

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3650

Appeal MA17-610

Guelph Police Services Board

August 16, 2018

Summary: The Guelph Police Services Board (the Guelph police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for an occurrence report concerning an incident in a specified year and location. They located a responsive record and disclosed all of the appellant's personal information to her. However, they withheld police coding pursuant to section 38(a) (discretion to refuse requester's information) in conjunction with the law enforcement exemption at section 8(1)(l) (facilitate commission of an unlawful act). This order upholds the access decision of the Guelph police not to disclose police coding information, and the reasonableness of their search for responsive records.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 8(1)(l), 17, and 38(a).

OVERVIEW:

[1] A request was made to the Peel Regional Police Services (the Peel police) pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for two occurrence reports. One of those reports concerned a 2014 incident in Guelph at a specified place. The Peel police forwarded that part of the request to the Guelph Police Services Board (the Guelph police), and that part of the request is the subject of this appeal. The first part of the request is the subject of another appeal, appeal MA17-627.

[2] The Guelph police located an occurrence report in response to the request. They then issued a decision granting partial access to the record. The Guelph police withheld access to certain information pursuant to the discretionary exemption at section 8(1)(l)

(facilitate commission of an unlawful act) of the *Act*. The decision letter also stated that the police forwarded¹ part of the request to the University of Guelph because the University's Campus Police (the campus police) had responded to the 2014 incident, and might have responsive records under their care and control in their separate records management system.

[3] The requester, now the appellant, appealed the access decision of the Guelph police to this office.

[4] During mediation, the appellant expressed her belief that additional records exist. The Guelph police conducted a search and advised the mediator that they had obtained an additional record from the campus police. The Guelph police issued a supplementary decision, granting the appellant full access to that record. However, this did not resolve the issue of reasonable search, as the appellant continued to believe that further records exist.

[5] Further mediation was not possible, and the appeal moved to adjudication. Since the records appeared to contain the appellant's personal information, I added the issue of the possible application of section 38(a) (discretion to refuse requester's own information) to the scope of this appeal. I sought and received written representations from the police and the appellant.

[6] This order upholds the access decision of the police and the reasonableness of their search for responsive records.

RECORD:

[7] The information at issue is in a one-page Occurrence Summary.

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1), and if so, to whom does it relate?
- B. Does the discretionary exemption at section 38(a) in conjunction with the section 8(1)(l) exemption apply to the information at issue?
- C. Did the police exercise their discretion under section 38(a), and if so, should that exercise be upheld?
- D. Did the police conduct a reasonable search for responsive records?

¹ See section 18 of the *Act*.

DISCUSSION:

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

[8] 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.

[9] “Personal information” is defined in section 2(1) as follows:

“personal information” means recorded information about an identifiable individual, including,

...

(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;

[10] The record in this case contains that kind of personal information about the appellant (and no other individuals in their personal capacity).

Issue B: Does the discretionary exemption at section 38(a) in conjunction with the section 8(1)(l) exemption apply to the information at issue?

[11] As explained below, I find that the information at issue is the police coding on a record that contains the personal information of the appellant, and that police coding is exempt from disclosure by section 38(a) (discretion to refuse requester’s own information) in conjunction with the law enforcement exemption at section 8(1)(l) (facilitate commission of an unlawful act).

[12] Section 36(1) gives individuals a general right of access to their own personal information held by the police. Section 38 provides a number of exemptions from the right of an individual to a record containing their own personal information.

[13] Because the record in this case contains the personal information of the requester, section 38(a) is relevant.

[14] Section 38(a) of the *Act* recognizes the special nature of requests for one’s own personal information and the desire of the legislature to give the police the power to

grant requesters access to their personal information.² Section 38(a) allows the police to withhold a requester's personal information if one of a list of exemptions – including the law enforcement exemption at section 8 – applies.

[15] In this case, the Guelph police provided the appellant with her personal information, and only withheld police-related coding information. They determined that the law enforcement exemption at section 8(1)(l) applies to that coding.

[16] Section 8(1)(l) says:

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

...

(l) facilitate the commission of an unlawful act or hamper the control of crime.

[17] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.³ However, it is not enough for the police to take the position that the harms under section 8 are self-evident from the record.⁴

[18] The Guelph police explained that it is their regular practice to withhold police coding information when responding to freedom of information requests, primarily to prevent those engaged in illegal activities from being able to track the status and activities of police and police employees. They also explained that if their coding systems were to become common knowledge, police activity could be more easily tracked by criminals and could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime.

[19] In keeping with a long line of IPC orders respecting this reasoning,⁵ I find that the exemption at section 8(1)(l) applies to permit the police to withhold the coding that they severed from the record.

Issue C: Did the police exercise their discretion under section 38(a), and if so, should that exercise be upheld?

[20] On the basis of the following, I find that the Guelph police properly exercised their discretion.

[21] The section 38 exemption is discretionary, and permits the Guelph police to

² Order M-352.

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

⁴ Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

⁵ See, for example, Orders MO-2871, M-93, M-757, MO-1715, PO-1665, MO-2014, and MO-2112.

disclose information, despite the fact that they could withhold it. The police must exercise their discretion.

[22] Since access to some information was denied under section 38(a), the Guelph police had to demonstrate that, in exercising their discretion, they considered whether the record should be released to the requester because the record contains her personal information, and they did.

[23] I find that the Guelph police considered relevant factors in making their decision, and did not err in the exercise of their discretion. This finding relates to the reasoning of the Guelph police, not the actual decision that they made because this office may not substitute its own discretion for that of the police.⁶

[24] There is no evidence that the police erred in the exercise of their discretion by:

- doing so in bad faith or for an improper purpose,
- taking into account irrelevant considerations, or
- failing to consider relevant factors.

[25] Rather, the Guelph police took into account many possible relevant considerations in withholding their coding,⁷ including:

- the purposes of the *Act*, including the principles that individuals should have a right of access to their own personal information, and exemptions from the right of access should be limited and specific;
- the wording of the exemption and the interests it seeks to protect;
- whether the requester is seeking her own personal information;
- the nature of the information and the extent to which it is significant and/or sensitive to the police, the requester or any affected person; and
- the historic practice of the police with respect to similar information.

[26] These were proper and relevant considerations,⁸ so I will not send the matter back to the Guelph police for a re-exercise of discretion.

Issue D: Did the police conduct a reasonable search for records?

[27] Since the appellant claims that additional records exist beyond those identified by the police, I must decide whether the Guelph police have conducted a reasonable

⁶ Section 43(2).

⁷ Orders P-344 and MO-1573.

⁸ Order MO-1573.

search for records as required by section 17.⁹ I uphold their search and have no reason to order a further search, as explained below.

[28] The *Act* does not require the police to prove with absolute certainty that further records do not exist. However, the police must provide sufficient evidence to show that they have made a reasonable effort to identify and locate responsive records.¹⁰

[29] To be responsive, a record must be "reasonably related" to the request.¹¹

[30] 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.¹²

[31] The Guelph police provided a written summary of all steps taken in response to the request in affidavit form, and I accept that this summary demonstrates that their search was reasonable.

[32] The Guelph police submit that the search was conducted by a Guelph police Freedom of Information Analyst/Legal Assistant, employed by the Guelph police for fifteen years. This satisfies me that an employee who is knowledgeable in the subject matter handled the request.

[33] The details in this employee's affidavit and the Guelph police representations also persuade me that the employee expended a reasonable effort to locate responsive records:

- a. The request was clear and specific, so there was no need for clarification from the requester.
- b. The Guelph police employee searched the police records management system by the requester's surname since that system links all occurrences by surname. She found only one responsive record.
- c. Because the record contains the prefix UG, the Guelph police employee knew that this occurrence happened on the University of Guelph campus. This record had been entered into the Guelph police's system for statistical purposes after an occurrence report had been forwarded to the police by the campus police, which keeps separate records from the Guelph police. This record was provided to the appellant during mediation.
- d. The Guelph police employee then contacted the campus police for responsive records to the request. She also attests that it is possible that additional records related to the incident on campus exist, but if they do, they would be in the

⁹ Orders P-85, P-221 and PO-1954-I.

¹⁰ Orders P-624 and PO-2559.

¹¹ Order PO-2554.

¹² Orders M-909, PO-2469 and PO-2592.

custody and control of the campus police in their separate records management system.

[34] In contrast to the detailed evidence of the Guelph police, the appellant's representations do not address the search issue. Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.¹³ In my view, she did not do so. I find that she did not provide any evidence outweighing that of the Guelph police to suggest that other responsive records exist.

[35] For these reasons, I find that the Guelph police expended a reasonable effort to identify and locate all of the responsive records within their custody or control, and no further search will be ordered.¹⁴

ORDER:

I uphold both the access decision and the search of the Guelph police, and dismiss the appeal.

Original signed by _____
Marian Sami
Adjudicator

August 16, 2018

¹³ Order MO-2246.

¹⁴ Order MO-2185.