police officers would exercise care and control of these files. Finally, the police advise that "no meetings were held with CSIS regarding the appellant".

Decision and Analysis

[19] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.[1] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[20] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[2] To be responsive, a record must be "reasonably related" to the request.[3]

[21] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[4]

[22] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[5]

[23] Throughout his representations, the appellant raises concerns about two individuals in the police's Freedom of Information Office who were responsible for processing his access request. He questions the veracity of the information they reported in the police's decision letter and exchanged during mediation. He also questions whether they have the qualifications to conduct the types of searches required given the amount and type of electronic records located on the police's servers. I have considered the appellant's evidence along with the police's decision letter and information exchanged during mediation and am satisfied that the police's search for responsive records were conducted by individuals knowledgeable in the

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[1] Orders P-85, P-221 and PO-1954-I.
[2] Orders P-624 and PO-2559.
[3] Order PO-2554.
[4] Orders M-909, PO-2469, PO-2592.
[5] Order MO-2185.

police's records holdings. However, the fact that the police's search did not locate the copies of the Office of the Independent Police Review Director's letters to the Chief or the letter that the appellant received from the police's Professional Standards Section suggest that a further search of these record holdings should be ordered.

[24] With respect to the remainder of the police's search, I am satisfied that the police's freedom of information office expended a reasonable effort to locate responsive records. In making my decision, I took into account that the police's freedom of information office provided the appellant with lengthy explanations in response to his questions, in addition to conducting another search for responsive records. However, the appellant was and continues to be dissatisfied with the police's search as it has failed to locate records which would corroborate CSIS' and the police's collaboration relating to him.

[25] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[6] In my view, the appellant has failed to adduce sufficient evidence to establish a reasonable basis to conclude that such records exist. The appellant himself admits that he made several complaints to the police seeking protection from CSIS, but that his complaints were not taken seriously. The appellant also maintains that he has never been arrested or charged with any crime. Having regard to the circumstances of this appeal, I find that the appellant has failed to adduce sufficient evidence to conclude that records establishing a full-scale investigation into his complaints or collaboration between CSIS and the police exist.

[26] However, I will order the police to conduct a further search to locate responsive records in Chief's and Professional Standard Section files, as the appellant has provided a reasonable basis for concluding that additional records in these files may exist.

B. Do the records contain "personal information" as defined in section 2(1)?

[27] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates.

[28] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[7]

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[6] Order MO-2246.
[7] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

[29] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[8]

[30] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[9]

[31] The parties agree that some of the information contained in the records at issue consists of the appellant's personal information, specifically at pages 4, 17, 30-31, 47 and 77. I have carefully reviewed the records and find that the appellant's name appears with other personal information relating to him such as his sex, age and birthdate. Accordingly, this information constitutes his personal information as that term is defined in paragraphs (a) and (h) of the definition of "personal information" in section 2(1).

[32] The police submit that page 89 only contains the personal information of an identifiable individual who was in the police's reception area the same time the appellant was present. The record itself does not identify this individual by name. In another portion of page 89 that was disclosed to the appellant, he indicated to the desk officer that he recognized this individual, though he did not identify him by name. Because the individual referred to in page 89 cannot be identified, I am not satisfied that it contains the personal information of an identifiable individual within the definition of that term in section 2(1). In order to qualify as personal information, it must relate to an identifiable individual, unlike the information that comprises the undisclosed severance from page 89. As only personal information can be subject to the exemption in section 38(b), I find that the single severance made to page 89 is not exempt under that section and should be disclosed to the appellant.

[33] With respect to the information I found constitutes the personal information of the appellant contained in pages 4, 17, 30-31, 47 and 77, I will review the police's decision to withhold these records under section 38(a), which recognizes the special nature of requests for one's own information.

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[8] Orders P-1409, R-980015, PO-2225 and MO-2344.
[9] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

C. Does the discretionary exemption at section 38(a), in conjunction with section 8(1)(l), apply to pages 4, 17, 30-31, 47 and 77?

[34] Section 36(1) gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right. Section 38(a) reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if section 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

[35] 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.[10]

[36] 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.

[37] In this case, the institution relies on section 38(a) in conjunction with section 8(1)(l), which states:

> 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.

[38] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[11]

[39] In the case of section 8(1)(l), where section 8 uses the words "could reasonably be expected to", the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[12]

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[10] Order M-352.

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

[12] Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

[40] It is not sufficient for an institution to take the position that the harms under section 8 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfillment of the requirements of the exemption.[13]

[41] In its decision letter, the police describe the information it withheld in the CPIC records located at pages 4, 17, 30-31, 47 and 77 as police code information. The appellant questions the possible application of this section in the circumstances of this appeal given that he has not been charged with any criminal charges and has no criminal record. In his representations, the appellant states:

> If [section] 8(1)(l) is an exemption used to redact CPIC information, I highly suspect that they might be claiming they are hampering the commission of an unlawful act or crime when, in fact, they are facilitating a cover-up of *significant* abuse by law enforcement agencies, particularly CSIS.

[42] Previous IPC orders have found that the disclosure of access/transmission codes, query information and caution information contained in CPIC records could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime.[14] In Order PO-2970, Adjudicator Frank Devries states:

> On my review of the representations of the parties and the portions of records remaining at issue, which consist solely of CPIC codes and query format information, I am satisfied that this information qualifies for exemption under section 14(1)(l) of the *Act* [provincial equivalent of section 8(1)(l)].
>
> Previous orders of this office have addressed the issue of whether section 14(1)(l) applies to this type of information, and have found that it does. For example in Order MO-1335, Adjudicator David Goodis reviewed the application of the equivalent to section 14(1)(l) found in the *Municipal Freedom of Information and Protection of Privacy Act*, and stated:
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> > Where information could be used by any individual to gain unauthorized access to the CPIC database, an important law enforcement tool, it should be considered exempt under [section 14(1)(l)]. …
>
> Other orders have found that CPIC access codes, ORI numbers, or other information which could compromise the security and integrity of the CPIC computer system qualify for exemption under section 14(1)(l) (see, for example, Orders M-933, MO-1004, MO-1929).

[13] Order PO-2040; *Ontario (Attorney General) v. Fineberg*.
[14] Orders P-1214, PO-2970 and PO-3075.

[43] I have carefully reviewed the information contained on pages 4, 17, 30-31, 47 and 77 that the police withheld under section 38(a), in conjunction with section 8(1)(l). The records contain access/transmission codes, caution information along with information generated when the police added information relating to the appellant to the CPIC system. Small portions of the record also identify the appellant. In my view, the majority of the information withheld on pages 4, 17, 30-31, 47 and 71 comprise of the type of access/transmission codes, caution and other police information previous decisions from this office have found exempt under section 8(1)(l). Although some small portions of the information at issue identifies the appellant's name, sex, age and birth date, I find that there is no purpose to be served in severing these small items of information, as they are clearly known to the appellant and would reveal only "disconnected snippets" or meaningless or misleading information.[15]

[44] Having regard to the above, I find that disclosure of the withheld CPIC records located on pages 4, 17, 30-31, 47 and 77 could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime and this qualifies for exemption under section 38(a), in conjunction with section 8(1)(l). I will now consider whether the police properly exercised their discretion in withholding these records from the appellant.

D. Did the police properly exercise their discretion?

[45] The section 38(a) exemption is discretionary, and permits 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.

[46] 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.

[47] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[16] This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

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[15] See Orders PO-2033-I, PO-1735 and MO-2139, and *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.).
[16] Order MO-1573.

[48] The appellant submits that the police exercised their discretion in bad faith and for an improper purpose. The appellant also provided several examples demonstrating his concern about the police's handling of his complaint matters.

[49] In its decision letter, the police advise that they considered the appellant's right to access his own information.

[50] Having regard to the submissions of the parties, I am satisfied that the police properly exercised their discretion in withholding the records under section 38(a). Though I appreciate that the appellant is very dissatisfied with the service he received from the police, his dissatisfaction relates to matters outside the scope of this appeal. In my view, the appellant has not adduced sufficient evidence to demonstrate that the police exercised its discretion in bad faith or took into account irrelevant considerations in applying section 38(a) to withhold records.

[51] I am satisfied that the police properly exercised their discretion and in doing so, took into account relevant factors such as the principle that requesters should have access to their own information. However, I note that the purpose of the law enforcement exemption supports the police's decision to withhold information it considers sensitive and treats confidentially.

[52] For the reasons states above, I find that the police properly exercised their discretion to withhold the records I found exempt under section 38(a).

ORDER:

1. I uphold the police's decision to withhold records 4, 17, 30-31, 47, and 77.

2. I order the police to disclose the severed portion of page 89 to the appellant by providing him a complete copy of that record by **November 21, 2012** but not before **November 15, 2012.**

3. I order the police to conduct a search for responsive records in the Chief's and Professional Standard Section files.

4. I order the police to provide me with an affidavit from the individual(s) who conducted the search, confirming the nature and extent of the search conducted for responsive records within 30 days of this interim order. At a minimum the affidavit should include information relating to the following:

   (a) information about the employee(s) swearing the affidavit describing his or her qualifications and responsibilities;

(b) the date(s) the person conducted the search and the names and positions of any individuals who were consulted;

(c) information about the type of files searched, the search terms used, the nature and location of the search and the steps taken in conducting the search; and,

(d) the results of the search.

4. The affidavit referred to above should be sent to my attention, c/o Information and Privacy Commissioner/Ontario, 2 Bloor Street East, Suite 1400, Toronto, Ontario, M4W 1A8. The affidavit provided to me may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for the submitting and sharing of representations is set out in IPC Practice Direction 7.

5. If, as a result of the further search, the police identifies any additional records responsive to the request, I order the police to provide a decision letter to the appellant regarding access to these records in accordance with the provisions of the *Act*, considering the date of this order as the date of the request.

6. I remain seized of this appeal in order to deal with any outstanding issues arising from this appeal.

Original signed by: October 16, 2012
Jennifer James
Adjudicator