Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3640

Appeal MA17-194

Toronto Police Services Board

July 27, 2018

Summary: A request was submitted to the Toronto Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the requester's own information relating to an incident involving his wife. The police located a responsive record and granted partial access to it, denying access to portions pursuant to the discretionary personal privacy exemption at section 38(a) (discretion to refuse a requester's own information), read in conjunction with the law enforcement exemption at section 8(1)(l) of the *Act.* The police also withheld some of the information as not responsive to the request. The requester appealed the police's decision to withhold the information and indicated that additional responsive records should exist. In this order, the adjudicator finds that the information identified by the police as not responsive to the request is responsive and orders the police to issue an access decision with respect to it. She finds that section 38(a), read in conjunction with section 8(1)(l), applies to the information the police withheld under that exemption. She also finds that the police conducted a reasonable search for records responsive to the request.

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)(l), 17, 38(a).

Orders Considered: Order MO-2871.

OVERVIEW:

[1] A request was submitted to the Toronto Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access

to all of the requester's own information relating to a specific incident involving his wife, including his contact with the police following the incident.

[2] The police located one responsive record, a General Occurrence Report. Before making a final access decision, the police obtained the requester's wife's consent to disclose her personal information to the requester. The police granted partial access to the records, withholding portions of them pursuant to the discretionary personal privacy exemption at section 38(a), read in conjunction with the law enforcement exemption at section 8(1)(l) of the *Act*. The police also advised that some of the information contained in the records was not responsive to the request and that it had been severed on that basis.

[3] The requester, now the appellant, appealed the police's decision.

[4] The appellant's wife subsequently made a separate request to the police for a copy of her police file, in its entirety, in relation to the incident. That decision was also appealed to this office and is being addressed as a separate appeal, Appeal Number MA16-328.

[5] During mediation, the appellant advised that he is appealing the police's decision to withhold information under section 38(a), read in conjunction with section 8(1)(l) of the *Act*. He also seeks access to the information that the police have identified as not responsive to the request.

[6] Also during mediation, the appellant advised that he believes additional responsive records should exist. Specifically, he states that following the incident, he had a telephone conversation with a named officer and he believes that records documenting that conversation should exist. The police confirmed that they conducted a detailed search and that no additional records exist. However, during the mediation of the related appeal, Appeal Number MA16-328, the police located additional records related to that appeal. Amongst those additional records were police officer memorandum book notes that contained notes documenting a follow-up telephone conversation that a police officer had with the appellant about the incident. Those police officer notes relating to the conversation with the appellant were subsequently disclosed to him.

[7] At the conclusion of mediation, the appellant indicated that he is still not satisfied with the police's decision and is appealing the information that has been withheld. He also indicated that he continues to question the reasonableness of the police's search for responsive records.

[8] As a mediated resolution could not be reached, the appeal was transferred to the adjudication stage of the appeal process for an adjudicator to conduct an inquiry. I sought and received representations from the police which were shared with the appellant. The appellant provided representations in response.

[9] In this order, I find that the information identified by the police as not responsive

to the request is responsive and I order the police to issue an access decision with respect to it. I find that the discretionary exemption at section 38(a), read in conjunction with section 8(1)(l), applies to the information for which it has been claimed. Finally, I find that the police's search for records responsive to the request was reasonable.

RECORDS:

[10] The record at issue consists of a General Occurrence Report. The portions at issue are those that have been withheld on the basis that the exemption at section 38(a), read in conjunction with section 8(1)(l) applies, and on the basis that they are not responsive to the request.

ISSUES:

A. Is the information identified by the police as not responsive to the request, within the scope of the request?

B. Does the record contain "personal information" as defined in section 2(1) of the *Act* and, if so, to whom does it relate?

C. Does the discretionary exemption at section 38(a), read in conjunction with section 8(1)(l), apply to the information at issue?

D. Did the police conduct a reasonable search for responsive records?

DISCUSSION:

A. Is the information identified by the police as not responsive to the request, within the scope of the request?

[11] The appellant takes the position that the information in the General Occurrence Report that has been withheld by the police as not responsive to the request is, in fact, responsive and should be disclosed to him.

[12] It has been determined that institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[1] To be considered responsive to the request, records must "reasonably relate" to the request.[2]

[13] The police submit that the only information withheld from the record as not responsive is information pertaining to the Canadian Centre for Justice Statistics (CCJS).

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[1] Orders P-134 and P-880.
[2] Orders P-880 and PO-2661.

The appellant does not make any specific submissions with respect to this information.

[14] Having reviewed the specific information that the police have identified as not responsive to the request and having considered the police's representations, I find that it is responsive to the request. Although I am not convinced that the severed information would provide the appellant with new information or more information than he already has at his disposal, in my view, its content reasonably relates to the request. The request is for information relating to the specific incident documented in the General Occurrence Report. The section of the report that details information for the CCJS forms part of that General Occurrence Report. In the absence of further evidence from the police on why CCJS information found in the middle of a General Occurrence Report that relates specifically to the incident identified in the request is not responsive, I find that it is. Accordingly, I will order the police to issue an access decision with respect to the information identified as not responsive on pages 1 and 7 of the General Occurrence Report at issue.

B. Does the record contain "personal information" as defined in section 2(1) of the *Act* and, if so, to whom does it relate?

[15] The police have claimed that section 38(a), read in conjunction with the law enforcement exemption at section 8(1)(l), applies to withhold some of the information in the General Occurrence Report. For section 38(a) to apply, the information must contain the personal information of the appellant. The term "personal information" is defined in section 2(1) of the *Act* 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 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;

[16] 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.[3]

[17] 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.[4]

[18] The police submit that the responsive record contains the personal information of the appellant and his wife. They submit that upon written authorization of the appellant's wife, access was granted to her information.

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

[20] Having reviewed the General Occurrence Report that is responsive to the request, it clearly contains the personal information of both the appellant and his wife. The personal information includes information relating to their race, national origin, colour, age, sex and marital status (paragraph (a)), information relating to their medical, psychiatric, and psychological history (paragraph (b)), identifying numbers or particulars, their address and telephone numbers (paragraph (d)), their personal opinions or views of other individuals about them (paragraph (g)), and their names where they appear with other personal information relating to them (paragraph (h)).

[21] Given that I find the record contains the personal information of the appellant, I must now consider whether the discretionary personal privacy exemption at section 38(a), read in conjunction with the law enforcement exemption at section 8(1)(l), applies to the record.

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[3] Order 11.
[4] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

C. Does the discretionary exemption at section 38(a), read in conjunction with section 8(1)(l), apply to the information at issue?

[22] Section 36(1) of the *Act* grants 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 grant requesters access to their own personal information.[5] 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.

[25] In this case, the police rely on section 38(a), read in conjunction with the law enforcement exemption at section 8(1)(l), which reads as follows:

> 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.

[26] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[6]

[27] 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.[7] 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

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[5] Order M-352.
[6] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[7] Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

consequences.[8]

[28] The police submit that the information it has withheld under section 8(1)(l) consists of police ten-code information. They explain that the use of ten-codes in law enforcement is an effective and efficient means of conveying a specific message without publicly identifying its true meaning. They submit that the use of the word "code" implies the intention that the information not be widely disclosed.

[29] The police go on to submit that by encoding a particular meaning within a ten-code, they seek to reduce public knowledge of that meaning in order to circumvent detection and reduce the possibility of action being taken to counter the actions of police personnel in responding to situations.

[30] With respect to the specific ten-code information at issue in the record, the police submit that it does not, in isolation, provide a specific meaning, but when read in the context of the record its meaning would easily be revealed.

[31] Numerous orders issued by this office have considered the application of section 8(1)(l) to police code information. In Order MO-2871, Adjudicator Diane Smith found that the disclosure of ten-codes could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. She stated:

> This office has issued numerous orders with respect to the disclosure of police codes and has consistently found that section 8(1)(l)9 applies to "10-codes" (see Orders M-93, M-757, MO-1715 and PO-1665), as well as other coded information such as "900 codes" (see Order MO-2014). These orders adopted the reasoning of Adjudicator Laurel Cropley in Order PO-1665:
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> > In my view, disclosure of the "ten-codes" would leave OPP officers more vulnerable and compromise their ability to provide effective policing services as it would be easier for individuals engaged in illegal activities to carry them out and would jeopardize the safety of OPP officers who communicate with each other on publicly accessible radio transmission space...

[32] I adopt these previous findings that police ten-code information is subject to the law enforcement exemption at section 8(1)(l) of the *Act*.

[33] The information that the police have severed from the record at issue pursuant to section 38(a), read in conjunction section 8(1)(l), clearly consists of ten-code information. I accept that disclosure of this type of information has consistently been found to reasonably be expected to facilitate the commission of an unlawful act or

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

[9] Section 8(1)(l) of the *Municipal Freedom of Information and Protection of Privacy Act* (the municipal *Act*) is the equivalent of section 14(1)(l) of the *Freedom of Information and Protection of Privacy Act*.

hamper the control of crime. I also accept that the disclosure of this information could reasonably be expected to compromise the ability of officers to provide effective policing services by enabling individuals engaged in illegal activities to conduct such activities. Subject to my review of the police's exercise of discretion, I find that this information is exempt under section 38(a), read in conjunction with section 8(1)(l) of the *Act*.

[34] As section 38(a) is a discretionary exemption, it permits the police to disclose information, despite the fact that it can withhold it. The police must exercise their discretion. On appeal, this office may determine whether the institution failed to do so. This office 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 consideration
- it fails to take into account relevant consideration.

[35] In the circumstances of this appeal, the police submit that they considered the information at issue and they exercised their discretion not to disclose the police ten-code information to the appellant. They explain that in making their decision they considered that although the incident to which the record relates is non-criminal in nature, the release of any information to an appellant must be considered release to the public as a whole. They submit that in exercising their discretion, they weighed the importance of keeping police ten-codes and their meanings confidential against the appellant's right of access and decided to withhold them. They submit that disclosure of the ten-codes reduces their effectiveness to the point of rendering them useless and they determined that this outweighs the appellant's right of access to this information.

[36] Based on the police's representations and the information at issue in the records, I accept that in withholding the information the police have exercised their discretion in a proper manner, taking into account relevant considerations and not taking into account irrelevant ones.

[37] Accordingly, I uphold the police's exercise of discretion and find that the information at issue is exempt under section 38(a), read in conjunction with section 8(1)(l).

D. Did the police conduct a reasonable search for responsive records?

[38] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.[10] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's

[10] Orders P-85, P-221 and PO-1954-I.

decision. If I am not satisfied, I may order further searches. The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[11] To be responsive, a record must be "reasonably related" to the request.[12]

[39] The police submit that they conducted a reasonable search for records responsive to the appellant's request. They submit that the request was clear and did not require an extensive search or consultation with anyone outside of the Access and Privacy Section. It submits that the search consisted of a query (the appellant's name and date of birth) being made of the relevant police database that stores general occurrence information. It submits the report was located and access was provided pursuant to the *Act*.

[40] The police submit that during the mediation of a related appeal, Appeal MA16-328 (which was a request for information relating to the same incident submitted by the appellant's wife), further searches were conducted. They submit that at that time, a search of officer memorandum book notes revealed that an officer had a telephone conversation with the appellant, following the incident, and had recorded the interaction in his memorandum book notes. The police submit that this information was disclosed to the appellant in a supplemental decision.

[41] The police submit that the officer was subsequently questioned on whether it was possible that additional notes with respect to his phone call with the appellant might exist beyond those recorded in his memorandum book. The police submit that the officer advised that he recalled his conversation with the appellant and confirmed that he did not record any additional information other than what he recorded in his memorandum book.

[42] A reasonable search is one in which an experienced employee, knowledgeable in the subject matter of the request, expends a reasonable effort to locate records which are reasonably related to the request.[13] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[14]

[43] I accept that, on its face, the request at issue is clear and did not require any additional clarification prior to its processing. Additionally, I accept that the actions taken by the police to search and identify records responsive to the request were reasonable and undertaken by experienced employees, knowledgeable in the subject matter of the request. I acknowledge that it is unfortunate that the police subsequently identified responsive memorandum book notes relating to the telephone conversation about the incident between the appellant and the officer which had not been previously

[11] Orders P-624 and PO-2559.
[12] Order PO-2554.
[13] Orders M-909, PO-2469 and PO-2592.
[14] Order MO-2185.

located and were specifically identified by the appellant in his appeal. However, those notes have since been located and disclosed to the appellant. I have no evidence before me to suggest that additional responsive records should exist.

[44] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester must still provide a reasonable basis for concluding that such records exist.[15] Having considered the appellant's representations, which do not specifically address the issue of search, I find that I have not been provided with a reasonable basis for concluding that additional responsive records, beyond those that have already been disclosed to him, should exist. Additionally, it not evident from my review of the responsive records that further records relating to the appellant and his involvement in the incident identified in the request should exist.

[45] In the absence of a reasonable basis upon which to believe that additional responsive records might exist, for a search to be considered reasonable, the police must demonstrate that an experienced employee, knowledgeable in the subject matter of the request, expends a reasonable effort to locate records which are reasonably related to the request. In the circumstances before me, I have found this to be the case. Accordingly, I uphold the police's search as reasonable.

ORDER:

1. I order the police to issue an access decision in accordance with the *Act* with respect to the CCJS information that they have identified as not responsive to the request on pages 1 and 7 of the record. For the purposes of sections 19, 22 and 23 of the *Act*, the date of this order shall be deemed to be the date of the request.

2. I uphold the police's decision to deny access to the information that it has withheld under section 38(a), read in conjunction with section 8(1)(l).

3. I uphold the police's search for responsive records as reasonable.

4. In order to confirm compliance with this order, I reserve the right to require the police to provide me with a copy of the access decision, including any information disclosed to the appellant, issued pursuant to order provision 1.

Original Signed by: July 27, 2018
Catherine Corban
Adjudicator

[15] Order MO-2246.