

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3927

Appeal MA18-473

Windsor Police Services Board

June 5, 2020

Summary: This appeal deals with the police's decision, in response to an access request, to withhold access to parts of a proposal it made to provide policing services to a neighbouring town. The police assert that parts of the proposal are excluded from the *Municipal Freedom of Information and Protection of Privacy Act* on the basis of the employment and labour relations exclusion in section 52(3) and that the other withheld parts of the proposal are exempt due to the following discretionary exemptions: sections 11(f) (economic and other interests), 6(1)(b) (closed meeting), 8(1)(c) (reveal investigative techniques and procedures), (e) (endanger life or safety), (g) (intelligence information), (i) (security) and (l) (facilitate commission of an unlawful act).

In this order, the adjudicator determines that the police cannot rely on the exclusion in section 52(3) and orders the police to issue an access decision pertaining to those parts of the record for which it made this claim.

The adjudicator upholds the police's decision to withhold information on two pages of the proposal on the basis of section 8(1)(l) because the information pertains to police dispatch codes and otherwise orders the police to disclose the remaining parts of the proposal to the appellant.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O., Ch. M.56, sections 52(3), 11(f), 6(1)(b), 8(1),(c),(e),(g),(i),(l), 47.

Orders and Investigation Reports Considered: Orders MO-3815, PO-3013, PO-2571, M-102.

Cases considered: *Ontario Medical Association v. Ontario (Information and Privacy Commissioner)*, 2017 ONSC 4090 (affirmed by *Ontario Medical Association v. Ontario*

(Information and Privacy Commissioner), 2018 ONCA 673, *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).

OVERVIEW:

[1] The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Windsor Police Services Board (the police or the WPSB) for access to a copy of the police's proposal to provide policing services in the Town of Amherstburg.

[2] Initially, the WPSB denied the appellant access to the proposal in full, claiming that the record was excluded from the scope of the *Act* pursuant to section 52(3) (employment or labour relations) and, in the alternative, was exempt under sections 8(1)(c), (e), (g) and (l) (law enforcement), 10(1)(a) (third party information) and 11(c), (f) and (g) (economic and other interests). The appellant appealed the WPSB's decision.

[3] Prior to mediation, the WPSB issued a revised access decision, revising and claiming additional exemptions. The WPSB decided to: rely on sections 6(1)(b) (closed meeting), 9(1)(d) (relations with other governments) and 14(1) (personal privacy); and, cease to rely on sections 10(1)(a) and 11(g). Accordingly, the latter two exemptions are not at issue in this appeal.

[4] During mediation, the WPSB issued two further revised access decisions and provided this office and the appellant with an updated index of records indicating the exclusion or exemption relied on to justify its decision to withhold access to specific portions of the proposal. The WPSB disclosed the portions of the proposal that were not subject to any exclusion or exemption claims. Also during mediation, the WPSB decided not to rely on sections 11(c) or 14(1) and these exemptions are therefore no longer at issue in this appeal.

[5] The mediation was unable to resolve the appeal and the matter was transferred to the adjudication stage where the parties and an affected party were provided with an opportunity to make representations about the exclusion and exemptions claimed.

[6] As described, the mediation resulted in the issue in dispute being narrowed to the following exclusion and exemption claims: section 52(3) (employment or labour relations), section 11(f) (economic and other interests), section 9(1)(d) (relations with other governments), section 6(1)(b) (closed meeting), and various section 8(1) (law enforcement) exemptions.

[7] During the inquiry, the WPSB abandoned two of its claims. First, it abandoned its claim that the section 9(1)(d) (relations with other governments) exemption applied to page 122 so this exemption is no longer at issue in this appeal and I will order that the withheld portions of page 122 be disclosed. Second, after reviewing the representations of the affected party, it abandoned its claim that the section 6(1)(b) (closed meeting)

exemption applied to page 131 so I will order that page 131 be disclosed.

[8] In this order, I find that the WPSB cannot rely on the exclusion in section 52(3) to justify the decision to withhold part of the record and I order the police to make an access decision pertaining to those parts of the proposal for which it made this claim. I uphold the WPSB's decision to withhold two pages of the proposal on the basis of section 8(1)(l) because they contain information about police dispatch codes. I do not uphold the claimed exemptions under sections 8(1)(l) or 11(f) for the remainder of the information at issue and as a result, I order the WPSB to disclose these parts of the proposal to the appellant.

RECORD:

[9] The record at issue is a 131 page proposal made by the WPSB to provide police services to Amherstburg.

[10] During the adjudication, the WPSB abandoned its claim that the exemption in section 9(1)(d) (relations with other governments) applied to a severed portion of page 122 and that the exemption in section 6(1)(b) (closed meeting) applied to page 131. As a result, I will order those portions to be disclosed to the appellant.

ISSUES:

- A. Are portions of pages 23, 24, 28, 29, 32 and all of page 98 excluded from the *Act* because of the employment or labour relations exclusion in section 52(3)?
- B. Does the discretionary exemption at section 11(f) (economic and other interests) apply to the severed portions of page 98 of the record?
- C. Does the discretionary exemption at section 6(1)(b) (closed meeting) apply to page 130 of the record?
- D. Do the discretionary exemptions at sections 8(1)(c), (e), (g), (i) and/or (l) (law enforcement) apply to severed portions of the record on several pages of the record?
- E. If any of the discretionary exemptions apply, did the WPSB exercise its discretion and if so, should its exercise of discretion be upheld?

DISCUSSION:

A. Are portions of pages 23, 24, 28, 29, 32 and all of page 98 excluded from the *Act* because of the employment or labour relations exclusion in section 52(3)?

Representations

[11] The WPSB claims that excerpts on pages 23, 24, 28, 29, 32 and all of page 98 are not subject to the *Act* because of the employment or labour relations exclusion in section 52(3).

[12] The WPSB described and characterized the information on pages 28 and 98 but made no specific submissions about records 23, 24, 29 or 32. The information on all of these pages relates to the impact on the Amherstburg police force if the WPSB took over policing services.

[13] In response, the appellant states that the exclusion in section 52(3) may only operate to exclude the application of the *Act* to a record "as a whole," citing Order PO-3926. The appellant also made other alternative submissions to dispute the WPSB's claim that the exemption applies.

[14] The WPSB did not address the issue about whether the exclusion could apply to part of a record.

Analysis and Findings

[15] In this appeal, there is one record at issue – the proposal. The WPSB claims that certain *parts* of the proposal are excluded from the *Act*. For the reasons that follow, I find that the exclusion cannot apply to parts of the proposal.

[16] The *Act* contains a number of exclusions, meaning that if a record at issue is captured by an exclusion, the *Act* will not have any application to it. The exclusion at issue in this appeal is section 52(3), which excludes records pertaining to labour relations or employment.

[17] Section 52(3) states,

Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.

2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.

3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[18] The type of records excluded from the *Act* by section 52(3) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue.¹ Briefly and broadly stated, institutions claiming this exclusion must demonstrate the connection between the record's collection, preparation or maintenance and its use in labour relations or employment proceedings, negotiations or matters.

[19] As noted by the appellant, adjudicators of this office have consistently rejected the claim that the labour relations exclusion can apply to part of a record because this exclusion requires a record-by-record approach which requires consideration of the record as a whole.² As observed by the adjudicator in Order PO-3642³, the record-by-record approach to the exclusion is respectful of the language of the exclusion, which applies to "records" that meet the relevant criteria.

[20] Turning to the present appeal, the record at issue is a 131-page proposal prepared by the WPSB as a response to a request for proposals issued by the town of Amherstburg to provide policing services. The WPSB's position in this appeal is that *portions only* of the proposal are excluded because of section 52(3).

[21] Having reviewed the proposal, I am not satisfied that it relates, as a whole, to labour and employment matters. It is clear on the face of the proposal that it was prepared by the WPSB for the purpose of seeking to provide police services to a neighbouring town and not for any purpose that could reasonably be framed as the WPSB acting as an employer.

[22] The WPSB's own representations that the exclusion only applies to part of the record support this conclusion. Regarding the claim that the exclusion applies only to part of the record, I agree with and adopt the reasoning in Order PO-3642 that the

¹ *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.), *Ontario (Attorney General) v. Toronto Star*, 2010 ONSC 991 (Div. Ct.) (both considering the equivalent exclusion in the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990 C. F.31 (*FIPPA*)), Order MO-2589.

² Order MO-3798-I at para 29.

³ Order PO-3642 deals with the equivalent exclusion in *FIPPA*.

record must be examined as a whole.

[23] For these reasons, I do not uphold the police's claim that the section 52(3) exclusion applies to any part of the proposal and I find that the police improperly withheld the information on pages 23, 24, 28, 29, 32 and 98 of the proposal on the basis of the exclusion of section 52(3).

[24] The WPSB has made an alternative exemption claim for the information on page 98, which will be examined below.

[25] Having determined that the exclusion is not available to the police, I will order that it issue a new access decision for pages 23, 24, 28, 29 and 32. Based on my review of pages 28 and 29, it appears that the withheld information may contain personal information, requiring that notice may need to be given if the police decide to disclose the information.

B. Does the discretionary exemption at section 11(f) (economic and other interests) apply to severed portions of page 98 of the record?

[26] The WPSB claims that the discretionary exemption in section 11(f) applies to page 98 of the proposal.

[27] Section 11(f) states:

A head may refuse to disclose a record that contains,

...

(f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;

[28] The purpose of section 11 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially-valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*.

[29] In order for section 11(f) to apply, the WPSB must show that:

1. the record contains a plan or plans, and
2. the plan or plans relate to:
 - i. the management of personnel, or
 - ii. the administration of an institution, and

3. the plan or plans have not yet been put into operation or made public

[30] This office has adopted the dictionary definition of “plan” as a “formulated and especially detailed method by which a thing is to be done; a design or scheme.”⁴

Representations

[31] The WPSB submits that the severed information on page 98 “contains a detailed plan formulated to manage personnel [that] outlines a structured way of hiring and ranking positions currently held by the existing Amherstburg Police staff.” The WPSB states that the details of these plans were not public at the time the proposal was developed – or when the original access decision was made – although this information has become more widely known since January 1, 2019 when the WPSB commenced providing police services in Amherstburg.

[32] In response, the appellant states that the WPSB’s representations fail to establish that section 11(f) applies and points to the fact that the plans referred to in the proposal have been implemented. Based on the disclosed portions of the record, the appellant surmises that the severed information contains descriptions of the “hiring and rank/position determination policies” for existing Amherstburg staff and stated that the information contained in the proposal has been publicly disclosed by the consultant hired by Amherstburg to evaluate the proposal.

Analysis and Findings

[33] Page 98 is one page of a 131 page proposal made by the WPSB to a neighbouring town to provide policing services. There is nothing final or certain about the proposal – it is a proposal for consideration by Amherstburg. Much of the information on page 98 recites external regulations or standards that dictate how rank determinations are made for all police officers in Ontario, although there are some statements that indicate how the WPSB would apply these external standards to the work force in Amherstburg.

[34] In my view, the information contained on page 98 is not a plan as that term is understood and interpreted in the *Act*. Rather, it is a general description, without identifying whom or how many are impacted, about how existing Amherstburg employees would be impacted if the proposal is accepted. The information lacks specificity that one might expect to see in a plan, such as transition dates, deadlines, or logistical and administrative information.

[35] I find that the first part of the three-part test required to establish the section 11(f) exemption has not been met. As a result, I do not uphold the town’s decision to

⁴ Orders P-348 and PO-2536.

withhold the information on page 98 and because no other discretionary exemptions were claimed for this information and no mandatory exemptions apply to it, I will order it to be disclosed to the appellant.

C. Does the discretionary exemption at section 6(1)(b) (closed meeting) apply to page 130 of the record?

[36] The police claim that the discretionary exemption in section 6(1)(b) (closed meeting) applies to page 130 of the proposal. Page 130 is an appendix to the proposal containing a copy of a resolution passed at a meeting of the police board.

Representations

[37] In support of its position, the WPSB simply says that the resolution was passed in private pursuant to the authority in section 35(1)(4) [sic] of the *Police Services Act*,⁵ which, it submits, authorizes police boards to meet in private to discuss certain subject matters. It has not provided any other evidence, such as minutes of the meeting at issue.

[38] In response, the appellant refers to another portion of the proposal that she asserts reveals the substance of page 130. She says that page 18 of the proposal, which is a cover letter to the proposal from the mayor of the City of Windsor, states: "Also enclosed are copies of the resolutions passed by both the Windsor Police Service Board and the Windsor City Council, fully and confidently endorsing this proposal..."

[39] In reply, the WPSB submits that the minutes "were reviewed and found that discussions included the deliberation of intimate financial and personal matters related to the employment of the Amherstburg employees, therefore, the meeting was held in compliance with section 35(1)(f) of the *Police Services Act*." I note that there is no section 35(1)(f) of the *Police Services Act*.

Analysis and Findings

[40] Section 6(1)(b) states

A head may refuse to disclose a record,

...

(b) that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of

⁵ R.S.O. 1990, Ch. P.15

them if a statute authorizes holding that meeting in the absence of the public.

[41] For this exemption to apply, the WPSB must establish that:

1. the WPSB held a meeting;
2. a statute authorizes the holding of the meeting in the absence of the public; and,
3. disclosure of the record would reveal the actual substance of the deliberations of the meeting.⁶

[42] The first part of the test is self explanatory and is not at issue in this appeal.

[43] The second part of the test requires the police to establish that the meeting was properly held in private, which is more than the mere authority to hold the meeting in private.⁷

[44] The third part of the test requires the police to establish that disclosure of the information would reveal the substance, not just the subject matter, of the deliberations.⁸

[45] For the reasons that follow, I conclude that the WPSB has failed to establish the second part of the three-part test: that the meeting was *properly held in private*.

[46] In its submissions, the WPSB says that it was authorized to hold a meeting in private pursuant to the *Police Services Act*. As noted, one of the sections it points to does not exist; however, the police state that the meeting included the deliberation of intimate financial and personal matters related to the employment of the Amherstburg employees.

[47] If I give the WPSB's representations a broad and generous reading, I can infer that it seeks to rely on section 35(4)(b) of the *Police Services Act*, which provides police boards discretion to hold meetings in private if "intimate financial or personal matters or other matters may be disclosed of such a nature, having regard to the circumstances, that the desirability of avoiding their disclosure in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that proceedings be open to the public."

[48] The police have not provided copies of minutes or other information about the

⁶ Orders M-64, M-102 and MO-1248.

⁷ Orders M-102, MO-1344, MO-2389, MO-3541 and MO-2499-I.

⁸ *St. Catharines (City) v. IPCO*, 2011 ONSC 2346 (Div. Ct.).

procedural steps it took to hold the meeting in private. However, page 130 itself is marked "special in-camera." There is no other information on the page about the statutory authority pursuant to which the police purported to meet in private.

[49] The burden to establish that the exemption applies is on the WPSB. In a similar appeal dealing with section 6(1)(b) (Order M-102), the adjudicator concluded that the York Region Police Services Board (the YRPSB) failed to establish that a meeting was held *in camera* when it provided only a copy of the record with a notation on that record that the information is "private" or "personal." The adjudicator in Order M-102 stated, "the fact that some of the records have been stamped 'in camera', in itself, is not sufficient to establish that the meeting or part of it was held in camera." Similar to the present appeal, in Order M-102, the YRPSB had not provided this office with the minutes of the meeting in question.

[50] After reviewing the record, and without further evidence from the police about the procedural steps it took to have the meeting in private or the purpose of the meeting in general, I am unable to conclude that the meeting at issue was properly held in private pursuant to the *Police Services Act*. As a result, I find that the second part of the section 6(1)(b) test has not been met.

[51] Although it is not necessary to do so because the police's failure to establish the second criterion determines the matter, I provide the following observations about the third part of the section 6(1)(b) test. Without any context about the meeting at issue, such as its purpose or how the board invoked its authority to meet in private, I am unable to draw any conclusions about whether disclosure of the content on page 130 would reveal the *substance* of any deliberations or, conversely, just the *subject matter*. In this appeal it is particularly challenging because of the brevity of the information found on page 130. I include these observations to assist the police in understanding how the section 6(1)(b) three-part test works together and because, in my view, this appeal illustrates the importance of the second part of the section 6(1)(b) test.

[52] In summary, I find that the WPSB has not established that the discretionary exemption in section 6(1)(b) applies and I do not uphold its decision to withhold page 130. As no other discretionary exemptions were claimed for this information, I will order it to be disclosed to the appellant.

D. Do the discretionary exemptions at sections 8(1)(c), (e), (g), (i) and/or (l) apply to the severed portions of the records on several pages of the record?

[53] The WPSB asserts that several pages or portions of pages are exempt due to a variety of law enforcement exemptions in section 8(1). Section 8(1) permits a head to refuse to disclose a record if the head can demonstrate that certain harms can reasonably be expected to flow from a variety of circumstances related to law enforcement. The WPSB relies on five different sub-sections of section 8(1), which are set out in the analysis below.

[54] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.⁹ However, 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.¹⁰ Establishing the exemptions in section 8(1) requires that the expectation of one of the enumerated harms coming to pass, should a record be disclosed, not be fanciful, imaginary or contrived, but rather one that is based on reason.¹¹ The institution must provide detailed 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.¹²

[55] In its reply to the appellant's representations, the WPSB refers to an unidentified website that it says publishes information obtained from various sources, including access requests, about the services provided by the WPSB. The WPSB says that this website causes risks to the safety of WPSB officers and it offers this website as an example of why the WPSB must "safeguard" information about police. As I understand it, this submission is intended to apply globally to all of the WPSB's claims under section 8(1). While I acknowledge the perspective and concerns raised, it is my view that these allegations of harm are too general and remote to assist the WPSB in its claims.

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

[56] The WPSB claims that parts of 12 pages of the proposal are exempt from disclosure based on section 8(1)(c). Section 8(1)(c) states:

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.

[57] 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

⁹ *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

¹⁰ Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

¹¹ Orders PO-2099, MO-2986 and MO-3842

¹² *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

will not apply where the technique or procedure is generally known to the public.¹³ The techniques or procedures must be "investigative." The exemption will not apply to "enforcement" techniques or procedures.¹⁴

[58] What follows is a description of these pages or groups of pages grouped by subject matter, followed by a summary of the parties' positions and my determination about whether the exemption applies.

Pages 62 and 64

[59] Pages 62 and 64 are found within a section of the proposal titled, "Forensic Identifications/Scenes of crime" and contain descriptions of the WPSB's "forensic identification laboratory" and another related unit. These pages include a detailed description of equipment available to these units. The WPSB states that disclosing a list of its specialized tools and devices used "may allow alleged offenders to circumvent the techniques and procedures put in place and possibly cause harm to victims and officers."

[60] I have reviewed pages 62 and 64 together with the submissions. I have also reviewed the proposal in general and considered the content on these pages in the overall context of the proposal at large. In my view, the WPSB has not provided sufficient evidence to establish that disclosure of the information contained on pages 62 and 64 could reasonably be expected to hinder or compromise the use of the forensic identification laboratory or the other unit described on page 64 and I will consider whether the information on page 64 is exempt on the basis of section 8(1)(l), the alternative claim made by the WPSB.

Pages 66, 67, 68, 69, 71 and 73

[61] The next group of pages (66, 67, 68, 69, 71 and 73) is found within a section of the proposal titled, "Communications services-digital, encrypted, GPS, mobile radios." These pages contain descriptions of the specifications of the hardware and software in patrol cars. The hardware and software listed include commonly-known brand names that are not unique or proprietary to the WPSB – in other words, they appear to be common names of equipment and software that is likely used by similar organizations for similar purposes. The withheld descriptions indicate where some of the equipment is physically located or stored within the patrols cars.

[62] The WPSB says that disclosure of the type and location of equipment within police vehicles may lead to theft of equipment endangering the security of the vehicle and safety of officers. The WPSB also says, "I see no compelling need for the appellant

¹³ Orders P-170, P-1487, MO-2347-I and PO-2751.

¹⁴ Orders PO-2034 and P-1340.

to have access to this information."

[63] The appellant disputes that disclosure of the proposal would lead to any greater risk of theft of the equipment. The appellant also points to Order MO-2199 which held that the usefulness of the records to the requestor is an irrelevant consideration under the *Act*. In general, the WPSB says that disclosure of the equipment that the WPSB has available to it "may allow alleged offenders to circumvent the techniques and procedures put in place and possibly cause harm to victims and officers."

[64] I have reviewed pages 66, 67, 68, 69, 71 and 73, considered the parties' submissions and the overall context of the information within the proposal.

[65] As argued by the appellant, the WPSB's assessment of the appellant's need for access is not a relevant consideration when applying the exemptions in the *Act*. As noted by the Justice Nordheimer in *Ontario Medical Association v. Ontario IPC*¹⁵, the "proper question to be asked in this context, therefore, is not "why do you need it?" but rather is "why should you not have it?"

[66] In my view, the WPSB has not demonstrated that disclosure of the information on these pages could reasonably be expected to "reveal investigative techniques and procedures currently in use or likely to be used." It is not clear what investigative techniques in particular risk being revealed. The information on these pages illustrates that the WPSB has available to it a variety of equipment that one would expect a police force of a large city to have. The WPSB's concerns about increased risk of theft are speculative and, in my view, unrelated to the purposes of section 8(1)(c).

[67] As a result, I find that pages 66, 67, 68, 69, 71 and 73 are not exempt under section 8(1)(c) and I will consider the alternative claim that this information is exempt pursuant to section 8(1)(l).

Pages 83, 84, 85 and 97

[68] The withheld portions of page 83 describe the WPSB's fleet of "low profile enforcement vehicles" and, unrelated to the low profile vehicles, potential new technology. The withheld portions of page 84 are general descriptions of available equipment.

[69] Generally, the WPSB asserts that the withheld information includes "techniques and procedures used to detect and monitor criminal activity." The WPSB explains that this includes an inventory of specialized tools and devices used in dynamic entry and barricaded situations, equipment used for analysis, computer and mobile device forensic

¹⁵ 2017 ONSC 4090 (affirmed by *Ontario Medical Association v. Ontario (Information and Privacy Commissioner)*, 2018 ONCA 673 at para 34.

software and hardware, mapping tools, networks, evidence handling procedures and equipment used during searches. The WPSB asserts that disclosure “may allow alleged offenders to circumvent the techniques and procedures put in place and possibly cause harm to victims and officers.” Regarding the vehicles, the WPSB says that public identification of unmarked vehicles would interfere with the WPSB’s ability to covertly monitor driver speed.

[70] Other than the WPSB’s general assertions I have little evidence before me about how this information could impact ongoing investigation techniques. The withheld information on pages 83 and 84 is either the same as the information disclosed in its representations making it difficult to conceive how additional harm could be caused by disclosure – or the WPSB has not provided sufficient evidence that disclosure of any of this information could reasonably be expected to hamper or impact at all ongoing investigation efforts. As a result, I find that the information on pages 83 and 84 is not exempt under section 8(1)(c) and will review the alternative claim that this information is exempt pursuant to section 8(1)(l).

[71] Although located in a separate section of the proposal titled, “List of all specialized equipment”, most of page 85 also describes computer hardware and software available in police patrol cars that is duplicative of the information on pages 66, 67 and 69. For the reasons set out in the section immediately above, I find that the portions of information pertaining to equipment on page 85 are not exempt under section 8(1)(c).

[72] One paragraph on page 85 describes a particular vehicle that one would expect a police force of the city the size of Windsor to have. I have reviewed this information, the parties’ submissions and considered the information in the context of the proposal and I have determined that the WPSB has not explained what investigative techniques in particular are at stake by disclosing this information, nor has it provided any evidence to demonstrate that the harm that could flow from disclosing the information. As a result, I find that the paragraph about a vehicle on page 85 is not exempt under section 8(1)(c) and will review the alternative claim that both parts of section 85 are exempt pursuant to section 8(1)(l).

[73] Page 97 includes a description of the video monitoring components of the WPSB’s detention unit and it includes a picture; this page is part of a section of the proposal called “Monitoring of Prisoners in Police Cells.” The WPSB has not provided specific representations about how the information on this page reveals any investigative techniques. I have reviewed this page and cannot identify the investigative technique that is at risk of impairment due to disclosure. Without specific representations about the harm that disclosure of information about the video monitoring could cause any investigative technique, I find that the WPSB has not established that the exemption in section 8(1)(c) applies to this information. I will review the alternative claim that the information should be withheld on the basis of section 8(1)(l).

[74] I will now turn to the pages that the WPSB claims are exempt under section 8(1)(e).

8(1)(e): life or physical safety

[75] The WPSB claims that part of nine pages of the proposal are exempt based on section 8(1)(e).

[76] Section 8(1)(e) states:

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

...

(e) endanger the life or physical safety of a law enforcement officer or any other person.

[77] The term "person" is not limited to an identifiable individual and can include members of an identifiable group or organization.¹⁶ A person's subjective fear, while relevant, may not be enough to justify the exemption.¹⁷

[78] Regarding the application of this exemption, the WPSB submits that disclosure of type and location of equipment inside police vehicles may lead to theft of equipment endangering the security of the vehicle and safety of officers. The WPSB did not provide submissions about how disclosure of such information could reasonably be expected to harm *persons*. Although none of the pages for which WPSB claimed section 8(1)(e), which are discussed below, pertain to equipment within vehicles, I have considered whether disclosure of the withheld information could reasonably be expected to cause the harm indicated by WPSB and I find that this is not the case.

Pages 74 and 75

[79] Page 74 and 75 describe the equipment (such as uniforms, devices and weapons) that the WPSB provides to its officers; it refers to external standards (eg. provincial government regulations) that the WPSB is required to meet for such equipment. It describes how the equipment standards in place at the WPSB will be applied to the officers from Amherstburg. The description includes comments about Amherstburg's equipment and fleet and provides a list of equipment that will be issued to all officers.

¹⁶ Order PO-1817-R.

¹⁷ Order PO-2003.

[80] The WPSB has not made any representations about how disclosure of the equipment issued to the police could reasonably be expected to endanger any person or group of persons. The WPSB has not met its burden to demonstrate that disclosure of the information on pages 74 and 75 could reasonably be expected to cause any harm to any person. I find that section 8(1)(e) does not apply and I will review the alternative claim that the section 8(1)(l) exemption applies to these pages.

Page 76

[81] Page 76 includes an inventory of equipment available to the "crisis negotiator unit," which is part of the section of the proposal titled, "List of all specialized equipment." The WPSB has not made any representations about how, specifically, disclosure of this type of information could reasonably be expected to endanger any person's life. The WPSB must provide evidence to support its claim and without such evidence I find that section 8(1)(e) does not apply and I will consider the alternative claim that the section 8(1)(l) exemption applies to page 76.

Pages 77, 78, 79, 80, 81 and 82

[82] Pages 77, 78, 79, 80, 81 and part of 82 contain an inventory of various equipment available to the Emergency Services Unit and the Marine Unit of the WPSB. The WPSB has made no representations about how disclosure of this information could reasonably be expected to cause harm to any person. I find that section 8(1)(e) does not apply and I will review the alternative claim that the section 8(1)(l) exemption applies to this information.

Section 8(1)(g): law enforcement intelligence information

[83] The WPSB claims that all or part of eight pages are exempt based on section 8(1)(g).

[84] Section 8(1)(g) states:

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

...

(g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons.

[85] The term "intelligence information" means:

Information gathered by a law enforcement agency in a covert manner with respect to ongoing efforts devoted to the detection and prosecution of crime or the prevention of possible violations of law. It is distinct from

information compiled and identifiable as part of the investigation of a specific occurrence.¹⁸

[86] In support of its claim that section 8(1)(g) applies, the WPSB says that disclosure of equipment used for intelligence gathering would assist individuals to conceal activities, thereby interfering with detection and prosecution of crime. Although not specifically related to intelligence, WPSB's submissions state,

The disclosure of details regarding the way in which officers gather information during an investigation or the techniques used to detect crime would render those methods ineffectual and permit individuals intent on a criminal act to avoid detection.

[87] The WPSB says that information about the intelligence gathering capacity is not generally known to the public.

[88] In response, the appellant says that information in the proposal would not contain information about "ongoing efforts devoted to the detection and prosecution of crime or the prevention of a possible violation of law."

[89] What follows is a discussion of the pages for which WPSB has claimed section 8(1)(g).

Pages 53-59

[90] Pages 53-59 are found under the heading, "Criminal Intelligence." The information on those pages describes the intelligence capacities of the WPSB. Page 53 includes a description of the component units of the Criminal Intelligence Unit (CIU), as well as information about the equipment available to, and the expertise of, the officers in the unit. Pages 54 and 55 include a description of the Technical Support Unit (TSU), one of the component units of the CIU. The WPSB disclosed part of the description of the TSU on page 56.

[91] Page 56 also includes a description of the skills and capacity of the civilian intelligence analyst. Page 57 includes a description of a component unit of the CIU, as well as other programs to assist the WPSB with its intelligence gathering. Page 58 includes a description of another component unit of the CIU. The information contains a description of how this unit works with other similar units in Ontario.

[92] I have reviewed the information on pages 53-59 in the context of the other

¹⁸ Orders M-202, MO-1261, MO-1583 and PO-2751; see also Order PO-2455, confirmed in *Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 4233 (Div. Ct.).

information contained in the section titled "Criminal Intelligence." I am unable to discern how the withheld information could hinder the WPSB's intelligence-gathering activities. When reviewed against the other information in the section that was disclosed, it is difficult to understand the particular risk that is protected against by withholding the information on pages 53-59. For instance, some of the component units of the CIU are described on pages 56, 57, 58 and 59. It is the WPSB's burden to demonstrate that the exemption applies and I find that it has not established that section 8(1)(g) applies. I find that section 8(1)(g) does not apply to pages 53-59.

[93] As no other discretionary exemptions were claimed for the information on pages 53, 54, 58 and 59, I will order these pages to be disclosed to the appellant. I will consider the alternative claim that the section 8(1)(l) exemption applies to the information on pages 55-57.

Page 72

[94] Page 72 is found in the section of the proposal titled, "Communications services-digital, encrypted, GPS, mobile radios" and is a description of software available in police vehicles. The WPSB has not sufficiently explained why disclosure of this information could interfere or impact intelligence gathering activities. I have reviewed the information on page 72 and I cannot find the connection between the information and the claim made by the WPSB. Accordingly, I find that section 8(1)(g) does not apply and I will review the alternative claim that the section 8(1)(l) exemption applies to that page.

Section 8(1)(i): security of a building, vehicle, system or procedure

[95] The WPSB claims that part of two pages are exempt based on section 8(1)(i).

[96] Section 8(1)(i) states:

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

...

(i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required.

[97] The WPSB submitted that the disclosure of information about information contained within patrol cars will lead to a greater risk of theft. The WPSB says, "granting access to this information would be equivalent to a home owner publishing an inventory of items in his home and the location of those items making it easy for would be thieves to find." In response to the appellant's attempt to rebut the WPSB's concerns, the WPSB provided statistics about the frequency of car break-ins in the

Windsor area. The statistics relate to the population at large and were not in reference to police cars in particular.

[98] What follows is a discussion of the WPSB's position in consideration of the specific pages for which it claimed that section 8(1)(i) applies.

Pages 61 and 70

[99] Page 61, which is included in the part of the proposal titled, "Forensic identification/scenes of crime," includes a description of the fleet of vehicles in the forensic investigation unit. Page 70 is found within the part of the proposal titled, "Communications services-digital, encrypted, GPS, Mobile radios" and is a description of the hardware installed in patrol cars.

[100] I have reviewed the information on pages 61 and 70 and I am not persuaded that the information on those pages could increase the likelihood of theft of police cars. With or without disclosure of this information, one would reasonably expect that police vehicles have valuable equipment within them.

[101] I considered whether some of the information about the installation specification on page 70 could provide some useful or helpful information to a proposed police car burglar (i.e. could the mounting devices provide greater information about fastening devices used); however, the WPSB has not provided sufficient information to draw this connection and I remain unconvinced that disclosure of the information on pages 61 and 70 could impact at all the security of the police vehicles. Accordingly, I find that the section 8(1)(i) does not apply. I will order the WPSB to disclose page 61 to the appellant. Regarding page 70, I will review the alternative claim that the section 8(1)(l) exemption applies to it.

Section 8(1)(l): commission of an unlawful act or control of crime

[102] The WPSB claims that section 8(1)(l) applies to information withheld on 34 pages of the proposal. Section 8(1)(l) states:

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.

[103] The WPSB's representations about section 8(1)(l) state that "[d]isclosure of police zones and officers assigned to those zones would provide information regarding the number of officers in a given area during a particular shift. This could be reasonably expected to facilitate the commission of an unlawful act or hamper the control of crime."

[104] In its reply, the WPSB provided the following elaboration in response to the appellant's submission that deployment is determined by supervisors: "Windsor police officers are divided in to platoons with an equal number of officers allocated to each. The officers are then assigned to a specific district and dispatched within those districts by 911 Centre staff. The shift supervisor's (Staff Sergeant) involvement is limited to ensuring that the staffing levels do not drop below the minimum established requirements."

[105] The appellant responded that the Amherstburg police zones are publicly known. In response to this and in general, the WPSB states:

... Amherstburg's police zones are public information, however, for the safety of our officers the Windsor Police Service has never publicly disclosed our zones and districts. Knowledge of the Police patrol zones and number of officers assigned to those areas could enable individuals involved in criminal activities to monitor the whereabouts and actions of specific units to gain familiarity with the patterns of the police putting officers at risk.

[106] The WPSB also refers to previous orders of this office pertaining to police codes, which are discussed in more detail below.

[107] As can be seen, the WPSB's representations regarding section 8(1)(l) focus on the potential risk arising from disclosure of staffing and deployment information and police codes.

[108] The WPSB relies on section 8(1)(l) to withhold information on 34 pages. I have reviewed these pages and have grouped them into three categories for the purpose of the following analysis.

[109] The following pages possibly include information about staffing or deployment: 33, 46, 49, 56 and 57. These are referred to below as the "staffing pages."

[110] The following pages may include information about police codes or zones: 45, 47, 99 and 100. These are referred to below as the "codes pages."

[111] The balance of the pages do not include either of this type of information: 48, 55, 64, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 96 and 97. These are referred to below as the "remaining pages." I will start with the remaining pages first.

The remaining pages (48, 55, 64, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 96 and 97)

[112] The WPSB has the burden to establish that the section 8(1)(l) exemption applies. Although it has made general submissions that it seeks to safeguard information about

police operations from public view, it has not provided specific representations to demonstrate that disclosure of the information on these pages could reasonably facilitate the commission of an unlawful act or hamper the control of harm.

[113] I acknowledge the WPSB's general claim that that it has good reason to "safeguard" police information because of the possibility that information disclosed pursuant to the *Act* could be published on unidentified websites. As noted above, the WPSB must demonstrate a risk of harm that is well beyond the merely possible or speculative. Without any specific representations to assist me in assessing the WPSB's view that disclosure of the information on the remaining pages could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime, I am unable to accept the WPSB's claim. As a result, I find that the section 8(1)(l) exemption does not apply to the remaining pages. As no other exemptions were claimed for this information, I will order that they be disclosed to the appellant.

The codes pages (45, part of 47, 99 and 100)

[114] I will now turn to the codes pages. This office has accepted that disclosure of dispatch codes could reasonably facilitate commission of unlawful acts or hamper crime control because the information could be used to anticipate or counter police action.¹⁹

[115] Referring to Orders PO-3013, PO-257 and M-757, the WPSB relies on the IPC's approach regarding codes to submit that section 8(1)(l) exempts information about how Windsor and Amherstburg are divided into zones for purpose of staffing and coverage. In response, the appellant states that Amherstburg police zones are publicly-known, which the WPSB concedes. However, the WPSB submits that the same is not true for Windsor area police zones, stating, "[k]nowledge of the Police patrol zones and number of officers assigned to those areas could enable individuals involved in criminal activities to monitor the whereabouts and actions of specific units to gain familiarity with the patterns of police putting officers at risk." In sur-reply, the appellant says that she is not interested in codes, but rather what she surmises are the police zones for Windsor.

[116] Orders PO-3013 and PO-2571 are examples of orders of this office in which the adjudicator finds that police dispatch codes are eligible for exemption under section 8(1)(l).²⁰ Orders PO-3013 and PO-2571 involved codes, including codes that related to particular zones. In Order M-757, the adjudicator upheld the police's decision to withhold information relating to police patrol zones, among other information, pursuant to section 8(1)(l) on the basis of compelling evidence provided by the police.

[117] The information withheld on page 45 and part of the information withheld on

¹⁹ See for example, Order MO-3815 for a discussion of the policy rationale for why and references to prior orders of this office.

²⁰ Or section 14(1), its equivalent in *FIPPA*.

page 47²¹ contains information that would reveal dispatch codes. I agree with and adopt the reasoning and policy rationale set out by the adjudicator in Order MO-3815 about why police forces and this office regularly determine that police codes are exempt under section 8(1)(l). I accordingly uphold the WPSB's decision to withhold the code-based information on pages 45 and 47, subject to my review of the WPSB's exercise of discretion.

[118] Pages 99 and 100 are maps of the patrol zones in Windsor and Amherstburg. The WPSB's submits that knowledge of the patrol zones *and number of officers assigned to those zones* could cause the risk set out in section 8(1)(l). I have reviewed the information on these pages. While it indicates the districts and patrol zones for Windsor and the districts for Amherstburg, the pages contain no information about the number of officers assigned in each. In my view, the WPSB has not provided sufficient information to establish that disclosure of pages 99 and 100 could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime and I therefore find that the section 8(1)(l) exemption does not apply to pages 99 and 100. As there are no other discretionary exemptions claimed for this information, I will order that they be disclosed to the appellant.

[119] I will now turn to the staffing pages: pages 33, 46, part of 47, 49 and 56.

The staffing pages (33, 46, part of 47, 49 and 56)

[120] The withheld information on page 33 includes a description of the number of staff in each police zone in Amherstburg. It is not clear to me that this information relates or reveals anything about the WPSB's staffing.

[121] The withheld information on page 46 consists of four paragraphs that describe the Crisis Negotiator Unit including the number of team members, qualifications and expertise available to the unit.

[122] Part of the withheld information on page 47 includes a description of the Emergency Services Unit, including the number of members.

[123] The withheld information on page 49 consists of one paragraph describing the Marine Patrol Unit including the number of members and the times of year that the unit is operational.

[124] The withheld information on page 56 includes a description of the skills and capacity of the civilian intelligence analyst and some of the resources available to that analyst. The withheld information on page 57 consists of a description of a component unit of the CIU, as well as two other assets or programs to assist the WPSB with its

²¹ Part of the information withheld on page 47 pertains to staffing and I will address this below.

intelligence gathering.

[125] The WPSB's main argument is that disclosure of how its officers are assigned to police zones could reasonably be expected to cause the commission of an unlawful act or hamper crime control. Strictly speaking, the WPSB's representations do not contain any information about how section 8(1)(l) harms could be caused by disclosure of the staffing plans for other separate units, such as the Crisis Negotiator Unit. However, to give the WPSB's representations a broad reading, I have considered whether disclosure of this type of information could give rise to section 8(1)(l) harms.

[126] In my view, with respect, I cannot conclude that disclosure of the number of staff assigned to each zone could reasonably be expected to facilitate commission of a crime. In my view, this concern is merely speculative and thereby insufficient to establish the exemption applies. I form this view as well in consideration of the representations of the appellant and the WPSB (in reply), that particular incidents are staffed based on priorities established by other entities, such as the 911 call centre and my observation that the proposal does not include about these priorities.

[127] Regarding the information about the Crisis Negotiator and Marine Patrol Units, the civilian intelligence analyst and the other programs described on pages 47 and 57, I do not have sufficient evidence before me about how disclosure of this information could facilitate the commission of crime or hamper crime control.

[128] I have also considered whether disclosure of the zone maps (pages 99 and 100), combined with the staffing information could facilitate the commission of crime or hamper crime control. The information on page 33 (zone staffing numbers) could possibly be connected to the information on pages 99 and 100; however, for the same reasons as I found in relation to page 33, I do not have sufficient evidence before me to establish that the section 8(1)(l) exemption. In my view, the WPSB's stated harms are speculative and insufficient to establish that the exemption applies. As noted above, it is common ground between the parties that staffing levels are responsive to incidents and, as noted above, I observe no information that would eliminate these priorities in the proposal.

[129] As a result, I do not uphold the WPSB's decision to withhold the information contained on the staffing pages on the basis of section 8(1)(l). As no other discretionary exemptions were claimed for this information, I will order that they be disclosed to the appellant.

Issue E: Did the WPSB exercise its discretion under section 8(1)(l)? If so, should this office uphold the exercise of discretion?

[130] I have determined that I will uphold the police's decision to withhold the information on pages 45 and 47 on the basis of section 8(1)(l). An institution must exercise its discretion. On appeal, this office may determine whether the institution failed to do so and may possibly send the matter back to the institution for a proper

exercise of discretion. In addition, 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 considerations, or it fails to take into account relevant considerations.

Representations

[131] The WPSB states that it carefully considered the request but that it was also concerned with the risks that disclosure of what it considered to be highly sensitive information. Furthermore, the WPSB explains that it was concerned with harms that could occur if the requested information was disclosed. The appellant disputes that the WPSB has exercised its discretion properly. Although the appellant has made detailed submissions about the process leading to eventuality that the WPSB now provides police services in Amherstburg, she does not point squarely make any case that the WPSB has acted in bad faith or an improper purpose.

Finding

[132] In exercising its discretion to withhold the information on the code pages, the police placed significant weight on the potential harms that disclosure could cause the police, which are relevant and appropriate considerations in response to the access request and the information at issue. There is no basis to find that the police did not exercise their discretion or took into account irrelevant considerations. I uphold the police's exercise of discretion in relation to the code pages.

ORDER:

1. I do not uphold WPSB's decision that section 52(3) applies to pages 23, 24, 28, 29 and 32 of the record and order it to issue an access decision with respect to the these pages. For the purposes of the procedural requirements of the access decision, the date of this order is to be treated as the date of the access request.
2. I uphold the WPSB's decision to deny access to the information on pages 45 and part of 47 (the code information only) on the basis of section 8(1)(l) of the *Act*.
3. I order the WPSB to disclose the following pages of the record: 33, part of 47 (the non-code information), 48, 49, 53, 54, 55, 56, 57, 58, 59, 61, 62, 64, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 96, 97, 98, 99, 100, 122, 130 and 131 by providing the appellant with a copy of these pages by **July 7, 2020**.
4. In order to verify compliance with order provisions 1 and 3, I reserve the right to require the police to provide me with a copy of the access decision and the records sent to the appellant.

5. The timelines in order provisions 1 and 3 may be extended if the police are unable to comply in light of the current COVID-19 situation. I remain seized of the appeal to address any such requests.

Original Signed by: _____

Valerie Jepson
Adjudicator

June 5, 2020 _____