Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3773

Appeal MA16-612

The Greater/Grand Sudbury Police Services Board

May 27, 2019

Summary: This appeal deals with the police's decision in response to an access request made for all files and records pertaining to the appellant during a specified time period. The police granted partial access to the records under the *Municipal Freedom of Information and Protection of Privacy Act*. The police withheld other records either in whole, or in part, claiming the application of the discretionary exemptions in section 38(a) (discretion to refuse requester's own information), in conjunction with sections 8(1)(c) (reveal investigative techniques and procedures), 8(1)(h) (security) and 8(1)(l) (facilitate commission of an unlawful act), as well as section 38(b) (personal privacy). During the inquiry, the police raised the possible application of the discretionary exemption in section 38(a), in conjunction with section 12 (solicitor-client privilege).

In this order, the adjudicator upholds the police's decision, in part. She allows the police to raise a discretionary exemption late. She finds that the records contain the personal information of the appellant, as well as a number of identifiable individuals. She further finds that sections 38(a) and 38(b) apply to exempt the majority of the highly sensitive personal information that was withheld. The police's exercise of discretion is upheld. The police are ordered to disclose the non-exempt information to the appellant.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2 (definition of "personal information"), 8(1)(c), 8(1)(h), 8(1)(l), 12, 38(a) and 38(b).

Orders and Investigation Reports Considered: Order MO-1698.

OVERVIEW:

[1] This order disposes of the issues raised in an appeal of an access decision made by the Greater/Grand Sudbury Police Services Board (the police). The access request, made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), was for all files and records pertaining to the requester during a specified time period.

[2] The police contacted the requester, who clarified that the request was for all police reports in its Records Management System pertaining to him during a specified time period.

[3] The police subsequently issued an interim access decision with a fee estimate and advised that the time limit for responding to the request would be extended for an additional 30 days in accordance with section 20 of the *Act*. The police advised that a number of responsive records were located and upon initial review partial access may be granted, and some information may be withheld in accordance with the discretionary exemptions in section 38(a) (discretion to refuse requester's own information), in conjunction with sections 8(1)(c), and 8(1)(l) (law enforcement), as well as section 38(b) (personal privacy).

[4] In a second interim access decision, the police advised that in addition to the exemptions identified in the first interim access decision, portions of the records may be withheld in accordance with section 52(2.1) of the *Act* as the records relate to an ongoing prosecution.

[5] In its final decision, the police granted partial access to the records. The police denied access to records, either in whole or in part, claiming the application of the discretionary exemptions in section 38(a) (discretion to refuse requester's own information), in conjunction with the law enforcement exemptions in sections 8(1)(c), 8(1)(h), and 8(1)(l), and section 38(b) (personal privacy), as well as the exclusion in section 52(2.1) (ongoing prosecution) of the *Act*.

[6] In a follow-up decision, the police granted access to additional records in part (pages 354 to 445), as the prosecution related to that court proceeding was completed. The police denied access to portions of these records relying on the discretionary exemptions in section 38(a) (discretion to refuse requester's own information), in conjunction with the law enforcement exemptions in sections 8(1)(c), and 8(1)(l), and section 38(b) (personal privacy). In a subsequent decision, the police advised the appellant that the previous decision would be reversed as the occurrence was again before the courts on appeal. Consequently, the police reverted to its decision denying access to the records at pages 354 to 445 in their entirety, claiming the application of the ongoing prosecution exclusion in section 52(2.1) of the *Act*.

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

[8] During the mediation of the appeal, the police confirmed their position that no additional records may be disclosed. The appellant advised that he continued to appeal all the decisions of the police, and that he was seeking access to all the information withheld.

[9] The file then moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry. In their representations, the police advise that they are no longer relying on the exclusion in section 52(2.1) for pages 354 to 445 because the court proceeding (an appeal) was dismissed. Consequently, the exclusion is no longer at issue in this appeal. The police also advised that the name of a Child Protection Worker in one of the occurrence summaries was severed in error.[1] Consequently, this information is no longer at issue. I will order the police to disclose this information to the appellant. The appellant did not provide representations.

[10] In addition, in their representations, the police raised the possible application of the discretionary exemption in section 12 (solicitor-client privilege) to the responses made by the police to Crown Screening Requests. As a result, I sought further representations from the parties on the possible application of section 12 to those records, as well as the late raising of a discretionary exemption. I received representations from the police, but not the appellant.

[11] For the reasons that follow, I uphold the police's decision, in part. I allow the police to raise the possible application of section 38(a), in conjunction with section 12 despite the fact that the police raised the exemption late. I find that the majority of the information that was withheld is exempt from disclosure under either section 38(a) or 38(b). I uphold the police's exercise of discretion. I order the police to disclose certain information to the appellant, as it is not exempt from disclosure under either sections 38(a) or 38(b).

RECORDS:

[12] The records at issue document five investigations that were conducted by the police relating to the appellant. There are 529 pages of records, consisting of Occurrence Summaries, General Occurrence Reports, Supplementary Occurrence Summaries, Arrest Reports, Witness Statements and Responses to Crown Screening Requests.

---

[1] The name of the Child Protection Worker, which was severed, is located on page 525 in an 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 sections 8(1)(c), 8(1)(h) and/or 8(1)(l) exemptions apply to the information at issue?

C. Should the police be permitted the late raising of a discretionary exemption, namely section 38(a), in conjunction with section 12?

D. Does the discretionary exemption at section 38(a), in conjunction with section 12 apply to the information at issue?

E. Does the discretionary exemption at section 38(b) apply to the personal information at issue?

F. Did the police exercise their discretion under sections 38(a) and 38(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

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

[13] In order to determine whether sections 38(a) and/or 38(b) of the *Act* may apply to the records at issue, it is necessary to decide whether the records contain "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;

[14] 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]

[15] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[3]

Representations

[16] The police submit that the records contain the personal information of a number of identifiable individuals. In particular, the police submit that there is personal information as defined in paragraphs (a), (b), (c), (d), (e), (g) and (h) of the definition of personal information in section 2(1) of the *Act*.

Analysis and findings

[17] I have carefully reviewed the records at issue and I find that they all contain the personal information of the appellant. In addition, they contain the personal information of several identifiable individuals, including some of the appellant's family members, alleged victims, a minor, two police officers, several witnesses, and co-accused individuals.

---

[2] Order 11.
[3] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[18] In particular, I find that there is personal information about a number of identifiable individuals, including their:

- age, sex, marital and family status, falling within paragraph (a) of the definition of personal information in section 2(1) of the *Act*;
- criminal or medical history of some identifiable individuals, falling within paragraph (b) of the definition;
- addresses and telephone numbers of several individuals, which falls within paragraph (d) of the definition;
- personal views or opinions, which qualifies as their personal information under paragraph (e) of the definition; and
- names where it appears with other personal information about them, falling within paragraph (h) of the definition.

[19] With respect to the police officers, I find that there is information in the records that would reveal something of a personal nature about them, which qualifies as their personal information.

[20] Having found that the records contain the personal information of a number of identifiable individuals, including the appellant, I will now determine whether the personal information the police withheld is exempt from disclosure under either section 38(a) or 38(b) of the *Act*.

Issue B: Does the discretionary exemption at section 38(a) in conjunction with the sections 8(1)(c), 8(1)(h) and/or 8(1)(l) exemptions apply to the information at issue?

[21] 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, and 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.

[22] 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.[4]

[23] 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.

[24] In this case, the police rely on section 38(a) in conjunction with sections 8(1)(c), 8(1)(h) and 8(1)(l), which state:

> (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;
> >
> > . . .
> >
> > (h) reveal a record which has been confiscated from a person by a peace officer in accordance with an Act or regulation;
> >
> > . . .
> >
> > (l) facilitate the commission of an unlawful act or hamper the control of crime.

[25] 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)

[26] The term "law enforcement" includes a police investigation into a possible violation of the *Criminal Code of Canada.*[5]

[27] Generally, the law enforcement exemption must be approached in a sensitive

---

[4] Order M-352.
[5] Orders M-202 and PO-2085.

manner, recognizing the difficulty of predicting future events in a law enforcement context.[6]

[28] 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 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.[8]

Representations

Section 8(1)(c): investigative techniques and procedures

[29] The police submit that there are caution flags/warnings in the records, which are used to prepare officers prior to responding to a call for service. These flags, the police submit, are withheld because they consist of law enforcement information that is not known by the general public. The police goes on to submit that caution flags are added to an individual and/or to an address through the Records Management System where an individual has exhibited behaviour that could be a threat to either police officers or the public. These threats may consist of direct threats to persons or property, or indirect threats to investigations or intelligence gathering. The caution flags, the police submit, alert police officers to potential safety hazards, and are not generally known to the public. They submit that the disclosure of these caution flags could reasonably be expected to hinder or compromise their effective utilization.

[30] The police also claim that section 8(1)(c) applies to the results of database searches such as CPIC (Canadian Police Information Centre), Niche RMS (Records Management System) and MTO (Ministry of Transportation).

[31] Lastly, the police submit that section 8(1)(c) also applies to CSR (Crown Screening Requests) in which the Crown makes a request to the police in order to obtain material required for Court proceedings. However, the police also submit that upon a later review of the exemptions under the *Act*, they acknowledge that a solicitor-client relationship may exist with respect to the responses to the CSR's, and that the section 12 solicitor-client privilege claim is the more appropriate exemption for these records.

---

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

Section 8(1)(h): record confiscated by a peace officer

[32] The police submit that this exemption applies to information that they seized after a search warrant was granted under section 487.01 of the *Criminal Code of Canada*. The police submit that this exemption applies to information regarding computers, storage media, child pornography images and file names.

Section 8(1)(l): facilitate commission of an unlawful act

[33] The police argue that section 8(1)(l) applies to deny access to Local Police File Numbers, RCMP FPS (fingerprint number), CPIC ORI numbers and Police ten-codes. The police submit that each CPIC terminal is identified by an ORI number, and that number is severed when responding to an access request. The police further submit that the Local Police File Numbers and the RCMP FPS number are unique identifiers, which are not generally known to the public. Lastly, the police submit that Police ten-codes are used by dispatch to reduce the use of words on the police radio, and these codes are not generally known to the public.

Analysis and findings

Section 8(1)(c): investigative techniques and procedures

[34] 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.[9] The techniques or procedures must be "investigative".

[35] I find that the caution flags/warnings in the records contain law enforcement information that is not known by the general public, the disclosure of which would reveal investigative techniques and procedures. I also find, on my review of the records, that some of the information that was withheld under section 38(a) contains investigative techniques used by police officers in interacting with members of the public while conducting investigations, the disclosure of which would also reveal investigative techniques. Consequently, I find that this information is exempt under section 38(a) in conjunction with section 8(1)(c), subject to my findings regarding the police's exercise of discretion.

[36] However, I do not find that the CPIC search results, the Niche RMS search results and the MTO search results qualify for exemption under section 8(1)(c). Past orders of this office have found that while access codes relating to these databases are exempt under section 8(1)(l), the substantive content of these searches is not exempt

[9] Orders P-170, P-1487, MO-2347-I and PO-2751.

from disclosure under section 8(1)(l), where a requester is seeking access to his or her own personal information. For example, in Order MO-1698, the adjudicator stated:

> In my view, the Police have not established that there is a reasonable expectation that disclosure of the substantive information (as distinct from the system code information), such as the appellant's name, date of birth, age and any criminal charges, criminal convictions, warrants, probations and drivers licence suspensions, as well as basic date information and the name of the contributing agency could facilitate the commission of an unlawful act or hamper the control of crime. Where there may be unusual situations where this type of information should be withheld from a requester (such as where disclosure could reasonably be expected to cause harm to an individual), the Police have not identified any particular concerns of this nature here.

[37] While the adjudicator was considering the possible application of section 8(1)(l) to the results of a CPIC search, I find that his conclusions apply equally to the application of section 8(1)(c). I further find that the substantive content of the searches relating to the appellant (or any other individual) would not reveal investigative techniques or procedures, nor have the police detailed in their representations how this information would reveal either investigative techniques or procedures. Consequently, I find that the substantive content of the CIPC and Niche RMS searches is not exempt from disclosure under section 8(1)(c). As no other exemptions were claimed regarding this information, I will order it to be disclosed to the appellant. I note that the MTO searches relate to another individual. I will, therefore, consider the application of section 38(b) to this information under Issue E.

[38] Similarly, I find that the police's responses to the Crown Screening Requests do not qualify for exemption under section 8(1)(c). These responses detail the material the police provided to the Crown Attorney upon request by the Crown. I find that this information, if disclosed, would not reveal investigative techniques or procedures. The police also claim the application of the exemption in section 12 to this information. I address this below under Issues C and D.

Section 8(1)(h): record confiscated by a peace officer

[39] The purpose of this section is to exempt records that have been confiscated or "seized" by search warrant.[10] This exemption applies where the record at issue is itself a record which has been confiscated from a person by a peace officer, or where the disclosure of the record could reasonably be expected to reveal another record which

[10] Order PO-2095.

has been confiscated from a person by a peace officer.[11]

[40] In this case, the police have provided me with representations indicating that the information they withheld under section 8(1)(h) was obtained pursuant to a search warrant issued under section 487 of the *Criminal Code of Canada*. Having considered the representations of the police and the provisions of section 487 of the *Criminal Code of Canada*, I am satisfied that the police have provided sufficient evidence that the information they withheld under section 8(1)(h) could reasonably be expected to reveal the information that was confiscated from the appellant by the police. Consequently, I find that this information is exempt from disclosure under section 38(a), conjunction with section 8(1)(h), subject to my findings regarding the police's exercise of discretion.

Section 8(1)(l): facilitate commission of an unlawful act

[41] This office has issued many orders regarding the release of police codes and has consistently found that section 8(1)(l) applies to ten codes, as well as other law enforcement codes. The rationale for applying section 8(1)(l) to exempt these types of codes from disclosure is to avoid compromising police officers' ability to provide effective policing services. The disclosure of these codes would make it easier for individuals engaged in illegal activities to carry them out and would jeopardize the safety of police officers. Accordingly, I find that all of the code information withheld by the police is exempt from disclosure under section 38(a), in conjunction with section 8(1)(l), subject to my findings regarding the police's exercise of discretion.

[42] Having found that the exemption at section 38(a) in conjunction with section 8 applies to some of the personal information for which the police claimed this exemption, I will now determine whether the remaining personal information, consisting of the appellant's personal information, as well as the personal information of other individuals, is exempt from disclosure under section 38(a), in conjunction with section 12, or section 38(b).

Issue C: Should the police be permitted to raise a discretionary exemption late, namely section 38(a), in conjunction with section 12?

[43] In their initial representations, the police raised the issue of the possible application of section 12 to the police's responses to the Crown Screening Requests, although they originally claimed only the application of section 8 to these records.

[44] The *Code of Procedure* (the *Code*) provides basic procedural guidelines for parties involved in appeals before this office. Section 11 of the *Code* addresses circumstances where institutions seek to raise new discretionary exemption claims

[11] Order M-610.

during an appeal. Section 11.01 states:

> In an appeal from an access decision an institution may make a new discretionary exemption claim within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

[45] The purpose of the policy is to provide a window of opportunity for institutions to raise new discretionary exemptions without compromising the integrity of the appeal process. Where the institution had notice of the 35-day rule, no denial of natural justice was found in excluding a discretionary exemption claimed outside the 35-day period.[12]

[46] In determining whether to allow an institution to claim a new discretionary exemption outside the 35-day period, the adjudicator must also balance the relative prejudice to the institution and to the appellant.[13] The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.[14]

Representations

[47] The police submit that the appellant would not be prejudiced by the late raising of section 38(a), in conjunction with section 12, because the exemption in section 8 had previously been applied to these records, and disclosure does not rely solely on the late raising of section 12. Further, the police submit that they would be prejudiced if they are not allowed to claim this discretionary exemption, as the disclosure of the information would not only impact the police service, but all Crown counsel as well, compromising the integrity of the prosecution process. Lastly, the police argue that, as advised in their original representations, they acknowledge that as a result of further information gleaned from the appeals process, and upon a later review of the exemptions, section 12 should have been originally applied to the responses to the Crown Screening Requests.

[48] The appellant did not provide representations on this issue.

---

[12] *Ontario (Ministry of Consumer and Commercial Relations v. Fineberg)*, Toronto Doc. 220/95 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 1838 (C.A.). See also *Ontario Hydro v. Ontario (Information and Privacy Commissioner)* [1996] O.J. No. 1669 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 3114 (C.A.).
[13] Order PO-1832.
[14] Orders PO-2113 and PO-2331.

Analysis and findings

[49] As stated above, the *Code* sets out basic procedural guidelines for parties involved in an appeal. Section 11 of the *Code* sets out the procedure for institutions wanting to raise new discretionary exemption claims after an appeal has been filed. These guidelines for the late raising of discretionary exemptions were found to be reasonable by the Divisional Court in the judicial review of Order P-883.[15]

[50] Section 12 is a discretionary exemptions and, subject to the guidelines in section 11.01 of the *Code*, must be raised within 35 days of the issuance of the confirmation of appeal by this office.

[51] In Order P-658, former Adjudicator Anita Fineberg explained why the prompt identification of discretionary exemptions is necessary in order to maintain the integrity of the appeals process. She indicated that, unless the scope of the exemptions being claimed is known at an early stage in the proceedings, it will not be possible to effectively seek a mediated settlement of the appeal under section 51 of the *Act*. She also pointed out that, where a new discretionary exemption is raised after the Notice of Inquiry is issued, this could require a re-notification of the parties in order to provide them with an opportunity to submit representations on the applicability of the newly claimed exemption, thereby delaying the appeal. Finally, she pointed out that in many cases the value of information sought by appellants diminishes with time and, in these situations, appellants are particularly prejudiced by delays arising from the late raising of new exemptions.

[52] The objective of the 35-day policy established by this office is to provide government organizations with a window of opportunity to raise new discretionary exemptions, but to restrict this opportunity to a stage in the appeal where the integrity of the process would not be compromised or the interests of the appellant prejudiced. The 35-day policy is not inflexible. The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.

[53] With respect to the police's new section 12 claim, the records for which it is being claimed are the police's responses to Crown Screening Requests for which sections 38(a) and 8(1) were claimed prior to the commencement of the appeal. In my view, it would appear that the failure to include the reference to section 12 in the decision was simply an oversight in this case.

[54] In the specific circumstances of this appeal, I find that the integrity of the inquiry

---

[15] *Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg* (21 December 1995), Toronto Doc. 220/89, leave to appeal refused [1996] O.J. No. 1838 (C.A.).

process would not be compromised and the interests of the appellant would not be prejudiced if I were to allow the police to claim the application of section 12 to the responses to the Crown Screening Requests. In addition, the appellant has had an opportunity to provide representations on the application of both sections 8(1) and 12 to these records, and has not done so. Given these circumstances and the importance of the interests protected by the section 12 exemption, I will permit the police to claim this exemption.

Issue D: Does the discretionary exemption at section 38(a), in conjunction with section 12 apply exemption to the information at issue?

[55] The police are claiming the application of section 38(a), in conjunction with section 12 to the category of records referred to as responses to Crown Screening Requests. Section 12 states as follows:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

[56] Section 12 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 ("prepared by or for counsel employed or retained by an institution…") is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

[57] Branch 2 is a statutory privilege that applies where the records were "prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation." The statutory and common law privileges, although not identical, exist for similar reasons. For the reasons set out below, I find that the Branch 2 statutory litigation privilege applies here.

[58] Statutory litigation privilege applies to records prepared by or for counsel employed or retained by an institution "in contemplation of or for use in litigation." It does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.[16]

[59] Records that form part of the Crown brief, including copies of materials provided to prosecutors by police, and other materials created by or for counsel, are exempt under the statutory litigation privilege.[17] Documents not originally created for use in

---

[16] See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Ontario (Ministry of Correctional Service) v. Goodis*, cited above.
[17] Order PO-2733.

litigation, which are copied for the Crown brief as the result of counsel's skill and knowledge, are also covered by this privilege.[18] However, the privilege does not apply to records in the possession of the police, created in the course of an investigation, just because copies later become part of the Crown brief."[19]

[60] In contrast to the common law litigation privilege, termination of litigation does not end the statutory litigation privilege in section 12.[20]

Representations

[61] The police submit that the Crown Screening Requests are tasks and/or inquiries communicated by Crown counsel to the police, in order to obtain material required for Court proceedings. They further submit that in any circumstance where criminal charges are laid by the police, and additional information and/or records are required during the prosecution process, the Crown will communicate with the police who investigated the occurrence, through the Records Management System (otherwise known as CSR). The type of information requested can include consents to obtain medical records, photographs of injuries or property, witness statements from involved parties, and video surveillance.

[62] The police argue that the responses to the Crown Screening Requests are exempt from disclosure under both branch 1 and 2 of section 12 and that, in particular, they are subject to litigation privilege. The police state the following:

> The records at issue are subject to litigation privilege as they contain no detail to describe the occurrence, observations of Police or the investigation process, instead only contain communication and responses relative to tasks and/or inquiries between Police and Crown counsel solely for the purpose of litigation, more specifically intended for the use of prosecution by obtaining addition information through CSR.

[63] Further, the police submit that the records were prepared for and provided to Crown counsel by the police for use in litigation, and that these records formed part of the Crown brief. The police asserts that the records are subject to litigation privilege under both branch 1 and 2. Lastly, the police argue that while the litigation process has been completed, the statutory litigation privilege continues to apply and has not been waived by the police.

---

[18] *Ontario (Ministry of Correctional Services) v. Goodis*, cited above, and Order PO-2733.
[19] Orders PO-2494, PO-2532-R and PO-2498, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2009] O.J. No. 952.
[20] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, cited above.

Analysis and findings

[64] Upon my review of the records themselves, and the police's representations, I find that the police's responses to the Crown Screening Requests are exempt under section 38(a) in conjunction with branch 2 of section 12, subject to my findings regarding the police's exercise of discretion. It is clear that these records were prepared by the police solely for the Crown Attorney to use in criminal court proceedings, thus falling squarely within the litigation privilege in branch 2 of the exemption in section 12. I am satisfied that these responses took place within the zone of privacy intended to be protected by the privilege. I further find that the police have not, either explicitly or implicitly, waived this privilege.

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

[65] As previously stated, section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right.

[66] Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.

[67] Sections 14(1) to (4) provide guidance in determining whether disclosure of the information would be an unjustified invasion of personal privacy.

[68] If the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b).

[69] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), this office will also consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.[21]

[70] Section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.[22] The list of factors under section 14(2) is not exhaustive. The institution must

[21] Order MO-2954.
[22] Order P-239.

also consider any circumstances that are relevant, even if they are not listed under section 14(2).[23]

[71] If any of paragraphs (a) to (c) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b).

[72] Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may not be exempt because to withhold the information would be absurd and inconsistent with the purpose of the exemption.[24]

[73] The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement[25]
- the requester was present when the information was provided to the institution[26]
- the information is clearly within the requester's knowledge[27]

[74] However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.[28]

Representations

[75] The police submit that section 38(b) applies to numerous records, either in whole or in part, as detailed in the indices of records, which I will not re-produce in this order.

[76] The police submit that none of the exceptions listed in section 14(1) apply, and take the position that the disclosure of the personal information in the records would constitute an unjustified invasion of the personal privacy of a number of individuals.

[77] The police submit that the presumptions in sections 14(3)(a) and (b) apply, because some of the personal information in the records relates to medical diagnosis, condition and treatment of an individual other than the appellant, and the personal information contained in the records was compiled and is identifiable as part of an investigation into a possible violation of the law.

---

[23] Order P-99.
[24] Orders M-444 and MO-1323.
[25] Orders M-444 and M-451.
[26] Orders M-444 and P-1414.
[27] Orders MO-1196, PO-1679 and MO-1755.
[28] Orders M-757, MO-1323 and MO-1378.

[78] The police also submit that two of the factors listed in section 14(2) apply, namely sections 14(2)(f) and (h) respectively, because the personal information in the records is highly sensitive and some of the personal information was supplied by the individual to whom it relates in confidence.

[79] The police further argue that none of the exceptions in section 14(4) apply.

[80] Lastly, the police acknowledge that, on further review of the records, the absurd result principle may apply to some of the information at issue where, for example, the appellant provided the information to the police officers.

Analysis and finding

[81] I find that the remaining personal information that the police withheld, with a few exceptions, is exempt from disclosure under section 38(b). In particular, I find that the presumption in section 14(3)(b) applies. All of the records at issue were compiled and are identifiable as part of the police's investigations into possible violations of the *Criminal Code of Canada*. Charges were laid with respect to some of the investigations that are the subject matter of the records. Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.[29]

[82] But that does not end the matter. Because section 38(b) is a discretionary exemption, in determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), this office will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.[30]

[83] Turning to the factors in section 14(2), based on my review of the records themselves, I find that the factor in section 14(2)(f) weighs heavily against the disclosure of the personal information at issue. I find that the personal information contained in these records is extremely sensitive. This office has found that to be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.[31] In my view, there is a reasonable expectation that the disclosure of the personal information of the individuals identified in the records would cause them significant distress.

[84] Further, in the absence of representations from the appellant concerning the factors in section 14(2) that favour disclosure, and from my review of the records themselves, I find that none of the factors in section 14(2) which favour disclosure

---

[29] Orders P-242 and MO-2235.
[30] Order MO-2954.
[31] Orders PO-2518, PO-2617, MO-2262 and MO-2344.

apply. I further find that none of the exceptions listed in section 14(4) apply.

[85] Consequently, I find that the personal information remaining at issue, with a few exceptions, is exempt from disclosure under section 38(b), subject to my findings regarding the police's exercise of discretion. In making this finding, I acknowledge that some of the personal information at issue is the appellant's personal information. However, I note that the vast majority of the personal information that was withheld relates to individuals other than the appellant. Where the appellant's personal information is mixed with the personal information of others, I find that they are inextricably linked such that the personal information of other individuals cannot be severed.

[86] Lastly, I find that the absurd result principle applies to some of the personal information that the police severed, which the police acknowledge in their representations may be subject to the principle. In particular, the severances made under section 38(b) contained within statements on pages 16-17 and 295 were directly supplied to the police by the appellant. Applying the absurd result principle to this information, I find that it is not exempt under section 38(b) and I will order the police to disclose this information to the appellant.

Issue F: Did the police exercise their discretion under sections 38(a) and 38(b)? If so, should this office uphold the exercise of discretion?

[87] The sections 38(a) and 38(b) exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[88] 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, or it fails to take into account relevant considerations.

[89] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[32] This office may not, however, substitute its own discretion for that of the institution.[33]

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

---

[32] Order MO-1573.
[33] Section 43(2).

relevant:[34]

- 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 and the privacy of individuals should be protected;
- the wording of the exemption and the interests it seeks to protect;
- whether the requester is seeking his or her own personal information;
- whether the requester is an individual or an organization;
- the relationship between the requester and any affected persons;
- 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; or
- the historic practice of the institution with respect to similar information.

Representations

[91] The police submit that they exercised their discretion in good faith under sections 38(a) and 38(b), taking all relevant factors into consideration, and not taking into consideration irrelevant factors.

[92] With respect to their exercise of discretion under section 38(a), in conjunction with section 8(1), the police submit that they concluded that the purpose of the law enforcement exemption, which is to preserve law enforcement activities, outweighed any factors that would support disclosure of the information at issue. The police further argue that the information they withheld under section 38(a) directly relates to law enforcement information that is not generally known to the public.

[93] With respect to the police's exercise of discretion under 38(a) in conjunction with section 12, the police submit that the records they withheld under this exemption do not contain occurrence details, but only contain confidential information between the police and Crown counsel. The police further submit that while they did take into consideration that individuals should have access to their own personal information, they also considered that it is in the public interest to foster the ongoing relationship of confidence between the Crown and law enforcement agencies and the integrity of the prosecution process.

---

[34] Orders P-344 and MO-1573.

[94] Concerning the police's exercise of discretion under section 38(b), the police submit that the appellant's personal information was withheld only to the extent required to protect the personal privacy of individuals other than the appellant. In addition, the police submit that, in exercising their discretion, they took into consideration the purpose of the *Act*, the relationship between the appellant and the other individuals in the records, and the nature of the information which is highly sensitive. The police further submit that they wanted to ensure that there was no re-victimization of these individuals by disclosing their personal information to the appellant. Lastly, the police argue that they disclosed as many of the records as possible to the appellant, without disclosing information that is exempt under the *Act*.

Analysis and findings

[95] On my review of the police's representations and the records themselves, I am satisfied that the police properly exercised their discretion, taking into consideration the importance of the protection of personal privacy, the preservation of law enforcement activities, and the protection of information that is subject to litigation privilege, while balancing the appellant's right of access to his own personal information. I note that in the majority of instances the police only withheld portions of records, and disclosed as much of the appellant's personal information as possible to him. Consequently, I uphold the ministry's exercise of discretion.

ORDER:

1. I order the police to disclose the name of the Child Protection Worker to the appellant, which is located on page 525 by **July 2, 2019** but not before **June 25, 2019.**

2. I order the police to disclose to the appellant the information he provided to them in his witness statements, located on pages 16-17 and 295 by **July 2, 2019** but not before **June 25, 2019**.

3. I order the police to disclose the results of the appellant's CPIC and Niche RMS searches on pages 11, 40, 41, 186, 191, 285 and 290 to the appellant by **July 2, 2019** but not before **June 25, 2019**.

4. I have enclosed the pages referred to in Order provisions 1 through 3. I have highlighted the portions of the records that the police are to disclose to the appellant.

5. I reserve the right to require the police to provide to this office copies of the records it discloses to the appellant.

Original Signed By: May 27, 2019

Cathy Hamilton

Adjudicator