

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3547

Appeal MA16-468

London Police Services Board

December 28, 2017

Summary: The London Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* for information relating to a particular charge summary involving the requester. The police denied access to the information at issue in part. The adjudicator partially upholds the police's decision to deny access under section 38(a), in conjunction with section 8(1)(c). She does not uphold the police's decision to exempt information under section 38(a) with sections 8(2)(a) or 9(1)(d).

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 38(a), 8(1)(c), 8(2)(a), 9(1)(d), 9(2).

OVERVIEW:

[1] The London Police Services Board (the police) received a request, under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for information relating to a particular charge summary involving the requester.

[2] The police granted partial access to the records. Portions of the records were denied in accordance with the discretionary exemptions in section 38(b) (personal privacy) and section 38(a) (discretion to refuse requester's own information), in conjunction with sections 7(1) (advice or recommendations), 8 (law enforcement), 9(1)(d) (relations with other governments), and 12 (solicitor-client privilege), as well as the exclusion in 52(3)3 (employment or labour relations) of the *Act*.

[3] The requester (now appellant) appealed the decision to this office.

[4] During the course of mediation, the appellant advised the mediator that he was no longer pursuing access to the withheld information on the following pages: 3, 5, 7, 35-37, 39, 57, 60-62, 68, 71-73, and 77. Accordingly, these pages and section 52(3)3 of the *Act* are no longer at issue in the appeal. The appellant is also not seeking access to the first severance on page 41 and accordingly, this information is also not at issue.

[5] The mediator discussed the non-responsive claim being made to the information on pages 19, 20, 54, and 55 with the police. The police clarified they were not relying on the non-responsive claim, and that sections 38(b) in conjunction with 14(3)(b) of the *Act* was the intended exemption to withhold the portions of information in each of these pages.

[6] The mediator also confirmed with the police that section 12 was not being applied to any of the information in the records. Accordingly, this section is no longer at issue in the appeal.

[7] The appellant advised the mediator he wished to pursue access to the remaining withheld information in the records. Accordingly, the appeal proceeded to the adjudication stage where an adjudicator conducts an inquiry.

[8] I sought the representations of the police and the persons whose personal information may be contained in the records (the affected persons), as well as the other government for which section 9(1)(d) has been claimed. I received the consent of the affected persons and the other government to disclose their information in the records.

[9] As a result, the police disclosed to the appellant pages 17, 19, 20, 52, 54 and 55 of the records. Therefore, these pages are no longer at issue in this appeal. As section 8(1)(d) was only claimed for page 17, this exemption is no longer at issue.

[10] Furthermore, as stated by the police in their representations, section 38(b) is no longer at issue, as it was only claimed for the information at issue in pages 19, 20, 54 and 55, which have been disclosed to the appellant.

[11] The police provided representations, portions of which were confidential.¹ I provided the appellant with a copy of the police's representations, less the confidential portions. I then received representations from the appellant.

[12] In this order, I partially uphold the police's decision to deny access under section 38(a), in conjunction with section 8(1)(c). I do not uphold the police's decision to

¹ The police refused to amend their representations on section 9(1)(d) after receipt of the consents from the other government. As well, I will only be referring to the non-confidential portions of the police's representations in this order, but in making my determination I will be considering the police's representations in their entirety.

exempt information under section 38(a) with sections 8(2)(a) or 9(1)(d).

RECORDS:

[13] The following are the only portions of records that remain at issue in the appeal:

- Record #1 London Police Service Call Hardcopy CP 15-136550

Pages: 15, 21-22, 24-28, and 30

- Record #2 London Police Service Call Hardcopy CP 15-130610

Pages: 41 (second severance only), 47, 48, 50-51, 56, 58, 59, 67, 69, 70, 74, 75, and 76

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) (right of access to one's own personal information), in conjunction with the section 8 law enforcement exemption, apply to the information at issue?
- C. Does the discretionary exemption at section 38(a) (right of access to one's own personal information), in conjunction with the section 9(1)(d) (relations with other governments) exemption, apply to the information at issue?
- D. Did the institution exercise its discretion under section 38(a)? 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?

[14] 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;

[15] 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.²

[16] 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.³

[17] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something

² Order 11.

³ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

of a personal nature about the individual.⁴

[18] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁵

[19] The police state that they investigated a "theft complaint" occurrence and that during this investigation, they spoke to the appellant and determined that there were no suspects in the alleged theft. They also discuss some statements the appellant made during this encounter.

[20] The police, therefore, submit that the records contain the personal information of identifiable individuals, including the appellant.

Analysis/Findings

[21] I agree with the police that the records contain the personal information of the appellant and other identifiable individuals in their personal capacity, including identifying numbers, information about their home address and telephone number, and the views or opinions of another individual about the individual, in accordance with paragraphs (c), (d) and (g) of the definition of personal information on section 2(1).⁶

B. Does the discretionary exemption at section 38(a) (right of access to one's own personal information), in conjunction with the section 8 law enforcement exemption, apply to the information at issue?

[22] 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.

[23] 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.

[24] 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

⁴ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁵ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

⁶ Other individuals' personal information has been disclosed to the appellant. Therefore, section 38(b) is no longer at issue.

grant requesters access to their personal information.⁷

[25] Where access is denied under section 38(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

[26] In this case, the institution relies on section 38(a), in conjunction with sections 8(1)(c) and 8(2)(a), which read:

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

(c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

(2) A head may refuse to disclose a record,

(a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

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

"law enforcement" means,

(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, or

(c) the conduct of proceedings referred to in clause (b)

[28] The term "law enforcement" has covered the following situations:

- a municipality's investigation into a possible violation of a municipal by-law.⁸
- a police investigation into a possible violation of the *Criminal Code*.⁹
- a children's aid society investigation under the *Child and Family Services Act*.¹⁰

⁷ Order M-352.

⁸ Orders M-16 and MO-1245.

⁹ Orders M-202 and PO-2085.

¹⁰ Order MO-1416.

- Fire Marshal fire code inspections under the *Fire Protection and Prevention Act, 1997*.¹¹

[29] This office has stated that “law enforcement” does not apply to the following situations:

- an internal investigation by the institution under the *Training Schools Act* where the institution lacked the authority to enforce or regulate compliance with any law.¹²
- a Coroner’s investigation or inquest under the *Coroner’s Act*, which lacked the power to impose sanctions.¹³

[30] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.¹⁴

[31] It is not enough for an institution to take the position that the harms under section 8 are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter.¹⁵ The institution must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.¹⁶

[32] The police provided confidential representations on this issue, except for a portion of their representations on section 8(2)(a), where they state:

...the information contained on these pages [pages 58 and 59] is a report, that was prepared in the course of law enforcement, and that it was prepared by an agency which has the function of enforcing and regulating compliance with a law.

[33] The appellant did not address this or any other issues directly in his representations.

¹¹ Order MO-1337-I.

¹² Order P-352, upheld on judicial review in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (1993), 102 D.L.R. (4th) 602, reversed on other grounds (1994), 107 D.L.R. (4th) 454 (C.A.).

¹³ Order P-1117.

¹⁴ *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

¹⁵ Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

¹⁶ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

Analysis/Findings re section 8(1)(c): investigative techniques and procedures

[34] The police rely on section 8(1)(c) for information on pages 15, 21, 22, 30, 41, 48, 50, 51 and 56 of the records.

[35] In the Notice of Inquiry, the police were advised that:

In order to meet the “investigative technique or procedure” test, 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.¹⁷

The techniques or procedures must be “investigative”. The exemption will not apply to “enforcement” techniques or procedures.¹⁸

[36] In the Notice of Inquiry, the police were asked to answer the following questions:

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.

[37] In its representations, the police identified specific investigative techniques or procedures contained in the records, but did not address the specific pages at issue in this appeal.

[38] I agree with the police’s confidential representations that section 8(1)(c) applies to pages 15, 22, 30, and 48. These pages reveal specific investigative techniques or procedures and disclosure could reasonably be expected to hinder or compromise their effective utilization.

[39] As I have found the information at issue on pages 15, 22, 30 and 48 to be subject to section 8(1)(c), in conjunction with section 38(a), this information is exempt subject to my review of the police’s exercise of discretion.

¹⁷ Orders P-170, P-1487, MO-2347-I and PO-2751.

¹⁸ Orders PO-2034 and P-1340.

[40] I find that pages 50 and 51 do not contain information that could reasonably be expected to compromise the effective utilization of an investigative technique or procedure. These pages reflect information resulting from a phone call by the appellant to the police. They concern information the police exchanged with another government agency, but the police have not claimed section 9(1) as an exemption for this information. The other government agency has also provided its consent for disclosure of information related to it.

[41] Therefore, I find that section 8(1)(c) does not apply to exempt pages 50 and 51. As no other exemptions have been claimed for this information, I will order it disclosed.

[42] I do not agree with the police that section 8(1)(c) applies to the information severed from pages 21, 41, and 56, which is one short severance on each page. The single short severances on each of these pages do not outline a specific investigative technique or procedure, nor have I been provided with sufficient evidence to establish how disclosure could reasonably be expected to hinder or compromise the effective utilization of such a technique or procedure.

[43] As no other exemptions have been claimed for this information, I will order pages 21, 41 and 56 disclosed, less the first severance on page 41, which the appellant is not seeking access to, as noted above.

Analysis/Findings re section 8(2)(a): law enforcement report

[44] In order for a record to qualify for exemption under section 8(2)(a) of the *Act*, the institution must satisfy each part of the following three-part test:

1. the record must be a report;
2. the report must have been prepared in the course of law enforcement, inspections or investigations; and
3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.¹⁹

[45] The word "report" means "a formal statement or account of the results of the collation and consideration of information". Generally, results would not include mere observations or recordings of fact.²⁰ The title of a document does not determine whether it is a report, although it may be relevant to the issue.²¹

[46] The police rely on section 8(2)(a) (law enforcement report) for pages 58 to 59. I find that these pages do not constitute a report within the meaning of section 8(2)(a).

¹⁹ Orders P-200 and P-324.

²⁰ Orders P-200, MO-1238 and MO-1337-I.

²¹ Order MO-1337-I.

Pages 58 and 59 are two pages of a form that contains questions. The form requires the answers to questions to be checked off concerning the appellant. The form has 19 questions and only five questions have been answered on this form.

[47] I find that the questions answered on the form that comprises pages 58 and 59 are mere observations or recordings of fact, and do not constitute a formal statement or account of the results of the collation and consideration of information.

[48] As section 8(2)(a) does not apply to pages 58 and 59, and as no other exemptions have been claimed for these pages, I will order them disclosed.

Conclusion re section 8

[49] In conclusion, I have found that the information at issue in pages 15, 22, 30 and 48 is subject to section 38(a) with section 8(1)(c). Therefore, there is no need for me to also consider whether sections 7(1) or 9(1)(d) apply to pages 15, 30 and 48. As section 7(1) was only claimed for pages 15, 30 and 48, this exemption is no longer at issue.

[50] I have found that the remaining pages that section 38(a), with section 8, has been claimed for, namely, pages 21, 41, 50, 51, 56, 58 and 59 are not subject to this exemption. No other discretionary exemptions have been claimed for this information, nor do any mandatory exemptions apply. Therefore, I am ordering these pages disclosed.

C. Does the discretionary exemption at section 38(a) (right of access to one's own personal information), in conjunction with the section 9(1)(d) (relations with other governments) exemption, apply to the information at issue?

[51] 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.

[52] 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.

[53] 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.²²

[54] Where access is denied under section 38(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

[55] In this case, the institution relies on section 38(a), in conjunction with section 9(1)(d), for pages 15, 24-28, 30, 48, 52, and 67-77. As I have found pages 15, 30 and 48 subject to section 8(1)(c), there is no need for me to also consider whether section 9(1)(d) applies to the information at issue in these three pages.

[56] Section 9 states:

(1) A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,

- (a) the Government of Canada;
- (b) the Government of Ontario or the government of a province or territory in Canada;
- (c) the government of a foreign country or state;
- (d) an agency of a government referred to in clause (a), (b) or (c); or
- (e) an international organization of states or a body of such an organization.

(2) A head shall disclose a record to which subsection (1) applies if the government, agency or organization from which the information was received consents to the disclosure.

[57] The purpose of this exemption is to ensure that governments under the jurisdiction of the *Act* continue to obtain records which other governments might otherwise be unwilling to supply without having this protection from disclosure".²³

[58] If disclosure of a record would permit the drawing of accurate inferences with respect to information received from another government, it may be said to "reveal" the information received.²⁴

²² Order M-352.

²³ Order M-912.

²⁴ Order P-1552.

[59] For a record to qualify for this exemption, the institution must establish that:

1. disclosure of the record could reasonably be expected to reveal information which it received from one of the governments, agencies or organizations listed in the section; and
2. the information was received by the institution in confidence.²⁵

[60] The focus of this exemption is to protect the interests of the supplier of information, and not the recipient. Generally, if the supplier indicates that it has no concerns about disclosure or vice versa, this can be a significant consideration in determining whether the information was received in confidence.²⁶

[61] The police provided confidential representations on this issue.

Analysis/Findings

[62] At issue is information found on pages 24 to 28, 52, and 67 to 77. The other government from which this information has been received has consented to the disclosure of this information.

[63] I have considered the police's representations. They did not provide representations on each page at issue, which comprise a number of different types of records. Many of these records are court forms, which appear to be documents that are publicly available.

[64] In many instances, it is not apparent what information was actually received from the other government. It also appears that much of the information in the pages at issue is information that the appellant is already aware of or that originated from the appellant.

[65] Taking into consideration the lack of record specific representations and that the other government has consented to the disclosure of the information that the police have claimed section 9(1)(d) for, I find that I do not have sufficient evidence to determine that any of the pages at issue contain information that was received in confidence from another government.

[66] Furthermore, as noted above, section 9(2) provides that a head shall disclose a record to which subsection (1) applies if the government, agency or organization from which the information was received consents to the disclosure. The police have received a copy of the consent from the other government. I find that section 9(2) applies to allow disclosure of the information for which section 9(1)(d) has been claimed.

²⁵ Orders MO-1581, MO-1896 and MO-2314.

²⁶ Orders M-844 and MO-2032-F.

[67] Accordingly, I find that the information at issue in pages 24 to 28, 52, and 67 to 77 is not exempt under section 9(1)(d). As no other exemptions have been claimed for this information and no mandatory exemptions apply, I will order this information disclosed.

D. Did the institution exercise its discretion under section 38(a)? If so, should this office uphold the exercise of discretion?

[68] The section 38(a) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[69] 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.

[70] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.²⁷ This office may not, however, substitute its own discretion for that of the institution.²⁸

[71] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:²⁹

- 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

²⁷ Order MO-1573.

²⁸ Section 43(2).

²⁹ Orders P-344 and MO-1573.

- 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.

[72] I have found that the information at issue in pages 15, 22, 30 and 48 was subject to the law enforcement exemption in section 38(a), with section 8(1)(c).

[73] The police state that the information was obtained in confidence and contains procedures currently in use, as well as advice and intelligence gathering. The police state that they also considered the appellant's right of access and determined that the protection of the described factors outweighed the right of access. They submit that disclosure could hinder police operations, techniques, procedures and the confidence of the public in assisting in police investigations. They state:

Further, consideration was given to the effective utilization of such information with that of the right of access and it was deemed the protection of this information outweighs disclosure of this information to the appellant.

Analysis/Findings

[74] Based on my review of the information at issue and the police's representations, I find that they exercised their discretion in a proper manner concerning the information I have found subject to section 38(a), with section 8(1)(c).

[75] I find that the police took into account relevant considerations and did not take into account irrelevant considerations in determining that the information at issue on pages 15, 22, 30 and 48 is subject to section 38(a), with section 8(1)(c). Therefore, I am upholding the police's exercise of discretion concerning this information and find that it is exempt.

ORDER:

1. I uphold the police's decision to deny access to the information at issue on pages 15, 22, 30 and 48 and the first severance on page 41 of the records.
2. I order the police to disclose the remaining information in the records to the appellant by **February 1, 2018** but not before **January 27, 2018**.

Original Signed by: _____

Diane Smith
Adjudicator

December 28, 2017 _____