Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3617

Appeal MA16-124

Halton Regional Police Services Board

May 29, 2018

Summary: The appellant seeks copies of correspondence between the police and the United States Federal Bureau of Investigation about an investigation of the appellant. The police refused to confirm or deny the existence of responsive records on the basis that any records, if they exist, would be subject to law enforcement exemptions (section 8(3)), or to the personal privacy exemption (14(5)) of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). As any responsive records, if they exist, would contain the personal information of the appellant (as well as that of other individuals), the claims were amended at the adjudication stage to include reference to section 38 (discretion to deny requester's own personal information). In this order, the adjudicator does not uphold the police's refusal to confirm or deny the existence of records under either of the grounds claimed, because she does not accept that disclosure of the very fact of their existence or non-existence would itself convey information that ought to be withheld under the *Act*. She accordingly orders the police to issue a decision under the *Act*, identifying any responsive records that may exist.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 8(1), 8(3), 14(5), 38(a) and 38(b).

Orders and Investigation Reports Considered: Orders M-615 and MO-2402.

OVERVIEW:

[1] The appellant reports that she was the subject of an investigation by United States law enforcement agencies, aided by the Halton Regional Police Services Board (the police), as a result of allegations of parental kidnapping made against her by her former spouse. She made a request to the police under the *Municipal Freedom of*

Information and Protection of Privacy Act (the *Act*) for access to records relating to any investigation of her by the United States Federal Bureau of Investigation (FBI) or Department of Justice, with the involvement of the police, during a specified period of time.

[2] After discussion with the police, the appellant's request was clarified to encompass the following two categories of records for the specified time period:

1. Email and letter correspondence between two named police detectives and the FBI [about the appellant]; and

2. Police reports and police officers' notebook entries relating to occurrences involving the appellant.

[3] The police issued a decision granting the appellant partial access to records responsive to item 2 of her request.

[4] In respect of item 1 (correspondence with the FBI), the police relied on sections 8(3) and 14(5) of the *Act* to refuse to confirm or deny the existence of responsive records. These sections permit an institution to refuse to confirm or deny the existence of a record if a law enforcement-related exemption would apply to the record (section 8(3)), or if its disclosure would constitute an unjustified invasion of personal privacy (section 14(5)).

[5] The appellant was dissatisfied with the police's decision. She resubmitted her request to the police, along with copies of records that, she claims, she received directly from the FBI and prove that the police have FBI-related records that are responsive to her request.

[6] The police maintained their decision to refuse to confirm or deny the existence of responsive records on the basis of sections 8(3) and 14(5).

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

[8] During the mediation stage of the appeal process, the appellant confirmed that she is only appealing the police's decision to refuse to confirm or deny the existence of records responsive to item 1 of her request, and is not appealing the police's access decision in respect of item 2.

[9] As the appeal could not be resolved through mediation, it was moved to the adjudication stage of the appeal process for a written inquiry under the *Act*. During this stage, this office sought and received representations from the police and the appellant, which were shared in accordance with this office's *Code of Procedure* and *Practice Direction 7*.

[10] The Notice of Inquiry sent to the police asked that they address the appellant's evidence that there exist records of correspondence between the police and the FBI.

[11] The police were also asked to consider the application of the exemptions at section 38 in the circumstances of this appeal. Section 38 contains the applicable exemptions when an institution denies access to a requester's own personal information. The adjudicator observed that the appellant seeks records relating to an investigation about her, and that it is therefore likely that any responsive records would contain the appellant's personal information. The adjudicator invited the police to consider and to provide representations on the application of section 38(a) (discretion to refuse requester's own information) in connection with their section 8(3) claim, and section 38(b) (personal privacy) in connection with their section 14(5) claim.

[12] The police accepted that any responsive records would contain the appellant's own personal information, and accordingly claimed sections 38(a) and (b) in conjunction with their existing claims.

[13] The appellant provided responding representations.

[14] The appeal was then transferred to me.

[15] In this order, I do not uphold the police's decision to refuse to confirm or deny the existence of responsive records, because I do not accept that disclosure of the very fact of their existence or non-existence would itself convey information that ought to be withheld under the *Act*. Accordingly, I order the police to issue a decision on access to any responsive records that may exist.

ISSUES:

A. Would the records, if they exist, contain "personal information" as defined in section 2(1) of the *Act*, and, if so, to whom would it relate?

B. Does the discretionary exemption at section 38(a), read in conjunction with section 8(3) of the *Act*, apply in the circumstances of this appeal?

C. Does the discretionary exemption at section 38(b), read in conjunction with section 14(5) of the *Act*, apply in the circumstances of this appeal?

DISCUSSION:

A. Would the records, if they exist, contain "personal information" as defined in section 2(1) of the *Act*, and, if so, to whom would it relate?

[16] In order for section 14(5) to apply, as the police have claimed, they must show that disclosure of responsive records, if they exist, would constitute an unjustified invasion of personal privacy. An unjustified invasion of personal privacy can only result from the disclosure of personal information.

[17] In addition, as noted above, the nature of the appellant's request gives rise to

the possibility that responsive records would contain her own personal information. Different exemption claims apply where an institution denies access to a requester's own personal information.

[18] It is necessary, therefore, to first decide whether records, if they exist, would contain "personal information," and, if so, to whom that information would relate.

[19] "Personal information" is defined at 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,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

(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[.]

[20] 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]

[21] I am satisfied that records, if they exist, would contain the personal information of the appellant. Records responsive to a request for correspondence between the police and the FBI about their investigation of the appellant would clearly contain information about her. At a minimum, such records would reveal the involvement of the police and the FBI in the appellant's affairs, which qualifies as the appellant's personal information within the meaning of paragraph (h). I also find it likely that records of an investigation into the appellant would contain other personal information about her, including descriptive information and information about any criminal and other history of the appellant, as set out in paragraphs (a) and (b), and any known identifying and contact information for the appellant, as set out in paragraphs (c) and (d).

[22] I also accept that responsive records, if they exist, would contain personal information of individuals other than the appellant. The appellant identifies a number of individuals, including her former spouse and her child, whose personal information would appear in responsive records because of their connection to her and the subject

[1] Order 11.

matter of any investigation of her by the FBI. I agree that the personal information of these individuals, and perhaps others, would appear in any responsive records. Among other things, the appearance of these individuals' names in such records would reveal their connection to the appellant and to a matter of interest to the police and the FBI. This qualifies as their personal information within the meaning of paragraph (h). I observe that, through their reliance on section 14(5), the police also acknowledge that the personal information of other individuals would appear in any responsive records.

[23] I conclude that responsive records, if they exist, would contain the personal information of the appellant. They would also contain the personal information of other individuals.

[24] Because the records would contain the appellant's personal information, the police's refusal to confirm or deny the existence of records is made through section 38 of the *Act*.

B. Does the discretionary exemption at section 38(a), read in conjunction with section 8(3) of the *Act*, apply in the circumstances of this appeal?

[25] Section 38(a) of the *Act* 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.

[26] 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.[2]

[27] 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.

[28] In this case, the police rely on section 38(a) in conjunction with section 8(3). Section 8(3) states:

A head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) applies.

[29] This section acknowledges the fact that in order to carry out their mandates, law enforcement agencies must sometimes have the ability to withhold information in answering requests under the *Act*. However, it is the rare case where disclosure of the mere existence of a record would frustrate an ongoing investigation or intelligence-gathering activity.[3]

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[2] Order M-352.
[3] Orders P-255 and PO-1656.

[30] For section 8(3) to apply, the institution must demonstrate that:

1. the records (if they exist) would qualify for exemption under sections 8(1) or (2), and

2. disclosure of the fact that records exist (or do not exist) would itself convey information that could reasonably be expected to compromise the effectiveness of an existing or reasonably contemplated law enforcement activity.[4]

[31] Because of my finding, below, it is only necessary for me to address part two of the section 8(3) test.

Part two: Would disclosure of the fact that records exist (or do not exist) itself convey information that could reasonably be expected to compromise the effectiveness of an existing or reasonably contemplated law enforcement activity?

[32] Under this part of the section 8(3) test, the police must establish that disclosure of the very fact of the existence or non-existence of responsive records could reasonably be expected to compromise the effectiveness of an existing or reasonably contemplated law enforcement activity.

[33] The police were asked to comment on evidence provided by the appellant that, she asserts, proves the existence of communications between the police and the FBI in relation to an investigation of her. The appellant reports that she obtained, through an access-to-information request to the FBI, copies of correspondence between the police and the FBI about her. She provided copies of this correspondence to the police to accompany her access request; she also provided copies to this office during the course of this appeal.

[34] The police acknowledge that the appellant has claimed that information responsive to her request exists, and that she has received a package from the FBI. The police do not otherwise address the appellant's claim.

[35] On their face, the documents provided by the appellant appear to be responsive to her request. Without making a determination on whether these documents are, in fact, responsive, I observe that the appellant's evidence raises at least the possibility that responsive records may exist, and, consequently, that the appellant may be aware of law enforcement activity concerning her. This in turns raises questions about a claim that disclosure of the fact that records exist or do not exist would compromise the effectiveness of a law enforcement activity. The police do not address this matter at all. In particular, they do not explain the impact, if any, the appellant's evidence had on their decision to refuse to confirm or deny the existence of records on this ground. As I lack evidence from the police on this matter, I find they have not discharged their burden under this part of the test for the application of section 8(3).

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[4] Order PO-1656.

[36] As a result, the police cannot rely on section 8(3) to refuse to confirm or deny the existence of responsive records.

C. Does the discretionary exemption at section 38(b), read in conjunction with section 14(5) of the *Act*, apply in the circumstances of this appeal?

[37] I found, above, that any responsive records would contain the personal information of the appellant as well as that of other individuals.

[38] Where records contain a requester's own personal information, access to the records is addressed under Part II of the *Act* and the discretionary exemptions at section 38 may apply. Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, an institution may refuse to disclose that information to the requester, or may exercise its discretion to disclose the information to the requester.

[39] By contrast, where records contain the personal information of individuals other than the requester but not that of the requester, access to the records is addressed under Part I of the *Act* and the mandatory exemptions at section 14(1) may apply. Under section 14(1), the institution is prohibited from disclosing the personal information of other individuals unless one of the exceptions in sections 14(1)(a) to (e) applies, or unless disclosure would not be an unjustified invasion of personal privacy under section 14(1)(f).

[40] The police rely on section 14(5), which is found in Part I of the *Act*, to refuse to confirm or deny the existence of responsive records on the basis that disclosure would constitute an unjustified invasion of personal privacy.

[41] Section 38 contains no parallel provision to section 14(5). Since I have found that any responsive records would contain the appellant's personal information as well as the personal information of other individuals, the question arises whether section 14(5) can apply in the context of a request for one's own personal information. This office has found that it can. Specifically, in Order M-615, Adjudicator John Higgins stated:

Section 37(2) provides that certain sections from Part I of the Act (where section 14(5) is found) apply to requests under Part II (which deals with requests such as the present one, for records which contain the requester's own personal information). Section 14(5) is not one of the sections listed in section 37(2). This could lead to the conclusion that section 14(5) cannot apply to requests for records which contain one's own personal information.

However, in my view, such an interpretation would thwart the legislative intention behind section 14(5). Like section 38(b), section 14(5) is intended to provide a means for institutions to protect the personal privacy of individuals other than the requester. Privacy protection is one of the primary aims of the Act.

Therefore, in furtherance of the legislative aim of protecting personal privacy, I find that section 14(5) may be invoked to refuse to confirm or deny the existence of a record if its requirements are met, even if the record contains the requester's own personal information.

[42] This reasoning has been adopted in a number of subsequent orders.[5] I agree with this approach, and I adopt it in the circumstances of this appeal. Accordingly, I will consider whether section 14(5) applies in this case. This section reads:

A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

[43] A requester in a section 14(5) situation is in a very different position from other requesters who have been denied access under the *Act*. By invoking section 14(5), the institution is denying the requester the right to know whether a record exists, even when one does not. This section provides institutions with a significant discretionary power that should be exercised only in rare cases.[6]

[44] Before an institution may exercise its discretion to invoke section 14(5), it must provide sufficient evidence to establish both of the following requirements:

1. Disclosure of the record (if it exists) would constitute an unjustified invasion of personal privacy; and

2. Disclosure of the fact that the record exists (or does not exist) would in itself convey information to the requester, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

[45] The Ontario Court of Appeal has upheld this approach to the interpretation of section 21(5) of the *Freedom of Information and Protection of Privacy Act*, which is identical to section 14(5) of the *Act*, stating:

The Commissioner's reading of s. 21(5) requires that in order to exercise his discretion to refuse to confirm or deny the report's existence the Minister must be able to show that disclosure of its mere existence would itself be an unjustified invasion of personal privacy.7

[46] Because of my finding, below, it is only necessary for me to address part two of the section 14(5) test.

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[5] Among them, Orders MO-2984, MO-3235 and MO-3293.
[6] Order P-339.
[7] Orders PO-1809 and PO-1810, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 4813 (C.A.), leave to appeal to S.C.C. dismissed (May 19, 2005), S.C.C. 30802.

Part two: Would disclosure of the fact that the records exist (or do not exist) itself be an unjustified invasion of personal privacy?

[47] Under this part of the section 14(5) test, the institution must demonstrate that disclosure of the fact that a record exists (or does not exist) would in itself convey information to the appellant, and that the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

[48] The police provided confidential representations in support of its arguments under part two, which I have considered in arriving at my decision in this matter. In its non-confidential representations, the police urge me to follow the finding of the adjudicator in Order MO-2402. In that order, the adjudicator upheld an institution's refusal to confirm or deny the existence of records relating to an investigation of a named third party. Under part two of the test for the application of section 14(5), the adjudicator accepted that disclosure of the very fact that records exist or do not exist would be an unjustified invasion of personal privacy, as it would reveal whether that party had been involved with the police.

[49] The facts in Order MO-2402 are distinguishable from the present circumstances. In this case, the appellant seeks records about the police's investigation into her own activities. The police suggest that simply confirming or denying the existence of records could reveal personal information about other individuals, by permitting a particular inference (which they describe in confidential representations) to be drawn about these individuals, and that such disclosure would amount to an unjustified invasion of personal privacy. I disagree.

[50] First, I am not persuaded that the particular inference described by the police would necessarily follow from a statement that responsive records exist or do not exist. This is quite unlike the situation in Order MO-2402, where disclosure of the fact that records exist or do not exist would indisputably reveal something of a personal nature about a third party.

[51] Second, even if I were to accept that confirming or denying the existence of records would lead to an inference that reveals something about other individuals, I am not persuaded that this would amount to an unjustified invasion of those individuals' personal privacy.

[52] In their representations on this issue, the police describe some kinds of personal information of third parties that could be expected to appear in responsive records, if they exist, and why this information would be exempt under section 38(b). In fact, the question under this part of the section 14(5) test is not about the contents of any responsive records that may exist, but instead whether the mere acknowledgement of their existence or non-existence would itself qualify for exemption. The police have not satisfied me that this is the case.

[53] Here I also find relevant the police's failure to address the appellant's evidence that responsive records may exist. The fact that the appellant may already be aware

that records exist or do not exist, and the potential absurdity of withholding this information from her in these circumstances, is, in my view, a factor for consideration in determining whether disclosure would be an unjustified invasion of personal privacy.[8]

[54] For these reasons, I do not uphold the police's refusal to confirm or deny the existence of records under section 14(5).

[55] As I do not uphold the police's refusal to confirm or deny the existence of responsive records on either of the grounds claimed, I will order the police to issue a decision to the appellant under the *Act*. In their decision, the police must identify any responsive records that may exist, as well as any applicable grounds for withholding all or parts of any such records.

[56] To provide the police with an opportunity to review this order and determine whether to apply for judicial review, I will delay its release to the appellant in accordance with order provision 3, below.

ORDER:

1. I do not uphold the police's decision under section 38(a), in conjunction with section 8(3).

2. I do not uphold the police's decision under section 38(b), in conjunction with section 14(5).

3. If I do not receive notice of an application for judicial review from the police by **June 20, 2018**, I will release a copy of this order to the appellant.

4. I order the police to make a decision under the *Act* in respect of item 1 of the appellant's request for information, treating the date of this order as the date of the request.

5. In order to verify compliance with order provision 4, I reserve the right to require the police to provide me with a copy of the decision letter issued to the appellant.

Original Signed By: May 29, 2018
Jenny Ryu
Adjudicator

[8] The absurd result principle may apply where a requester originally supplied the information or is otherwise aware of it. In such cases, the information may not be exempt under sections 14(1) or 38(b), because to withhold it would be absurd and inconsistent with the purpose of the exemption: Orders M-444 and MO-1323.