

Information and Privacy Commissioner,  
Ontario, Canada



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

---

## ORDER MO-3028

Appeal MA12-205

London Police Services Board

March 31, 2014

**Summary:** The appellant sought access to all police records relating to him. The police located officers' notes, general occurrence hardcopies and other records that were responsive to the appellant's request and granted partial access to them. The police relied on the discretionary exemptions in section 38(a) (discretion to refuse requester's own information), in conjunction with sections 7(1) (advice or recommendations) and 8(1)(c), (d), (g), (h) and (l) (law enforcement), and section 38(b) (personal privacy) to deny access to many of the records in whole or in part. The police also claimed that some records were excluded from the application of the *Act* in accordance with section 52(3)3 and determined that portions of other records were not responsive to the request. The appellant appealed the decision of the police. The police's decision is upheld. The withheld information in the records is found to be exempt under sections 38(a) and 8(1)(g), and 38(b) of the *Act*.

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

**Orders and Investigation Reports Considered:** M-202, P-242, P-650, PO-1670, MO-2235, MO-2950 and MO-3001.

### OVERVIEW:

[1] The appellant made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the London Police Services Board (the police) for

access to all records relating to him. Along with his request, the appellant included a signed form from his brother, authorizing the police to release to him all of the information in the requested records that related to his brother.

[2] The police located 231 pages of responsive records and issued a decision granting partial access to them. The police disclosed 29 complete pages<sup>1</sup> of the records to the appellant. In denying access to the remaining records or portions thereof, the police relied on the discretionary exemptions in section 38(a) (discretion to refuse requester's own information), in conjunction with sections 7(1) (advice or recommendations) and 8(1)(c), (d), (g), (h) and (l) (law enforcement), and section 38(b) (personal privacy), with reference to the factor in section 14(2)(h) and the presumption in section 14(3)(b). The police also claimed that some records were excluded from the application of the *Act* in accordance with section 52(3)3 and determined that portions of other records were not responsive to the request.

[3] The appellant appealed the police's decision to this office.

[4] During mediation, the appellant advised that he is not seeking access to information that is not responsive to his request. Accordingly, the portions of the records that the police have withheld as non-responsive on pages 1 to 9, 11 to 19, 21, 22, 24 to 27, 29 to 31 and 33 are no longer at issue. The appellant also advised that he is not seeking access to the ten codes, patrol zone information and statistical codes that the police withheld under section 8(1)(l) of the *Act*. Accordingly, these portions of information on pages 1, 4 to 6, 8, 11, 17, 19, 25 to 27, 30, 31, 34, 36, 47, 48, 54, 55, 58, 61, 62 to 63, 67, 69, 71, 82, 83, 86, 95, 108, 110, 120, 128, 129, 136, 138, 144, 147, 150, 153, 160, 164, 168, 173, 178, 182, 187, 191, 197, 202, 207, 211, 214, 220 and 225 of the records, and this exemption, are no longer at issue. Finally, the appellant advised that he is satisfied with the partial disclosure provided to pages 10, 20, 23, 28, 32, 35, 70, 77 to 80, 94, 102, 103, 137, 158 and 159. Accordingly, these pages are no longer at issue.

[5] A mediated resolution of the appeal was not possible and the appeal was moved to the adjudication stage of the appeal process for an inquiry under the *Act*. I began my inquiry into this appeal by inviting the representations of the police on the issues set out in the Notice of Inquiry. The police provided representations and requested that portions of them be kept confidential. I determined that portions of the police's representations satisfy the confidentiality criteria set out in section 7.07 of this office's *Code of Procedure and Practice Direction Number 7*. I shared the non-confidential representations of the police with the appellant and invited his representations. The appellant did not submit representations.

---

<sup>1</sup> Pages 40, 43 to 46, 74, 81, 93, 98, 100, 101, 106, 107, 109, 125, 127, 135, 142, 143, 145, 146, 148, 149, 152, 156, 157, and 229 to 231.

[6] In this order, I uphold the police's decision to withhold the information remaining at issue under sections 38(a), 8(1)(g) and 38(b). Because I find that this information qualifies for exemption under these three sections, it is not necessary for me to address the application of the remaining exemptions and exclusions claimed by the police.

## **RECORDS:**

[7] The records at issue in this appeal are the remaining withheld portions of handwritten police notes and various types of hardcopies (i.e. general occurrence, ticket offence and call) in pages 1 to 9, 11 to 19, 21, 22, 24 to 27, 29 to 31, 33, 34, 36 to 39, 41, 42, 47 to 69, 71 to 73, 75, 76, 82 to 92, 95 to 97, 99, 104, 105, 108, 110 to 124, 126, 128 to 134, 136, 138 to 141, 144, 147, 150, 151, 153 and 153 to 155, as well as pages 160 to 228, which have been withheld in their entirety.

## **ISSUES:**

- A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the discretionary exemption at section 38(a), in conjunction with the section 8(1)(g) exemption, apply to pages 160 through 228?
- C. Does the discretionary exemption at section 38(b) apply to the remaining information at issue?
- D. Did the police exercise their discretion under sections 38(a) and (b)? If so, should this office uphold the exercise of discretion?

## **DISCUSSION:**

### **A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?**

[8] To determine which sections of the *Act* may apply, I must decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1), in part, as follows:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,  
...
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,  
...
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[9] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.<sup>2</sup> To qualify as personal information, the information must be about the individual in a personal capacity and it must be reasonable to expect that an individual may be identified if the information is disclosed.<sup>3</sup>

[10] The police submit that the records reflect a number of incidents they investigated involving the appellant and other identifiable individuals (the affected parties), including "trouble with person," "traffic – driving complaint," "check on welfare" and "suspicious person" occurrences. They state that information such as addresses, telephone numbers, dates of births, gender, places of employment, vehicle information and statements were collected from the appellant and the affected parties. As a result, the police submit that the records contain the personal information of the appellant, as well as that of a number of affected parties. The police also provide confidential representations on this issue.

[11] Based on my review of the records and the representations of the police, I find that all of the records contain the personal information of the appellant as that term is

---

<sup>2</sup> Order 11.

<sup>3</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

defined in paragraphs (a), (b), (d), (e), (g) and (h) of the personal information definition in section 2(1) of the *Act*. I also find that all of the records contain the personal information of one or more identifiable affected parties, including these individuals' names, addresses, dates of birth, telephone numbers and other information that reveals something of a personal nature about them. Accordingly, I find that all of the records at issue contain the mixed personal information of the appellant and the affected parties.

[12] As I have found that all of the records contain the mixed personal information of the appellant and other identifiable individuals, I will consider whether the discretionary exemptions in sections 38(a) and (b), which the police have claimed for all of the withheld records and severances, apply to the information at issue.

**B. Does the discretionary exemption at section 38(a), in conjunction with the section 8(1)(g) exemption, apply to pages 160 through 228?**

[13] Section 38 provides a number of exemptions from the general right of access individuals have under section 36(1) to their own personal information held by an institution. 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.

[14] 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.<sup>4</sup> In this case, the police rely on section 38(a) in conjunction with section 8(1)(g), which states:

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

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

[15] The term "law enforcement" is used in several parts of section 8, and is defined in section 2(1), in part, as follows:

"law enforcement" means,

---

<sup>4</sup> Order M-352.

- (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 . . .

[16] The term “law enforcement” has been found to apply in the circumstances of a police investigation into a possible violation of the *Criminal Code*.<sup>5</sup> 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>6</sup> 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.<sup>7</sup> Nor is it 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.<sup>8</sup>

[17] The term “intelligence information” means:

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.<sup>9</sup>

### ***The police’s representations***

[18] The police provide detailed confidential representations on the application of the intelligence information exemption in section 8(1)(g) to pages 160 to 228 of the records. I am not able to refer to these in my order due to their confidential nature. The police also provide the following non-confidential representations on this issue:

As stated in Order MO-1431:

The purpose of section 8(1)(g) is to provide the institution with the discretion to preclude access to records in

---

<sup>5</sup> Orders M-202 and PO-2085.

<sup>6</sup> *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

<sup>7</sup> 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.).

<sup>8</sup> Order PO-2040; *Ontario (Attorney General) v. Fineberg*.

<sup>9</sup> Orders M-202, MO-1261, MO-1583, PO-2751; see also Order PO-2455, confirmed in *Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 4233 (Div. Ct.).

circumstances where disclosure would interfere with the gathering of or reveal law enforcement intelligence information. Previous orders have defined intelligence information 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 violation of law, and is distinct from information which is compiled and identifiable as part of the investigation of a specific occurrence (Orders M-202 and P-650).

### ***Analysis and findings***

[19] Based on my review of pages 160 to 228 of the records and my consideration of the police's confidential and non-confidential representations, I agree with the police. I find that these pages contain intelligence information as that term has been defined in previous orders of this office, including Orders M-202 and P-650. In more recent orders, this office has upheld the application of the section 8(1)(g) exemption to police records similar to those found in pages 160 to 228. In Order MO-2950, Adjudicator Laurel Cropley accepted that certain police occurrence reports before her contained intelligence information that had been gathered in a covert manner for a particular purpose in the expectation that the information gathered would be useful in future investigations. Adjudicator Cropley upheld the police's decision to withhold these records in their entirety from the appellant, whose personal information was contained therein, under section 38(a), in conjunction with section 8(1)(g). In Order MO-3001 Adjudicator Diane Smith accepted that intelligence information gathered in street checks by the police could reveal information about individuals who are being monitored and who could then take steps to conceal their activities or their associates affecting the way that police do their investigations, and its disclosure could hamper the control of crime. On this basis, she upheld the police's decision to withhold records in their entirety under sections 38(a) and 8(1)(g), even though they contained the personal information of the appellant in that appeal. I adopt the approaches of Adjudicators Cropley and Smith in this appeal.

[20] I find that the information in pages 160 to 228 was gathered by the police 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. Accordingly, I find that disclosure of pages 160 to 228 of the records could reasonably be expected to reveal law enforcement intelligence information respecting organizations or persons, thus satisfying the requirements for the application of section 8(1)(g) to these records. Subject to my review of the police's exercise of discretion below, I find that pages 160

to 228 are exempt from disclosure in their entirety under section 38(a), in conjunction with section 8(1)(g).

**C. Does the discretionary exemption at section 38(b) apply to the remaining information at issue?**

[21] Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an “unjustified invasion” of the other individual’s personal privacy, the institution may refuse to disclose that information to the requester. Sections 14(1) to (4) provide guidance in determining whether disclosure of the information would be an unjustified invasion of personal privacy. If the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). Section 14(1)(a) states:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;

[22] For section 14(1)(a) to apply, the consenting party must provide a written consent to the disclosure of his personal information in the context of an access request.<sup>10</sup>

[23] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), this office will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.<sup>11</sup> If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 38(b). In this appeal, the police claim that the presumption at section 14(3)(b) applies to the records. This section states:

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;

---

<sup>10</sup> Order PO-1723.

<sup>11</sup> Order MO-2954.



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

[24] The police submit that disclosure of the withheld information is presumed to be an unjustified invasion of personal privacy under section 14(3)(b) because all of the records at issue were created as part of the police's investigation of incidents involving the appellant. The police state that the investigated incidents included, among other things, "trouble with person, traffic – driving complaint, check on welfare and suspicious person occurrences." The police assert that for each incident reported in the records, they responded to calls for service and conducted investigations, irrespective of whether charges were laid. The police add that the records relate to investigations involving possible assault, mischief, trespass and causing a disturbance, among other possible offences under the Criminal Code. The police also state that in each incident, they completed reports that include the personal information of the appellant and other identifiable individuals. The police rely on Orders MO-2658 and MO-2785, to argue that the records at issue, similar to the police investigation records at issue in those orders, are captured by the presumption in section 14(3)(b).

[25] The police add that the factor in section 14(2)(h) is relevant in this appeal. They submit that the personal information contained in the records which they received from individuals involved in and/or interviewed in relation to a complaint or investigation, was supplied by the individuals in confidence as contemplated by section 14(2)(h). They state that this factor must be considered in order to protect the personal information they obtained from the public during the investigations reported in the records and thereby, maintain the trust bestowed on them by the public. The police also provide confidential representations on why the presumption in section 14(3)(b) and the factor in section 14(2)(h) apply to the records.

### ***Analysis and findings***

[26] In this appeal, the appellant provided a signed consent from his brother authorizing the police to disclose his brother's personal information in the records to him. As such, disclosure of the appellant's brother's personal information cannot be said to be an unjustified invasion of the appellant's brother's privacy; rather, disclosure of this personal information is permitted by section 14(1)(a) of the *Act*. I have reviewed the records and I am satisfied that the police decided to disclose the appellant's brother's personal information in the records to the appellant where it is appropriate to do so, in accordance with section 14(1)(a) of the *Act*. I note that in some pages of the records, the police have decided to withhold the personal information of the appellant's brother because that personal information is inextricably intertwined with the personal information of the affected parties. Therefore, disclosure of the appellant's brother's personal information is not possible without revealing personal information of the affected parties. Consistent with my finding below, disclosure of the affected parties' personal information is presumed to be an unjustified invasion of privacy under section 14(3)(b) and thus, this personal information is exempt from disclosure under section

38(b). For this reason, I find that the personal information of the appellant's brother cannot be further disclosed as it is impossible to do so without revealing the personal information of the affected parties. I uphold the police's decision in this regard and find that the disclosure of the appellant's brother's personal information has been adequately addressed through the disclosure that was made in this appeal.

[27] I now turn to the police's decision on the disclosure of the appellant's personal information.

[28] Previous orders of this office have established that section 14(3)(b) may apply to records even if no criminal proceedings were commenced against any individuals; the presumption only requires that there be an investigation into a possible violation of law.<sup>12</sup> I adopt this approach in this appeal. Based on my review of the records and the representations of the police, I am satisfied that the personal information that remains at issue was compiled and is identifiable as part of an investigation into a possible violation of law. All of the records remaining at issue were compiled by the police in the course of their investigation of various incidents and matters involving the appellant. The police's confidential and non-confidential representations specify the criminal laws at issue in the various investigations documented in the records. Thus, I agree with the police that section 14(3)(b) applies to the remaining information at issue. I also agree with the police that the factor in section 14(2)(h) applies to the remaining information at issue. Section 14(2)(h) states:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

the personal information has been supplied by the individual to whom the information relates in confidence;

[29] The factor in section 14(2)(h) favours privacy protection. In order for this factor to apply, both the individual supplying the information and the recipient must have an expectation that the information will be treated confidentially, and that expectation must be reasonable in the circumstances.<sup>13</sup> I accept that the personal information of the affected parties to whom the information relates was supplied in confidence by them to the police. Therefore, I find that the factor in section 14(2)(h) applies to the remaining records at issue.

[30] I have no representations or evidence before me that any factors in section 14(2) that weigh in favour of disclosure, apply to the remaining information at issue.

---

<sup>12</sup> Orders P-242 and MO-2235.

<sup>13</sup> Order PO-1670.

[31] Thus, in balancing the appellant's right of access to his personal information under section 38(b) against the right of the affected parties to the protection of their privacy, I find that disclosure of the remaining records at issue is presumed to be an unjustified invasion of the affected parties' personal privacy under section 14(3)(b), and the only applicable factor, section 14(2)(h), weighs against disclosure. Subject to my review of the police's exercise of discretion below, I find that the remaining information at issue is exempt from disclosure under section 38(b).

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

[32] The section 38(a) and (b) 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>14</sup> This office may not, however, substitute its own discretion for that of the institution.<sup>15</sup> Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:<sup>16</sup>

- 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

---

<sup>14</sup> Order MO-1573.

<sup>15</sup> Section 43(2).

<sup>16</sup> Orders P-344 and MO-1573.

- the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the historic practice of the institution with respect to similar information.

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

[35] The police submit that they exercised their discretion under sections 38(a) and (b). They state that they considered the fact that the records at issue contain the personal information of not only the appellant, but also that of the affected parties involved in the incidents and investigations. The police continue that they considered the appellant's right of access and determined that in the context of the records at issue, the protection of the described factors outweigh the appellant's right of access because releasing the information could hinder police operations and decrease public confidence and assistance in police investigations. In respect of balancing the appellant's right of access against the affected parties' right to have their privacy protected, the police weighed the two interests and determined that privacy protection outweighed the appellant's right in this appeal. The police also provide confidential representations on some of the factors they considered and how they weighed these factors in their exercise of discretion.

### ***Analysis and findings***

[36] I find that the police properly exercised their discretion under both sections 38(a) and 38(b) in denying the appellant access to the records at issue in this appeal. In exercising their discretion under section 38(a), I find that the police considered the wording of the section 8(1)(g) exemption and the interests it seeks to protect. The police also weighed whether disclosure will increase public confidence in their

operation, along with the nature of the information and the extent to which it is significant and/or sensitive to the police, the affected parties and the appellant. In exercising their discretion under section 38(b), I find that the police considered the wording of the presumption in section 14(3)(b) and considered the significance of the interests it seeks to protect, while also bearing in mind the purposes of the *Act* and the fact that the appellant is an individual seeking access to his own personal information. I am satisfied that the police properly exercised their discretion in good faith, taking into account all relevant factors, and I uphold their exercise of discretion under sections 38(a) and (b) of the *Act*.

**ORDER:**

I uphold the decision of the police and dismiss this appeal.

Original Signed By \_\_\_\_\_  
Stella Ball  
Adjudicator

\_\_\_\_\_ March 31, 2014