Information and Privacy Commissioner,
Ontario, Canada

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

RECONSIDERATION ORDER MO-3027-R

Appeal MA13-138-2

Order MO-2999

Toronto Police Services Board

March 31, 2014

Summary: The requester sought access to any information about him that the police had placed on the Canadian Police Information Centre (CPIC) database. The police denied access to the responsive record, citing the discretionary law enforcement exemptions in sections 8(1)(c) and 8(1)(l), read in conjunction with section 38(a), and the discretionary personal privacy exemption in section 38(b). During adjudication of the appeal, the appellant withdrew his request for access to the CPIC-specific access codes and the personal information of other identifiable individuals in the record, and the police disclosed additional information to him. The adjudicator issued Order MO-2999, in which she did not uphold the police's decision to deny access to the remaining information in the record under section 38(b) or sections 8(1)(c) and 8(1)(l), read in conjunction with section 38(a).

The police sought reconsideration of Order MO-2999 under section 18.01(a) of the IPC's *Code of Procedure*. This order dismisses the police's reconsideration request.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1)(g) (definition of personal information), 8(1)(c), 38(a), 38(b), 14(3)(b).

Orders and Investigation Reports Considered: Orders MO-2999, MO-2429, MO-1515, MO-1384 and PO-2899-R.

OVERVIEW:

[1] The Toronto Police Services Board (TPS or the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for the following:

> 1. A copy of any information that the Toronto Police Service has placed on the Canadian Police Information Centre (CPIC) database in respect of, or in relation to [name of requester].
>
> 2. A copy of all notes, reports and any other documentation created by: [four named police officers] in respect of, or in relation to, the [date] incident detailed in Toronto Police Service occurrence report [number].
>
> 3. A copy of all notes, reports and any other documentation created by [named officer] in respect of, or in relation to, the [date] incident detailed in Toronto Police Service occurrence report [number].

[2] The police issued a decision granting partial access to the records. Access was denied to the withheld portions of the records pursuant to the discretionary law enforcement exemptions in sections 8(1)(c) and 8(1)(l), read in conjunction with section 38(a), and the discretionary personal privacy exemption in section 38(b). In addition, some portions of the records were withheld as they were deemed to be non-responsive to the request.

[3] The requester (now the appellant) appealed the police's decision to deny access to the withheld portions of the records.

[4] During mediation, the appellant told the mediator that he was not interested in pursuing access to the information withheld from the occurrence report or the police officers' notebooks. He stated that he was only seeking access to any information about him that the police submitted to the CPIC database.

[5] No further mediation was possible and the file was transferred to the adjudication stage of the appeals process where an adjudicator conducts an inquiry. I sent a Notice of Inquiry, setting out the facts and issues in this appeal, seeking the representations of the police on the one remaining record at issue, a one-page CPIC report about the appellant.

[6] The police then provided the appellant with a supplementary decision letter disclosing further information from the record. Following this disclosure, remaining at issue in the record were five severances.

[7] The police provided representations in response to the Notice of Inquiry. I sent a copy of the police's representations to the appellant, less a portion of one sentence that contained confidential information. The appellant provided representations in response. In his representations, the appellant stated that he was not seeking access to any personal information about any other individual. He also stated that he did not wish to receive access to the CPIC-specific access codes in the record. As such, only two severances from the record remained at issue.

[8] I then issued Order MO-2999 on January 20, 2014, in which I did not uphold the police's decision under section 38(b) or their decision under sections 8(1)(c) and 8(1)(l), read in conjunction with section 38(a), with respect to the remaining information at issue in the record. Taking into account the information that the appellant indicated that he was not interested in receiving, the order provisions in Order MO-2999 read:

> 1. I order the police to disclose all of the information in the record to the appellant by **February 10, 2014**, except for the following information which is to be withheld:
>
> - access codes and query formats, and
> - personal information of another individual.
>
> For ease of reference, I have provided the police with a copy of the record, highlighting the information to be withheld [emphasis in original].
>
> 2. I reserve the right to require the police to provide me with a copy of the record as disclosed to the appellant

[9] On February 12, 2014, I received a letter from the police, dated February 11, 2014. This letter sought a reconsideration of my decision to disclose information from the record. I sent a copy of this letter to the appellant and sought representations in response. The appellant provided representations supporting my findings in Order MO-2999 and also pointed out that the police's reconsideration request was not received until two days after the order compliance date.

[10] In this reconsideration order, I do not reconsider my decision in Order MO-2999 that the information at issue is not exempt under the *Act*.

ISSUES:

A. Should the police be allowed to seek a reconsideration of Order MO-2999 after the compliance date?

B. Are there grounds under section 18.01 of the IPC's *Code of Procedure* (the *Code*) to reconsider Order MO-2999?

DISCUSSION:

A. Should the police be allowed to seek a reconsideration of Order MO-2999 after the compliance date?

The reconsideration process

[11] This office's reconsideration process is set out in section 18 of the *Code* which applies to appeals under the *Act*. This section states:

> 18.01 The Commissioner may reconsider an order or other decision where it is established that there is:
>
> (a) a fundamental defect in the adjudication process;
>
> (b) some other jurisdictional defect in the decision; or
>
> (c) a clerical error, accidental error or omission or other similar error in the decision.
>
> 18.02 The IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision.
>
> 18.03 The IPC may reconsider a decision at the request of a person who has an interest in the appeal or on the IPC's own initiative.
>
> 18.04 A reconsideration request shall be made in writing to the individual who made the decision in question. The request must be received by the IPC:
>
> (a) where the decision specifies that an action or actions must be taken within a particular time period or periods, before the first specified date or time period has passed; or
>
> (b) where decision does not require any action within any specified time period or periods, within 21 days after the date of the decision.

> 18.05 A reconsideration request should include all relevant information in support of the request, including:
>
> (a) the relevant order and/or appeal number;
>
> (b) the reasons why the party is making the reconsideration request;
>
> (c) the reasons why the request fits within grounds for reconsideration listed in section 18.01;
>
> (d) the desired outcome; and
>
> (e) a request for a stay, if necessary.
>
> 18.06 A reconsideration request does not automatically stay any provision of a decision. A decision must be complied with within the specified time period unless the IPC or a court directs otherwise.
>
> 18.07 A reconsideration request does not preclude a person from seeking other legal remedies that may be available.
>
> 18.08 The individual who made the decision in question will respond to the request, unless he or she for any reason is unable to do so, in which case the IPC will assign another individual to respond to the request.
>
> 18.09 Before deciding whether to reconsider a decision, the IPC may notify and invite representations from the parties.
>
> 18.10 Where the IPC decides to grant or decline a reconsideration request, the IPC will make a written decision in the form of a letter or order and send a copy to the parties.

[12] Pursuant to the terms of Order MO-2999, the police were required to disclose all of the information in the record to the appellant by February 10, 2014, except for certain specified information. The police did not do so. On February 12, 2014, two days after the compliance date, the police's reconsideration request was received by the IPC.

[13] By the terms of section 18.04(a) of the *Code*, the police's reconsideration request should have been received by the IPC before February 10, 2014. The police did not even write their reconsideration letter until February 11, 2014, the day after the compliance date.

[14] The police have not provided an explanation in their reconsideration request as to why they did not comply with the terms of section 18.04 of the *Code*.

[15] Furthermore, the police did not seek a stay of Order MO-2999 order provisions in their reconsideration request pursuant to section 18.05(e). Section 18.05 provides that this information is relevant in support of a reconsideration request. Section 18.06 provides that a reconsideration request does not automatically stay any provision of a decision.

[16] Based on the police's non-compliance with the requirements of sections 18.04(a) and 18.05(e), I find that the police have not complied with the requirements for seeking a reconsideration under section 18 of the Code. The police did not provide an explanation in their reconsideration request as to why they were late in filing their request, nor did they seek a stay of the order provisions. As such I find that the police should not be allowed to seek a reconsideration of Order MO-2999 after the compliance date, and I dismiss this request and uphold the order provisions of Order MO-2999.

[17] Nevertheless, for the sake of completeness, I will consider whether the police have raised grounds under section 18.01 to reconsider Order MO-2999.

B. Are there grounds under section 18.01 of the IPC's *Code of Procedure* (the *Code*) to reconsider Order MO-2999?

The reconsideration request

[18] In their representations, the police state that they believe that there was a fundamental defect in the adjudication process as per section 18.01(a) of the *Code*.

[19] The police raised three grounds that support their application for a reconsideration, as follows:

> (1) That I erred in finding that the information at issue is personal information and should have considered the information to be part of the RCMP's query formats.
>
> (2) That, if the information at issue is the personal information of other individuals, I erred by not applying the presumption in section 14(3)(b).
>
> (3) That I did not seek reply representations from the police in response to the appellant's representations in my determination under section 38(b).

(1) That I erred in finding that the information at issue is personal information and should have considered the information to be part of the RCMP's query formats.

[20] The police provided both confidential and non-confidential representations on this ground. In their non-confidential representations, they state that:

> In your ruling, you have identified that the appellant only seeks information in direct relation to his personal and "personal health information" found in the CPIC record. Despite your acknowledgment of the specifics being sought by the appellant, you have ordered the TPS to release non-personal, "inner- workings" of the CPIC database. Specifically, in paragraph thirty (30), you have outlined that the appellant does not seek access to such information. Therefore, the TPS takes issue with the release of [the information at issue] contained inside the CPIC entry as these entries are specific to the Royal Canadian Mounted Police's (RCMP) query format, meant as a law enforcement tool and not sought by the appellant, as you have indicated…
>
> It is evident that these generic flags are not personal information about the appellant nor are they personal health information. They are officer safety tools which are used to assist the officers in analyzing any scenario they may encounter, and to ensure a safe outcome for all involved. It allows officers to prepare for how best to handle the scenario to ensure safety for themselves and others, including the identified party…
>
> As such, it is the TPS' position that you have failed to take into account the intent and purpose of these portions of the CPIC record; portions that are not personal information nor personal health information. TPS believes there has been a fundamental error in determining these portions of the CPIC record should be disclosed to the appellant.

[21] The appellant states that as he does not know what information the TPS desires to withhold from him, he is only left to speculate what this information might be.

Analysis/Findings re: ground 1

[22] At issue are two severances from the record. The first severance is a three-word sentence. These same three words are contained in the second severance. The second severance has an additional six-word sentence.

[23] Based on my review of the information remaining at issue in the record and the police's representations in support of their reconsideration request, I agree with the police that this information consists of flags. I also find these flags are not generic but are specific to the appellant.

[24] The police did not identify this information as flags in their initial representations. I find that the police are raising new evidence, which is not a ground for a reconsideration of an order under section 18.02 of the *Code*.

[25] In particular, the police did not provide representations in their initial representations that the record contained flags. Concerning the law enforcement exemption in section 8, the police only provided representations concerning access codes and query formats. The police submitted in their initial representations that disclosure of access codes and query formats could provide information on how information is retrieved and stored on the CPIC system, which may allow an unauthorized person to penetrate the CPIC system.

[26] In their representations in support of their reconsideration request, the police have indicated that the information at issue in the record consists of flags, which are officer safety tools, as opposed to information that could be used to penetrate the CPIC database. I find that the existence of flags in the record and the submission about flags being officer safety tools is new evidence being introduced by the police and therefore, the police cannot raise this new evidence in a reconsideration request under section 18.02 of the *Code*.

[27] In any event, I will consider whether section 8(1)(c) applies to the flags at issue in the record.

[28] Based on my review of the record and the police's reconsideration representations, I find that flags are separate and distinct information than query formats. There is nothing being queried in the information at issue. The flags in the record do not reveal the "inner-workings" of the CPIC database.

[29] The appellant stated in his initial representations that he was not seeking access to the inner-workings of the CPIC database. He stated that he was not seeking general access to CPIC-specific codes. The appellant made no mention of not seeking access to flags in his CPIC record. I find that the flags in the record is information that the appellant is seeking access to.

[30] The police are not claiming that the flags in the record contain the personal information of other individuals. I agree with the police that the flags in the record do not contain the personal information of individuals other than the appellant. As such, the personal privacy presumption in section 14(3)(b) cannot apply to information remaining at issue in the record.

[31] However, I do not agree with the police that the flags in the appellant's CPIC record do not contain the personal information of the appellant. Based on my review of the entire record, I find that the flags in the record comprise the personal information of the appellant. In particular, these flags contain the views or opinions of the police

about the appellant in accordance with paragraph (g) of the definition of personal information in section 2(1) of the *Act*.

[32] In support of my finding that the flags in the record contain the personal information of the appellant, I note that in Order MO-1515, the London Police Services Board described caution flags in police records as follows:

> The "caution flag" (a term used for lack of a better one) is based on police officers' observations, including notes and occurrence reports submitted, relating to the appellant during legitimate police involvement/investigations.

[33] As I have found that the flags in the record contain the personal information of the appellant, section 38(a) applies to this information. This section 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.

[34] The police have claimed in their representations in support of their reconsideration request that section 8(1)(c) applies to exempt the flags from disclosure. In this reconsideration order, I will consider the application of the law enforcement exemption in section 8(1)(c), in conjunction with section 38(a), to these flags. Section 8(1)(c) reads:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

[35] Except in the case of section 8(1)(e), 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.[1]

[36] 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* fulfilment of the requirements of the exemption.[2]

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[1] 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.).
[2] Order PO-2040; *Ontario (Attorney General) v. Fineberg*.

[37] In order to meet the "investigative technique or procedure" test under section 8(1)(c), the institution must show that disclosure of the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. The exemption normally will not apply where the technique or procedure is generally known to the public.[3]

[38] The techniques or procedures must be "investigative". The exemption will not apply to "enforcement" techniques or procedures.[4]

[39] Previous orders of this office have referred to police flags in CPIC records. In Order MO-2429, the police referred to the existence of flags in their representations.

[40] In Order MO-1515, referred to above, the requester had received copies of his London Police Services Board computerized police records, which included a flag that the requester was "mentally unstable". The requester in that appeal sought the removal of the flag "mentally unstable" from these computerized records under section 36(2)(a) of the *Act*.

[41] In this appeal, the appellant wants to know what information about him is contained in the record so that he can decide whether to seek a correction of the record under section 36(2)(a) of the *Act*. The decision in this reconsideration order, as well as the decision in the initial order, Order MO-2999, do not address whether section 36(2)(a) applies, only if the appellant should be allowed access to the information about him in his police record.

[42] In the Notice of Inquiry, the police were asked to answer the following questions related to section 8(1)(c):

> What is the technique or procedure in question?
>
> Is the technique or procedure "investigative" in nature?
>
> Is the technique or procedure currently in use or likely to be used in law enforcement?
>
> Could disclosure of the technique or procedure reasonably be expected to hinder or compromise its effective utilization? Is the technique or procedure generally known to the public? Please explain, with reference to the above.

[3] Orders P-170, P-1487, MO-2347-I and PO-2751.
[4] Orders PO-2034 and P-1340.

[43] The police did not provide representations in response to these questions, neither in their initial representations nor in their representations provided in support of their reconsideration request.

[44] I find that I do not have sufficient evidence to find that the placing of flags on the appellant's CPIC record is an investigative technique or procedure. Even if flags could be classified an investigative technique or procedure, I do not have enough evidence to find that the placing of flags on police records is a technique or procedure that is not generally known to the public. The exemption normally will not apply where the technique or procedure is generally known to the public.[5]

[45] Based on my review of the record and the police's representations, I also find that the police have not shown that disclosure of the particular flags in the appellant's CPIC record could reasonably be expected to hinder or compromise its effective utilization.

[46] There may be scenarios where disclosure of a flag may hinder or compromise its effective utilization, but given the particular flags in this record, the police's initial and reconsideration representations and the exemption claimed by the police, I find that section 8(1)(c) does not apply to the information at issue in the record.

[47] I find that I have not been provided with detailed and convincing evidence to establish a "reasonable expectation of harm" to the police or other individuals, including the appellant, should the flags in the record be disclosed. Accordingly, I find that the information at issue in the record is not exempt by reason of section 38(a), read in conjunction with section 8(1)(c). Therefore, I am not reconsidering my decision in Order MO-2999 on the basis of the first ground raised by the police.

(2) That, if the information at issue is the personal information of other individuals, I erred by not applying the presumption in section 14(3)(b).

[48] The police have not claimed in their reconsideration representations that the flags in the record contain the personal information of individuals other than the appellant. Based on my review of the record and the police's confidential and non-confidential reconsideration representations, I also find that the flags in the record do not contain the personal information of individuals other than the appellant.

[49] Accordingly, the discretionary personal privacy exemption in section 38(b) cannot apply to exempt the information at issue. Therefore, the presumption in section 14(3)(b) cannot apply to the information at issue in the record. The analysis concerning the application of section 14(3)(b) to the information at issue in the record in Order MO-2999 was not applicable to the flags in the record.

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[5] Orders P-170, P-1487, MO-2347-I and PO-2751.

[50] I stated in Order MO-2999 that it was not apparent from my review of the record and the police's representations that the police were investigating a possible violation of law. I do not agree with the police's position in their reconsideration representations that every time an officer is sent to a scene in response to a Call for Service, that the presumption in section 14(3)(b) must apply as the police are initially investigating a possible violation of law and ascertaining whether or not any laws have been broken. Section 14(3)(b) reads:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> > 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;

[51] For example, in Order MO-1384, information compiled by the police in accordance with their legislated authority under the *Mental Health Act* did not fit within the section 14(3)(b) presumption. In that order, former Assistant Commissioner Tom Mitchinson stated:

> Section 17 of the *Mental Health Act* does not create an offence for the actions of individuals which may justify the involvement of the Police. The Police have provided no evidence to suggest the appellant's behaviour harmed or threatened to harm any other person. Rather, it would appear that the Police decided to approach the appellant on the basis of possible harm she might inflict on herself. In my view, absent evidence to the contrary, the actions taken by the Police, under the apparent authority of the *Mental Health Act*, do not fall within the scope of section 14(3)(b) because, while they involve police officers, they do not involve or relate to "a possible violation of law". This situation can be distinguished from investigations undertaken by police services in situations involving a suspicious death, where possible foul play may have occurred. In those circumstances, it is often reasonable for a police service to conclude that there may have been "a possible violation of law", specifically the Criminal Code of Canada.

[52] Therefore, I find that it is not necessary to consider ground 2 of the police's reconsideration request as the information at issue does not contain the personal information of individuals other than the appellant.

3) That I did not seek reply representations from the police in response to the appellant's representations in my determination under section 38(b).

[53] The police state that the findings outlined in Order MO-2999 were relied upon based on the opinions of the appellant, to which they were not given an opportunity to review, consider or comment on. They state that while I may not have considered it necessary to request reply representations from them or to share some or all of the representation as per sections 7.05 and 7.07 of the *Code*, it was hardly fair to rule against them in the absence of a response to the appellant who provided "detailed representations as to why he believes that some of the personal information is incorrect."

[54] Concerning ground 3, the police in their reconsideration representations reference the following information in Order MO-2999, where I stated that:

> The appellant provided detailed representations as to why he believes that some of the personal information, including personal health information, about him provided by the police to the RCMP for entry into the CPIC's database is incorrect.

[55] This reference to the appellant's representations was only in regards to my analysis of the application of factors favouring disclosure under section 14(2) in my determination under section 38(b). As I have stated above, as the information at issue, the flags, do not contain the personal information of other individuals, section 38(b) cannot apply to exempt this information.

[56] I am not determining in this, or the previous,[6] order whether the information in the flags in the record is correct. I am only considering whether I should reconsider my decision in Order MO-2999. Therefore, even if my analysis under section 38(b) had been required in Order MO-2999, I find that it would have been unnecessary for me to obtain reply representations from the police on whether the information at issue in the record about the appellant was correct.[7]

[57] Therefore, I find that it is not necessary for me to consider ground 3 of the police's reconsideration request as the information at issue does not contain the personal information of individuals other than the appellant.

Conclusion

[58] Even if I had decided to consider the police's reconsideration request, I would have found that the information at issue was not subject to the personal privacy exemption in section 38(b). I would have also found that the information ordered disclosed in Order MO-2999 was still not exempt under the section 38(a), read in conjunction with section 8(1)(c). Accordingly, I would not have ordered the information

[6] Order MO-2999.
[7] Order PO-2899-R.

ordered disclosed in Order MO-2999 withheld. Accordingly, I am dismissing the police's reconsideration request and upholding the order provisions of Order MO-2999.

ORDER:

I uphold the order provisions of Order MO-2999 and order the police to disclose the information ordered disclosed in that order to the appellant **by April 22, 2014**.

Original Signed By: March 31, 2014
Diane Smith
Adjudicator