

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4133

Appeal MA20-00407

Niagara Regional Police Services Board

December 8, 2021

Summary: The Niagara Regional Police Services Board (the police) received an access request under the *Municipal Freedom of Information and Protection of Privacy Act* for police reports about the requester. The police issued a decision granting partial access to the responsive records with severances pursuant to section 38(a) (discretion to refuse access to requester's own personal information), with section 8(1)(l) (facilitate commission of an unlawful act) of the *Act*.

At issue in this order is one police operational code in one record. The adjudicator finds that this police operational code is exempt under section 38(a), with section 8(1)(l).

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

Orders Considered: Order MO-2871.

OVERVIEW:

[1] At issue in this appeal is whether one police operational code in a police report about an incident reported by the requester is exempt from disclosure under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*).

[2] The Niagara Regional Police Services Board (the police) received an access request under the *Act* for police reports about complaints made by and against the

requester.

[3] The police issued a decision granting partial access to the responsive records with severances pursuant to section 38(a) (discretion to refuse access to requester's own personal information), with section 8(1)(l) (facilitate commission of an unlawful act) of the *Act*.

[4] The requester, now the appellant, appealed the police's decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC) and a mediator was appointed to attempt a resolution of the issues in this appeal.

[5] During the course of mediation, the police advised that the non-responsive information in the records had also been withheld, and that they were maintaining their access decision. The appellant advised the mediator that she wished to proceed to adjudication, where an adjudicator may conduct an inquiry.

[6] I decided to conduct an inquiry and sought the police's representations initially. In addition to providing representations, the police also revised their decision and disclosed all of the information in the three-page record at issue, other than one three-character police operational code on page 1 of the record. I provided the appellant with a copy of the police's representations and sought her representations. The appellant provided representations in response.

[7] In their representations, both parties agreed, and I find, that the record at issue in this appeal contains the appellant's personal information.¹ Therefore, remaining at issue is whether the one withheld police operational code on page 1 of the record is

¹ This 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.

exempt by reason of section 38(a), in conjunction with the section 8(1)(l) law enforcement exemption.

[8] In this order, I find that the one police operational code at issue is exempt under section 38(a), in conjunction with section 8(1)(l).

RECORD:

[9] The record at issue consists of a three-page "Call Hardcopy" report. Only one police operational code on page 1 is at issue.

DISCUSSION:

Does the discretionary exemption at section 38(a), in conjunction with section 8(1)(l), apply to the withheld police operational code on page 1 of the record?

[10] 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. Section 38(a) reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

if section 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

[11] Section 38(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.²

[12] 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.

[13] In this case, the police rely on section 38(a), with section 8(1)(l). Section 8(1)(l) states:

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

² Order M-352.

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

[14] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.³

[15] 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.⁴ 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.⁵

Representations

[16] The police state that disclosure of the record could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. The police submit that the IPC has consistently found that section 8(1)(1) applies to police operational codes and rely on Orders M-393, M-757, and PO-1665, urging me to make the same finding in this appeal.

[17] The appellant did not address the police's withholding of the police operational code at issue in her representations. Instead, her representations focus on how the police respond to the general type of crime referred to in the record. That is a matter that falls outside the scope of my authority under *MFIPPA*.

Analysis/Findings

[18] Many past IPC orders have considered the application of section 8(1)(l) to police operational code information. In Order MO-2871, I found that the disclosure of police operational codes, also known as ten-codes, could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. I stated:

This office has issued numerous orders with respect to the disclosure of police codes and has consistently found that section 8(1)(l) applies to "10-codes" (see Orders M-93, M-757, MO-1715 and PO-1665), as well as other coded information such as "900 codes" (see Order MO-2014). These

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

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

⁵ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

orders adopted the reasoning of Adjudicator Laurel Cropley in Order PO-1665:

In my view, disclosure of the “ten-codes” [police operational codes] would leave OPP officers more vulnerable and compromise their ability to provide effective policing services as it would be easier for individuals engaged in illegal activities to carry them out and would jeopardize the safety of OPP officers who communicate with each other on publicly accessible radio transmission space...

[19] I remain of the view that police operational code information is subject to the law enforcement exemption at section 8(1)(l) of the *Act*, and I adopt the approach taken to this information in the orders mentioned above.

[20] The information that the police have severed from the record at issue pursuant to section 38(a), in conjunction section 8(1)(l), consists of one police operational code. I accept that its disclosure could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime because the information could reasonably be expected to compromise the ability of officers to provide effective policing services by enabling individuals engaged in illegal activities to more easily carry out such activities. Therefore I find that section 38(a), with section 8(1)(l), applies to the one police operational code at issue.

[21] As I stated above, the section 38(a) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion.

[22] Based on my review of the record and the police’s representations, I find that the police exercised their discretion under section 38(a) in a proper manner and I uphold it. Therefore, the police operational code at issue is exempt under section 38(a), with section 8(1)(l). Accordingly, I uphold the police’s decision to deny access to this code.

ORDER:

I uphold the police’s decision and dismiss the appeal.

Original Signed by: _____
Diane Smith
Adjudicator

December 8, 2021 _____