

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3318

Appeal MA15-391

Hamilton Police Services Board

May 31, 2016

Summary: The police received a request for access to all reports relating to a specified incident that occurred on an identified date. The police granted partial access to the responsive record, denying access to limited portions on the basis of the exemptions in sections 14(1) and 38(b) (personal privacy) and section 38(a) (discretion to deny requester's own information) in conjunction with sections 8(1)(e) (endanger life or safety) and 8(1)(l) (facilitate commission of unlawful act) of the *Act*. In this order, the adjudicator finds that the withheld portions of information qualify for exemption under the listed sections, and that the search conducted by the police was reasonable. The appeal is dismissed.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) ("personal information"), 8(1)(l), 14(2)(f) and (h), 17 (reasonable search), 38(a) and (b).

Orders and Investigation Reports Considered: M-757, M-909 and PO-1744.

OVERVIEW:

[1] The Hamilton Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all reports relating to a specified incident that occurred on an identified date.

[2] In their decision, the police granted partial access to the records. Access to some of the information was withheld pursuant to sections 14(1) and 38(b) (personal

privacy), and section 38(a) (discretion to deny requester's own information) in conjunction with sections 8(1)(e) (endanger life or safety) and 8(1)(l) (facilitate commission of unlawful act) of the *Act*. The decision letter of the police stated, in part:

After careful consideration of section 38 (a) [and] (b), a decision has been made to grant partial access to the requested report. Even though some of the information pertains to you, some of the information has been removed because disclosure would constitute an unjustified invasion of another individual's personal privacy

[3] The decision letter also referred to the factor in section 14(2)(f) and the presumption in section 14(3)(b) in support of the decision by the police to deny access. In addition, the letter indicated that sections 8(1)(e) and (l) were relied on to exempt "the 10-codes, patrol zone information and/or statistical codes".

[4] The requester, now the appellant, appealed the decision.

[5] During mediation, the appellant advised that she believes that further records should exist in response to this request. As a result, the issue of whether the police's search for responsive records was reasonable is raised as an issue in this appeal.

[6] Mediation did not resolve this appeal, and this file was transferred to the inquiry stage of the process, where an adjudicator conducts an inquiry under the *Act*. I sent a Notice of Inquiry to the police, initially, and the police provided representations in response.

[7] I then sent a Notice of Inquiry, along with a complete copy of the police's representations, to the appellant. The appellant was invited to address the issues, in light of the information in the Notice of Inquiry and with reference to the representations of the police. The appellant was also invited to identify any additional issues which she believes are relevant to the issues in this appeal. In response, the appellant provided representations, including a number of attachments.

[8] In this order, I find that the withheld portions of information qualify for exemption under sections 38(b), and 38(a) in conjunction with section 8(1)(l). I also find that the search conducted by the police was reasonable.

RECORDS:

[9] The records remaining at issue consist of the withheld portions of a two-page record titled: Occurrence Details.

ISSUES:

- A. Does the record 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(b) apply to the information at issue?
- C. Does the discretionary exemption at section 38(a) in conjunction with the sections 8(1)(e) and (l) exemptions apply to the information at issue?
- D. Did the institution exercise its discretion under sections 8, 38(a) and (b)? If so, should this office uphold the exercise of discretion?
- E. Did the institution conduct a reasonable search for records?

DISCUSSION:

Preliminary matter

[10] As a preliminary matter, I note that some portions of information severed from the record are duplicates of information which was disclosed in other portions of the record. For example, the address where the incident referenced in the record took place and the name of an officer involved is identified in the record and has been disclosed to the appellant; however, this information is duplicated and also referenced multiple times in the withheld portions of the record. To the extent that there is some overlap in some information contained in the record which was disclosed by the police in one portion of the record but not disclosed in another portion of the record, in the circumstances, I have decided that there is no purpose served in reviewing the issues regarding access to this information and/or ordering disclosure of these snippets of information. I will not consider this duplicated information further, and will not address it in this order.

Issue A: Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[11] 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. That term is defined in section 2(1) 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,

- (c) any identifying number, symbol or other particular assigned to the individual,
- (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,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name if 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;

[12] 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.¹

[13] Sections 2(2), (2.1) and (2.2) also relate to the definition of personal information. These sections state:

(2) Personal information does not include information about an individual who has been dead for more than thirty years.

(2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[14] 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.² 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

¹ Order 11.

² Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

something of a personal nature about the individual.³

[15] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁴

[16] The portions of the record that have been withheld on the basis of the personal privacy exemption are:

- the name, date of birth, gender, home address, and contact details (including telephone numbers) of an identified individual;
- the date of birth and gender of another individual (whose name has been disclosed); and
- the identifying number of a third individual (whose first name and the initial of their last name have been disclosed).

Representations and Findings

[17] The police take the position that the record contains the personal information of the appellant and the affected individuals. The police submit:

...[T]he occurrence report contains both the personal information of the appellant and the affected individuals, names, home addresses, dates of birth, phone numbers, and gender is listed. This falls within the definition of 'personal information' as defined in the Act.

[18] The appellant's representations do not directly address the issue of whether the record contains personal information.

[19] On my review of the information contained in the record, I find that the record contains the personal information of the appellant, including her name along with other personal information relating to her (paragraph (h) of the definition). As I have found that the record contains the appellant's personal information, I will consider her right of access under Part II of the *Act*.

[20] I am also satisfied that the portions of the record which the police have withheld contain the personal information of other identified individuals including their age and gender (paragraph (a) of the definition), an identifying number assigned to an individual (paragraph (c) of the definition), address and telephone numbers (paragraph (d) of the definition), and an individual's name which appears with other personal information relating to the individual (paragraph (h) of the definition).

³ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁴ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

Issue B: Does the discretionary exemption at section 38(b) apply to the information at issue?

[21] Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exceptions to this general right of access, including section 38(b). Section 38(b) introduces a balancing principle that must be applied by institutions where a record contains the personal information of both the requester and other individuals. In this case, the police must look at the information and weigh the appellant's right of access to her own personal information against the affected persons' right to the protection of their privacy. If the police determine that release of the information would constitute an unjustified invasion of the affected person's personal privacy, then section 38(b) gives the police the discretion to deny access to the appellant's personal information. Section 38(b) states:

A head may refuse to disclose to the individual to whom the information relates personal information,

if the disclosure would constitute an unjustified invasion of another individual's personal privacy

[22] In determining whether the exemption in section 38(b) applies, sections 14(1), (2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the affected person's personal privacy. Section 14(2) provides some criteria for the police to consider in making this determination; section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. In addition, if the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy under section 38(b).

Representations and Findings

[23] In this appeal, the police rely on the "presumed unjustified invasion of personal privacy" in section 14(3)(b) of the *Act*, which 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;

[24] In support of their position that the presumption in section 14(3)(b) applies, the police state:

Although no criminal proceeding was commenced ..., section 14(3)(b) applies to these records as officers were dispatched to an incident of the appellant causing a disturbance at a public location. No offence occurred and no one was charged with any offences.

[25] With respect to any factors that might apply to the personal information at issue, the police refer to the factor in section 14(2)(f) and I have also considered the factor in section 14(2)(h). Those sections read:

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,

(f) the personal information is highly sensitive;

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

[26] The police state:

... Section 38(b) is considered when the records contain information of other affected individuals. The views and opinions of [an] affected individual were released as it met the criteria for business, professional or official capacity. Personal identifiers such as birth dates, home addresses, and telephone numbers do not meet the criteria for release. No consent was received for the release of that information therefore section 14(2)(f) applies to this information in conjunction with section 38(b).

[27] The appellant's representations do not directly address any of the identified factors in section 14(2), nor do they raise the possible application of the exception in section 14(1) or 14(4). The appellant's representations focus primarily on her view of the circumstances giving rise to the incident which resulted in the creation of the record at issue, and the impact it has had on her. I review some of this information in my discussion of the police's exercise of discretion, below.

[28] With respect to the application of the exemption in section 38(b) to the information for which it is claimed, I have found above that the information is the personal information of the affected parties (including a name and dates of birth, gender, identifying numbers, home address and telephone numbers of the affected parties). On my review of the information and the context within which the information was collected, I am satisfied that the personal information at issue was supplied to the police in confidence. I also find that there are no factors favouring the disclosure of this personal information to the appellant. As a result, I find that disclosure of the information would constitute an unjustified invasion of the personal privacy of the affected parties, and that the information qualifies for exemption under section 38(b), subject to my review of the police's exercise of discretion.

Issue C: Does the discretionary exemption at section 38(a) in conjunction with the sections 8(1)(e) and (l) exemptions apply to the information at issue?

Introduction

[29] 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.

[30] 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.

[31] The police have withheld certain police codes contained in the record on the basis of the exemption in section 8(1)(l) of the *Act*. That section reads:

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.

Representations and Findings

[32] The police submit that disclosing this police code information could reasonably be expected to lead to the harms contemplated by section 8(1)(l). They state:

Access was granted to the appellant for her own personal information. The only exception was the exemption of law enforcement 10-codes and patrol zone information under sections 8(1) (e) and (l). These were removed from the incident report. This removal of codes is consistent [with] requests processed by the Hamilton Police Service. These exemptions have been upheld in numerous Orders.

[33] The appellant's representations do not directly address this issue.

[34] I have reviewed the portions of the record which the police claim falls within the exemption in section 8(1)(l). This information includes various police codes which include patrol zone codes and other police code information.

[35] Previous IPC orders have consistently found that the disclosure of such information could reasonably be expected to facilitate the commission of an unlawful

act or hamper the control of crime.⁵ For example, in Order M-757, Inquiry Officer Anita Fineberg stated:

The purpose of the exemption in section 8(1)(l) is to provide the police with the discretion to preclude access to records in circumstances where disclosure could reasonably be expected to result in the harm set out in this section. I am satisfied that, in this case, the police have provided sufficient evidence to establish that disclosure of the "ten" codes, patrol zones and patrol car identification numbers ... could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. Accordingly, I find that the requirements for exemption under section 8(1)(l) have been met with respect to this information.

[36] In the circumstances of this particular appeal, I am satisfied that disclosing the patrol zone codes and other police code information in the record could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. As a result, I find that this information qualifies for exemption under section 8(1)(l).

[37] I note that there is no reason to believe that the appellant would use this information for any unlawful purpose. However, this office has consistently found that police code information should be withheld from public disclosure under section 8(1)(l).

[38] Having found that the withheld police code information qualifies for exemption under section 8(1)(l), it is not necessary to review the possible application of section 8(1)(e) to the information.

[39] Having found that the police code information qualifies for exemption under section 8(1)(l), I am satisfied that the exemption in section 38(a) applies to it, subject to my review of the exercise of discretion by the police.

Issue D: Did the institution exercise its discretion under sections 8, 38(a) and (b)? If so, should this office uphold the exercise of discretion?

General principles

[40] The section 8 and 38 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.

[41] 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

⁵ See, for example, Orders MO-2175, M-757 and PO-2970.

- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[42] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.⁶ This office may not, however, substitute its own discretion for that of the institution.⁷

Relevant considerations

[43] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:⁸

- 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
 - 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 or her 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 age of the information
- the historic practice of the institution with respect to similar information.

⁶ Order MO-1573.

⁷ Section 43(2).

⁸ Orders P-344 and MO-1573.

Representations

[44] The police submit that they exercised their discretion in applying the exemptions at issue. They also confirm that they considered the fact that the appellant was asking for her own personal information. In addition, I note that the police provided the appellant with all of the narrative information contained in the record, and only withheld the brief portions of personal information and police code information identified above.

[45] The appellant provided representations in response to the Notice of Inquiry sent to her. In her representations, the appellant identifies the circumstances giving rise to the incident which resulted in the creation of the record at issue. She particularly identifies the reasons why she attended at the location where the incident occurred, her understanding of the manner in which the events unfolded, and her confusion and concerns about the actions taken by other individuals and the manner in which she was treated. The appellant's representations also ask questions about the reasons why certain events unfolded as they did, and why certain individuals acted in the manner in which they did. The appellant also identifies the impact the event had on her.

[46] In support of her position, the appellant provides additional documentation, including statements provided by individuals in support of the appellant and of her interest in obtaining the information about the incident.

Findings

[47] On my review of the representations of the parties, the circumstances of this case, and particularly the information that was disclosed to the appellant and the limited withheld portions of the record at issue, I am satisfied that the police properly exercised their discretion in deciding not to disclose the remaining portions of the record. I am satisfied that the police have not made this decision in bad faith or for an improper purpose, nor have they taken into account irrelevant considerations or failed to take into account relevant ones.

[48] I note that the police granted access to the personal information relating directly to the appellant and the name of one affected individual, as well as the complete narrative details of the occurrence, and also the names of officers or staff involved with the incident. The police have only withheld the limited personal information identified above and the police code information.

[49] I have also considered the representations provided by the appellant, including the supporting documentation she provided. It is clear from this material that the appellant has a keen interest in any information relating to the incident. However, upon my review of the limited information at issue in this appeal, and the significant information already provided to the appellant (including the complete narratives contained in the record), I am satisfied that the police properly exercised their discretion to withhold the information remaining at issue. I also note that, in my view, the limited information at issue will not address the appellant's concerns about the incident or directly answer the questions she has about the incident.

[50] In the circumstances, I find that the police properly exercised their discretion to deny access to the withheld portions of the record under sections 8 and 38.

Issue E: Did the institution conduct a reasonable search for records?

[51] In appeals involving a claim that additional responsive records exist, as is the case in this appeal, the issue to be decided is whether the police have conducted a reasonable search for the records as required by section 17 of the *Act*. If I am satisfied that the search was reasonable in the circumstances, the police's decision will be upheld. If I am not satisfied, further searches may be ordered.

[52] A number of previous orders have identified the requirements in reasonable search appeals.⁹ In Order PO-1744, the adjudicator made the following statement with respect to the requirements of reasonable search appeals:

... the *Act* does not require [the institution] to prove with absolute certainty that records do not exist. [The institution] must, however, provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request (Order M-909).

[53] I agree with this statement, and have applied this approach in previous orders.¹⁰

[54] Where a requester provides sufficient detail about the records that he/she is seeking and the institution indicates that records or further records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records that are responsive to the request. The *Act* does not require the institution to prove with absolute certainty that records or further records do not exist. However, in my view, in order to properly discharge its obligations under the *Act*, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

[55] Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

Representations

[56] The police provided representations in support of their position that the search conducted for responsive records was reasonable. The police submit:

During mediation the appellant was insistent that more records existed. In the appellant's original request it was stated "*all reports*" and gave the date of [a specified date] and a location of [an address in Hamilton].

⁹ Orders M-282, P-458, P-535, M-909, PO-1744, PO-1920 and PO-3535.

¹⁰ See, for example, Orders PO-3114, PO-3494 and PO-3527.

Further searches were conducted through our RMS (Records Management System) using the search criteria of the appellant's name. Only one incident report was located for that date. The appellant was given access to "all reports" for that date and location. There was nothing else involving this appellant in our system for that day. ... [emphasis by police]

[57] The appellant was invited to address this issue, and provided with a copy of the representations of the police. The appellant's representations do not directly address this issue.

Findings

[58] As set out above, in appeals involving a claim that additional responsive records exist, the issue to be decided is whether the police have conducted a reasonable search for the records as required by section 17 of the *Act*. If I am satisfied that the police's search for responsive records was reasonable in the circumstances, the police's decision will be upheld. If I am not satisfied, I may order the police to conduct additional searches.

[59] A reasonable search is one where an experienced employee, expending reasonable effort, conducts a search to identify any records that are reasonably related to the request.¹¹ In addition, the following excerpt from Order M-909 explains the obligation of an institution to conduct a reasonable search for records:

[...] an institution has met its obligations under the *Act* by providing experienced employees who expend a reasonable effort to conduct the search, in areas where the responsive records are likely to be located. In the final analysis, the identification of responsive records must rely on the experience and judgment of the individual conducting the search.

[60] I have considered the parties' representations and/or comments and have reviewed the record that the police located and disclosed (in part) to the appellant. In the circumstances of this appeal, I find that the police have provided sufficient evidence to establish that they conducted a reasonable search for responsive records, as required by section 17 of the *Act*.

[61] First, I find the appellant's request to be clear and sufficiently detailed so that clarification by the police was unnecessary. The appellant sought "all records" related to one specific incident on a particular date at a specified location.

[62] Second, I find that the police's representations adequately address the requirements of section 17 of the *Act*. The representations of the police identify that an initial search was conducted and that further searches were conducted through their "Record Management System" after the appellant insisted during mediation that more records should exist. Using the appellant's name as a search criterion, only the one

¹¹ Order M-909.

incident report was found for the specified date and location. The police did not indicate whether additional records existed in relation to other dates; however, based on the unambiguous wording of the request, I find that, if such records do exist, the police were reasonable to conclude that only records pertaining to the specified incident were responsive to the request.

[63] Third, I have considered the appellant's comments regarding her prior interactions with the police and/or the justice system. These comments do not provide any basis for me to find that additional records exist in relation to the specified incident found in her access request. While it may be that other records exist in relation to other matters, in this case, the appellant's request was unambiguous in seeking access to records related to one particular incident.

[64] As a result, I find that the police conducted a reasonable search for responsive records as required by section 17 of the *Act*.

ORDER:

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

Original Signed By: _____
Frank DeVries
Senior Adjudicator

_____ May 31, 2016