Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4188

Appeal MA20-00110

Toronto Police Services Board

April 12, 2022

Summary: The appellant sought access to specific law enforcement records about himself and his Toronto and Hamilton addresses from the Toronto Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The police refused to confirm or deny the existence of these law enforcement records under section 8(3) of the *Act*, claiming that any responsive records would be located in databases that house intelligence information. The appellant appealed this decision.

In this order, the adjudicator does not uphold the police's refusal to confirm or deny the existence of records under section 8(3), because she does not accept that disclosure of the very fact of their existence or non-existence would itself convey information that ought to be withheld under section 8 the *Act*. She accordingly orders the police to issue an access decision on any responsive records in accordance with the *Act*.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 8(1)(c), 8(1)(g), 8(3), and 38(a).

Orders Considered: Orders MO-3812-I, MO-3865-I, and MO-4085-F.

OVERVIEW:

[1] In 2013, the appellant made two access requests to the Toronto Police Services Board (the police) pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*), seeking access to records about himself and his addresses in Toronto and Hamilton.

[2] The police located responsive records and disclosed them to the appellant. The appellant believed that the police should have located additional responsive records and appealed the police's access decision to the Information and Privacy Commissioner of Ontario (the IPC) and Appeal MA13-610-2 was opened to address that appeal.[1]

[3] An inquiry was conducted in Appeal MA13-610-2 and the adjudicator issued an interim order, Interim Order MO-3812-I (the first interim order). In this interim order, the adjudicator ordered the police to conduct a further search for records responsive to the appellant's two access requests, including searching for records responsive to the appellant's "general" records requests, records relating to the identified Hamilton property, and records held by the Toronto Police Services Board, all of which should include searches for responsive email records.[2]

[4] In response to Interim Order MO-3812-I, the police conducted a further search for records. The police located one additional record, and issued a supplementary access decision to the appellant. The appellant appealed that decision to the IPC. The issues in that appeal are not before me in this order.

[5] The appellant continued to take issue with the police's search for records in response to Interim Order MO-3812-I. This resulted in another interim order, Interim Order MO-3865-I (the second interim order), where the adjudicator again found that the police's additional search was not reasonable. She ordered the police to conduct yet a further search for records responsive to the appellant's requests, including searching again for records responsive to the general information requests, records relating to the identified Hamilton property, and records held by the Toronto Police Services Board, all of which should include responsive email records.

[6] In response to Interim Order MO-3865-I, the police conducted another search for records, found additional records and issued an access decision letter dated January 20, 2020, granting full access to two Address History Reports.[3]

[7] The appellant's submissions prior to the issuance of the interim orders was that the police may have additional responsive records in databases related to various program areas, projects, and activities, such as joint-force projects and covert operations.

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[1] Initially Appeal MA13-610 was opened to address the issue as to whether the police were in a deemed refusal position by not issuing an access decision within 30 days from the date of receipt of the request. The police then issued an access decision and Appeal MA13-610 was closed. Therefore, the appellant's appeal on this access decision on his two requests was considered in Appeal MA13-610-2.

[2] The adjudicator also ordered the police to disclose certain information that she found not exempt under the *Act* and to issue an access decision for other information that she decided was responsive to the appellant's request.

[3] In their access decision dated January 20, 2020, the police also stated:

> In regards to your request for personal information, no additional records could be located. In addition, emails between yourself, members of the Toronto Police Service and the Toronto Police Services Board and City of Toronto employees have already been provided.

[8] In response, the police advised in their January 20, 2020 decision letter that members of their Intelligence Services Unit conducted searches for records relating to the appellant and/or the addresses listed in his requests, and how the appellant may possibly be involved in the "Provincial Counter-Terrorism Plan and any related bio-collections, the Hate Crime Extremism Investigation Team, covert operations, 'incidental' collections, intelligence gathering, joint-force projects, and virtue testing initiatives." The police advised in this decision letter that:

> Please note the existence of the record(s) cannot be confirmed or denied in accordance with subsection 8(3) [refusal to confirm or deny the existence of a law enforcement record] of the Act...
>
> Please note, in the event that records do exist or existed at any point in time, access would be denied relying on 8(1)(c) [reveal investigative techniques and procedures], 8(1)(g) [intelligence information], and 38(a) [discretion to refuse requester's own information] of the *Act*…

[9] The appellant appealed the police's access decision of January 20, 2020 issued in response to Interim Order MO-3865-I to the IPC. This appeal file, MA20-00110 was opened and a mediator was assigned to attempt resolution of this appeal.

[10] During the course of mediation of this appeal, the appellant advised the mediator that he wished to pursue access to the withheld records, should they exist, at adjudication. The appellant advised the mediator that he believed that further records responsive to his requests exist. Finally, the appellant wished to include the late raising of discretionary exemptions to any responsive records that may be located, as an issue for adjudication. As no further mediation was possible, this appeal proceeded to adjudication.

[11] I decided to conduct an inquiry and I sought the police's representations on their search for responsive records and their refusal to confirm or deny the existence of law enforcement records under section 8(3). I advised both the police and the appellant that I would address the exemptions on any records that may be located as a result of the adjudication of these two issues.

[12] The police provided representations, which I shared with the appellant, who provided representations in response. From both the police's and the appellant's references in their representations to the ongoing inquiry in Appeal MA13-610-2, it became clear to me that the search issue arising from Interim Order MO-3865-I was being addressed in Appeal MA13-610-2, which was still ongoing before the assigned adjudicator. Therefore, I determined that it would be duplicative to consider the search issue in my inquiry into Appeal MA20-00110. I advised the appellant that this appeal will only proceed on the remaining issue, being whether the police properly applied section 8(3) to confirm or deny the existence of law enforcement records.

[13] Appeal MA13-610-2 was closed when the adjudicator issued Final Order MO-4085- F, upholding as reasonable the police's search for responsive records in response

to Interim Order MO-3865-I.

[14] In this order, I find that the police did not properly apply section 8(3) to refuse to confirm or deny the existence of responsive law enforcement records and I order the police to issue an access decision on any responsive records in accordance with the *Act.*

DISCUSSION:

Did the police properly apply section 38(a) (discretion to refuse access to requester's own personal information), with section 8(3), to confirm or deny the existence of law enforcement records?

[15] 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 some exemptions from this general right of access to one's own personal information.

[16] Section 38(a) of the *Act* reads:

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

[17] The discretionary nature of section 38(a) ("may" refuse to disclose) recognizes the special nature of requests for one's own personal information and the desire of the Legislature to give institutions the power to grant requesters access to their own personal information.[4]

[18] If the institution refuses to give an individual access to their own personal information under section 38(a), the institution must show that it considered whether a record should be released to the requester because the record contains their personal information.

[19] In this case, the police rely on section 38(a), read with section 8(3). Section 8(3) reads:

> A head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) applies.

[20] This section acknowledges the fact that in order to carry out their mandates, law enforcement agencies must sometimes have the ability to withhold information in answering requests under the *Act*. However, it is the rare case where disclosure of the mere existence of a record would frustrate an ongoing investigation or intelligence-

[4] Order M-352.

gathering activity.[5]

[21] For section 8(3) to apply, the institution must demonstrate that:

1. the records (if they exist) would qualify for exemption under sections 8(1) or (2), and

2. disclosure of the fact that records exist (or do not exist) would itself convey information that could reasonably be expected to compromise the effectiveness of an existing or reasonably contemplated law enforcement activity.[6]

[22] The police's decision letter that is the subject of this appeal is dated January 20, 2020. This decision letter is the decision in which the police invoked the application of section 8(3) regarding whether responsive records exist about the appellant's requests for information about his possible involvement in:

> … the Provincial Counter-Terrorism Plan and any related bio-collections, the Hate Crime Extremism Investigative Team, covert operations, "incidental" collections, intelligence gathering, joint-force projects and virtue-testing initiatives.

[23] The police base their representations in this appeal on the application of section 8(3) to records responsive to this aspect of the appellant's request.

[24] However, the appellant now appears to be seeking to have me adjudicate upon records related to his name and addresses in respect of Countering Violent Extremism (CVE),[7] Project Houston,[8] and the Toronto Association of Police and Private Security (TAPPS).[9] He asserts that the police should have clarified his requests at the adjudication stage of Appeal MA13-610-2 to include this new information.

[25] In my view, the appellant is now seeking to obtain access to different records than those that are at issue in this order, which are the records the police referred to in their decision letter of January 20, 2020.

[26] The police's January 20, 2020 decision letter is the decision that gave rise to the police's claim that section 8(3) applies, and this is the decision letter that is the subject of this appeal.

[27] The appellant cannot now, after this appeal has gone through mediation, and the

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[5] Orders P-255 and PO-1656.
[6] Order PO-1656.
[7] The appellant describes CVE as initiatives targeting individuals and communities that are claimed "at-risk" or "vulnerable" to perpetrating, or being victimized by, violence, as well as at locations that foster "conditions" conducive to radicalization.
[8] The appellant describes Project Houston as an intense police investigation into the disappearances of a number of men, which investigation took place in areas including in the appellant's immediate residential neighbourhood in Toronto beginning in 2012.
[9] The appellant describes TAPPS as an information sharing program.

police have provided representations on the application of section 8(3) to the requests at issue in its January 20, 2020 decision letter, seek to modify his access requests to have me adjudicate upon the application of section 8(3) to records not identified in this decision letter.

[28] Therefore, I will be considering the application of section 8(3) to the wording of the requests it was applied to as set out in the January 20, 2020 decision letter. I will not be considering the application of section 8(3) to records about the appellant and his addresses in respect of CVE, Project Houston and TAPPS because these were not records that were required to be searched by the adjudicator in Interim Order MO-3865-I, which order resulted in the decision letter of January 20, 2020. Nor will I be referring to or relying on the appellant's representations on CVE, Project Houston, or TAPPS in this order.

Representations

[29] The police state that the appellant has clarified his requests during the course of Appeal MA13-610-2, which has resulted in the issue of reasonable search in regard to records about the appellant in relation to "the Provincial Counter-Terrorism Plan and any related bio-collections, the Hate Crime Extremism Investigative Team, covert operations, incidental collections, intelligence gathering, joint-force projects and virtue-testing initiatives." As a result, the police have relied on section 8(3) as the contents of intelligence databases housing this type of information are confidential in nature.

[30] The police submit that records, if they exist, relating to the appellant or anyone else, from these intelligence databases would demand the application of 8(3).

[31] The police state that in support of the application of section 8(3), any records would be directly related to intelligence information and be subject to sections 8(1)(c) and 8(1)(g), thus satisfying part 1 of the two-part test mentioned above.

[32] The police state that their Intelligence Services Unit is tasked with conducting covert investigations into various organizations and/or persons, with the intent to detect or prevent crime. The police refer to affidavits provided by the two members of the Intelligences Services Unit. These affidavits state that intelligence database checks were performed on the appellant (the names he provided) and his Toronto and his Hamilton addresses (the two addresses listed in his request).

[33] The police submit, therefore, that it stands to reason that the information housed in an intelligence database can only be intelligence information, to which the appellant is not entitled access, should it exist.

[34] The police refer to Order M-202, where the adjudicator wrote:

> In my view, for the purposes of section 8(1)(g) of the *Act*, "intelligence" information may be described as 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 violation of law, and is distinct from information which is compiled and identifiable as part of the investigation of a specific occurrence.

[35] The police submit that intelligence information is evidently different from information gathered in the course of routine investigations of specific incidents. As such, they state that the searches required to locate the responsive records to effectively answer access to information requests received under *MFIPPA* cannot and should not include searches of databases housing intelligence information.[10]

[36] The police state that the record(s) at issue, should they exist, would form part of an investigation that is inherently covert, and as such, any revelation that these records exist would reasonably be expected to compromise the effectiveness of an existing or reasonably contemplated law enforcement activity, thus meeting part 2 of the aforementioned two-part test above. They state:

> The mandate and the spirit of the *Act* is the balance of information protection with the public's right to information held by institutions. However, in order for a policing agency to effectively control crime, enhance officer safety and serve and protect the public at large, certain investigative measures must be undertaken covertly. The resulting intelligence information gathered from these measures must be, for all intents and purposes, excluded from the access to information process.

[37] The appellant provided extensive representations, much of which, in my view, do not relate to the application of the section 8(3) exemption to the requests at issue or respond to the police's representations on this section of *MFIPPA*.

[38] On the section 8(3) exemption, the appellant states that any responsive records would not be law enforcement records or would not be about the valid exercise of authority under a police power. The appellant submits that even if the records are related to law enforcement or the exercise of police power, they would not be subject to the exemptions at sections 8(1)(c) or 8(1)(g).

[39] The appellant states that for both sections 8(1)(c) and (g), the police have not provided sufficiently detailed evidence to connect the disclosure of information, if it exists, with the harms that these sections seek to avoid.

[40] The appellant states that for section 8(1)(g), although the police argue that disclosure would reveal law enforcement intelligence information respecting organizations or persons, the brevity of the police's evidence makes it insufficient to support the police's position that section 8(1)(g) applies.

[41] The appellant also argues that intelligence information cannot be rendered

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[10] The police refer to Orders MO-2950 and MO-3561.

immune from access by section 8(3), as intelligence information is often critical for the prevention of a variety of miscarriages of justice.

[42] The appellant states that conducting covert investigations into various organizations and/or persons, with the intent to detect or prevent crime, is only one of the undertakings of the Intelligence Unit of the police. He provided a list of a number of other types of activities this unit also conducts, including:

- performing technological crime investigations and computer forensic examinations; and,
- arresting individuals for breaching recognizances of bail.

[43] The appellant argues that disclosure of the fact that records exist (or do not exist) would not itself convey information that could reasonably be expected to compromise the effectiveness of an existing or reasonably contemplated law enforcement activity.

[44] The appellant disputes the police's claim that the "records at issue, should they exist, would form part of an investigation that is inherently covert, and as such, any revelation that these records exist would reasonably be expected to compromise the effectiveness of an existing or reasonably contemplated law enforcement activity." He also states that records, if they exist, concern investigations that took place prior to the time the requests were made in 2013 and as such are not about existing or reasonably contemplated law enforcement activity.

Findings re: section 8(3)

[45] As set out above, for section 8(3) to apply, the police must demonstrate that:

1. the records (if they exist) would qualify for exemption under sections 8(1) or (2), and
2. disclosure of the fact that records exist (or do not exist) would itself convey information that could reasonably be expected to compromise the effectiveness of an existing or reasonably contemplated law enforcement activity.[11]

[46] For part 1 of the test, whether any responsive records would qualify for exemption under sections 8(1) or (2), the police rely on the application of sections 8(1)(c) and 8(1)(g). These sections read:

> 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;

[11] Order PO-1656.

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

[47] The law enforcement exemption must be approached in a sensitive manner, because it is hard to predict future events in the law enforcement context, and so care must be taken not to harm ongoing law enforcement investigations.[12]

[48] However, the exemption does not apply just because a continuing law enforcement matter exists,[13] and parties resisting disclosure of a record cannot simply assert that the harms under section 8 are obvious based on the record. They must provide detailed evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred from the records themselves and/or the surrounding circumstances, parties should not assume that the harms under section 8 are self-evident and can be proven simply by repeating the description of harms in the *Act.*[14]

[49] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.[15] However, they do not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the information.[16]

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

[50] For 8(1)(c) to apply, I must be satisfied by the evidence that disclosure of the records (if they exist) could reasonably be expected to reveal investigative techniques and procedures to the public currently in use or likely to be used in law enforcement.

[51] The technique or procedure must be "investigative"; that is, it must be related to investigations. The exemption will not apply to techniques or procedures related to "enforcing" the law.[17] As well, the exemption normally will not apply where the technique or procedure is generally known to the public.[18]

[52] Besides determining whether disclosure of the records (if they exist) could reasonably be expected to reveal investigative techniques and procedures, I must determine whether disclosure of the records could reasonably be expected to interfere with, or compromise, their effective use.

[53] The police's evidence in support of the application of section 8(1)(c) [and section 8(1)(g)] is essentially that any responsive records would be housed in intelligence

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[12] *Ontario* (*Attorney General*) *v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[13] Order PO-2040 and *Ontario* (*Attorney General*) *v. Fineberg*, cited above.
[14] Orders MO-2363 and PO-2435.
[15] *Merck Frosst Canada Ltd. v. Canada* (*Health*), [2012] 1 S.C.R. 23.
[16] *Ontario* (*Community Safety and Correctional Services*) *v. Ontario* (*Information and Privacy Commissioner*), 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc. v. Ontario* (*Information and Privacy Commissioner)*, 2016 ONSC 1616.
[17] Orders PO-2034 and P-1340.
[18] Orders P-170, P-1487, MO-2347-I and PO-2751.

databases, which are databases that house intelligence information, and that it could only be defined as intelligence information. Their position is that, in responding to access requests, they should not be required to perform searches of databases housing intelligence information.

[54] The police have not identified the databases that house intelligence information. Instead, they appear to be making a blanket submission that all records located in databases housing intelligence information reveal intelligence information and, therefore, they are entitled to invoke the application of section 8(3) to refuse to confirm or deny the existence of all records that are located in intelligence databases.

[55] I find that for section 8(1)(c), the police have not provided the requisite detailed evidence about how any responsive records, if they exist, could reasonably be expected to reveal investigative techniques and procedures. In particular, they have not identified the technique or procedure in question. By not providing evidence identifying any specific investigative techniques and procedures in the records (if they exist), the police have failed to provide the required evidence on how disclosure of such techniques and procedures could reasonably be expected to interfere with their effective use. Nor have they provided evidence as to whether such techniques and procedures, which are contained in records dated 2013 or earlier (if they exist), are currently in use or likely to be used in law enforcement.

[56] Therefore, based on my review of the broadly-worded requests for which section 8(3) was claimed by the police in their January 20, 2020 decision letter, as well as the police's representations, I find that disclosure of responsive records, if they exist, could not reasonably be expected to reveal investigative techniques and procedures currently in use or likely to be used in law enforcement under section 8(1)(c).

[57] Accordingly, as I am not satisfied that disclosure of the records, if they exist, would qualify for exemption section 8(1)(c), I find that part 1 of the test under section 8(3) has not been met for this exemption.

Section 8(1)(g): interfere with the gathering of or reveal law enforcement intelligence information

[58] For section 8(1)(g) to apply, I must be satisfied by the evidence that disclosure of the records (if they exist) could reasonably be expected to interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons.

[59] For this exemption to apply, there must be a reasonable basis for me to conclude that disclosure of any responsive records could reasonably be expected to interfere with the gathering of or reveal law enforcement intelligence information.

[60] The term "intelligence information" has been defined in past orders and the case law as:

> 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.[19]

[61] For section 8(1)(g), as with section 8(1)(c), the police rely on the submission that responsive information (if it exists) would be housed in an intelligence database and therefore can only be defined as intelligence information.

[62] As was the case for section 8(1)(c), I find that the police have not provided the requisite detailed evidence as to how disclosure of responsive records (if they exist) could reasonably be expected to interfere with the gathering of law enforcement intelligence information about organizations or persons under section 8(1)(g).

[63] In particular, as set out above, other than their blanket submission that all records in databases housing intelligence information reveal intelligence information, the police have not provided evidence as to how disclosure of any responsive records could reasonably be expected to reveal law enforcement intelligence information. Nor have they provided evidence to identify what organizations or persons any such intelligence information would relate to if it exists.

[64] Therefore, based on my review of the broadly-worded requests for which section 8(3) was claimed by the police in their January 20, 2020 decision letter, as well as the police's representations, I find that disclosure of any responsive records, if they exist, could not reasonably be expected to interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons under section 8(1)(g).

[65] Accordingly, as I have not found that disclosure of the records, if they exist, would qualify for exemption section 8(1)(g), I also find that part 1 of the test under section 8(3) has not been met for this exemption.

Conclusion

[66] In conclusion, I have not been provided with sufficiently detailed evidence by the police to support a finding that any responsive records (if they exist) would qualify for exemption under sections 8(1)(c) or 8(1)(g) as claimed by the police.

[67] Therefore, as the police's representations did not satisfy me that any responsive records would qualify for exemption under sections 8(1) or (2), I find that part 1 of the test under section 8(3) has not been met.

[68] Part 2 of the test under section 8(3) concerns whether disclosure of the fact that records exist (or do not exist) itself convey information that could reasonably be

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[19] Orders M-202, MO-1261, MO-1583 and PO-2751; see also Order PO-2455, confirmed in *Ontario* (*Community Safety and Correctional Services*), 2007 CanLII 46174 (ON SCDC).

expected to compromise the effectiveness of an existing or reasonably contemplated law enforcement activity. As I have found that part 1 of the two-part test under section 8(3) has not been met, there is no need for me to consider part 2 of the test under section 8(3).

[69] Nevertheless, I find that part 2 of the test under section 8(3) has not been met. In support, I note that the police have not provided representations specific to the wording of part 2 of the test under section 8(3). Relying on my reasons as articulated above for part 1 of the test and the broad nature of the information at issue in this order, I find that revealing that responsive records exists or do not exist would not in itself convey information that could reasonably be expected to compromise the effectiveness of an existing or reasonably contemplated law enforcement activity.

[70] Accordingly, I have found that section 8(3) does not apply and the police cannot rely on that section to refuse to confirm or deny the existence of records responsive to the appellant's request. Therefore, I will order the police to issue a new access decision on these records, which are records about the appellant's name or addresses listed in his requests in relation to his possible involvement the Provincial Counter-Terrorism Plan and any related bio-collections, the Hate Crime Extremism Investigative Team, covert operations, incidental collections, intelligence gathering, joint-force projects and virtue- testing initiatives.

ORDER:

1. I do not uphold the police's decision under section 38(a), with section 8(3).

2. I order the police to issue an access decision under the *Act* in respect of the appellant's requests for information about his name or his addresses in relation to his possible involvement in the Provincial Counter-Terrorism Plan and any related bio-collections, the Hate Crime Extremism Investigative Team, covert operations, incidental collections, intelligence gathering, joint-force projects and virtue-testing initiatives, treating the date of this order as the date of the request.

3. In order to verify compliance with order provision 2, I reserve the right to require the police to provide me with a copy of the decision letter issued to the appellant.

Original Signed by: April 12, 2022

Diane Smith
Adjudicator