Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4210

Appeal MA20-00285

Toronto Police Services Board

June 14, 2022

Summary: The Toronto Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all forensic/ballistic information related to a 22-calibre Ruger revolver seized by the police. The police issued a decision in which they refused to confirm or deny the existence of responsive records under section 8(3) (law enforcement) of the Act. In this order, the adjudicator does not uphold the police's reliance on section 8(3) and orders the police to produce another decision in response to the request.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M.56, as amended: sections 2(1) ("definition of law enforcement"), 8(1)(d), 8(1)(e), 8(1)(l), 8(2)(a) and 8(3).

Order Considered: Order MO-1416.

Case Considered: *Ontario* (*Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner*), 2014 SCC 31.

OVERVIEW:

[1] The Toronto Police Services Board (the police) received a very narrow request[1]

[1] The request had originally been sent to the Ministry of the Solicitor General who then forwarded it to the police in accordance with section 25 of the *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31.

under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

> … *all forensic/ballistic information* related to a 22-calibre Ruger revolver seized by Toronto Police Service at [specified address] in the [specified] area on [specified date]. This 22-calibre Ruger revolver was found in the possession of [named individual]. (emphasis added)

[2] The police issued a decision relying on section 8(3) of the *Act* to refuse to confirm or deny the existence of responsive records.

[3] The requester (now the appellant) appealed the police's access decision to the Information and Privacy Commissioner of Ontario (the IPC).

[4] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process where an adjudicator may conduct an inquiry under the *Act*.

[5] I decided to commence an inquiry and representations were exchanged between the parties in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[6] In this order, I do not uphold the police's reliance on section 8(3) and order the police to issue another decision in response to the request.

DISCUSSION:

[7] The sole issue in this appeal is whether the police can rely on section 8(3) of the *Act*.

[8] Section 8(3) allows an institution to refuse to confirm or deny the existence of a record in some circumstances where an exemption in section 8(1) or section 8(2) would apply to the record, if one exists. It reads:

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

[9] The purpose of this section is to allow law enforcement agencies to withhold information in answering requests under the *Act* if it is necessary to do so in order for them to carry out their work and mandate. However, it is rare that disclosure of the mere existence of a record would prevent an ongoing investigation or intelligence-gathering activity from continuing.[2]

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

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[2] Orders P-255 and PO-1656.

1. The records (if they exist) would qualify for exemption under sections 8(1) and/or 8(2); and

2. Disclosure of the fact that records exist (or do not exist) would itself convey information that could reasonably be expected to harm one of the interests sought to be protected by sections 8(1) or 8(2).[3]

[11] The police provide representations on the possible application of the exemptions at sections 8(1)(d), 8(1)(e), 8(1)(l) and 8(2)(a) of the *Act*. The appellant takes issue with the police invoking section 8(3) in the circumstances of this appeal.

[12] In light of my finding below that the police have failed to satisfy Part 2 of the test, it is not necessary for me to consider Part 1.

Part Two: Would disclosure of the fact that a responsive record exists (or does not exist) in itself convey information to the appellant that is exempt under sections 8(1) or (2)?

[13] Under part two of the test, the police must demonstrate that disclosure of the mere fact that a record that is responsive to the request exists (or does not exist) would in itself convey information to the requester, and disclosure of that information could reasonably be expected to harm one of the interests sought to be protected by sections 8(1) or (2).

[14] The police provided representations on the possible application of the exemptions at sections 8(1)(d), 8(1)(e), 8(1)(l) and 8(2)(a) of the *Act*.

[15] Sections 8(1)(d), (e), (l) and 8(2)(a) state:

> (1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;
> >
> > (e) endanger the life or physical safety of a law enforcement officer or any other person;
> >
> > (l) facilitate the commission of an unlawful act or hamper the control of crime.
>
> (2) A head may refuse to disclose a record,

[3] Order PO-2450.

> (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

[16] The term "law enforcement" is defined in section 2(1) as follows:

> "law enforcement" means,
>
> (a) policing,
>
> (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or
>
> (c) the conduct of proceedings referred to in clause (b)

"Could reasonably be expected to"

[17] Many of the exemptions listed in section 8 apply where a certain event or harm "could reasonably be expected to" result from disclosure of the record.

[18] 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.[4]

[19] However, the exemption does not apply just because a continuing law enforcement matter exists,[5] 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. 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*.[6]

[20] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.[7] 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.[8]

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[4] *Ontario* (*Attorney General*) *v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[5] Order PO-2040 and *Ontario* (*Attorney General*) *v. Fineberg*, cited above.
[6] Orders MO-2363 and PO-2435.
[7] *Merck Frosst Canada Ltd. v. Canada* (*Health*), [2012] 1 S.C.R. 23.
[8] *Ontario* (*Community Safety and Correctional Services*) *v. Ontario* (*Information and Privacy Commissioner*), 2014 SCC 31 (CanLII) at paragraphs 52 to 54; *Accenture Inc. v. Ontario* (*Information and Privacy Commissioner*), 2016 ONSC 1616.

Section 8(1)(d): disclose the identity of a confidential source or information furnished by a confidential source

[21] The section 8(1)(d) exemption is intended to protect the identity of people who provide information to an institution in the context of a law enforcement matter. The institution must show that it was reasonable to expect that the identity of the source or the information given by the source would remain confidential in the circumstances.[9] The exemption also protects the information given by the confidential source.

Section 8(1)(e): endanger life or physical safety of a law enforcement officer or any other person

[22] For section 8(1)(e) to apply, there must be a reasonable basis for concluding that disclosure of the information at issue could be expected to endanger someone's life or physical safety. A person's subjective fear, or their sincere belief that they could be harmed, is important, but it is not enough on its own establish this exemption.[10]

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

[23] For section 8(1)(l) to apply, there must be a reasonable basis for concluding that disclosure of the information at issue could be expected to facilitate the commission of an unlawful act or hamper the control of crime.

Section 8(2)(a): law enforcement report

[24] For a record to be exempt under section 8(2)(a), it must be:

1. a report,
2. prepared in the course of law enforcement, inspections or investigations, and
3. prepared by an agency that has the function of enforcing and regulating compliance with a law.[11]

What is a "report"?

[25] A report is a formal statement or account of the results of the gathering and consideration of information. "Results" do not generally include mere observations or recordings of fact.[12] The title of a document does not determine whether it is a report,

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[9] Order MO-1416.
[10] Order PO-2003.
[11] Orders P-200 and P-324.
[12] Orders P-200, MO-1238 and MO-1337-I.

although it may be relevant to the issue.[13]

The representations

The police's representations

[26] The police provide confidential and non-confidential representations in support of their application of the section 8(3) exemption.

[27] As discussed below, as reflected in the detailed nature of the request as well as the confidential and non-confidential representations provided by the appellant, it is apparent that he has some knowledge of the circumstances under which the subject firearm was seized by the police. However, the police submit that at the time the request was received and during the course of its processing, no information was apparent or came to light indicating that the appellant had any involvement in or knowledge of the circumstances under which the firearm at issue was seized.

[28] In addition, the police assert that the appellant's knowledge of the incident is limited:

> … This skeletal detail is superficial compared to the actual incident and subsequent case details discovered through in-depth investigation. This institution will concede the 'information' included in the appellant's representations shows the appellant having 'some' knowledge. However, what the record also shows, and is of greater significance, is the appellant having no involvement in the matter where the gun at issue was seized. This knowledge, however, does not negate the initial decision of this Institution and the discretion to rely on section 8(3). As such, the decision should therefore be upheld.

[29] The police add that, in any event, simply having knowledge about a particular incident does not give the appellant a right of access.

[30] Turning to the possible application of section 8(1)(d) and relying on Order MO-1416, the police provide confidential representations in support of their submission that disclosing ballistics/forensic information related to a firearm would cause the section 8(1)(d) harms alleged.

[31] In addition to the confidential representations they provided regarding the possible application of sections 8(1)(e) and 8(1)(l), the police also referenced the following excerpt from an article in a publication by the Royal Canadian Mounted Police (RCMP):

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[13] Order MO-1337-I.

> "…every firearm essentially has its own 'fingerprints.' And when police compare and identify the bullets and casings they collect at crime scenes with seized guns, it can potentially provide them with the information to link those guns to other crime scenes."
>
> "We have a saying, 'Every gun tells a story'," says Det. Chris O'Brien, a member of the Ottawa Police Service (OPS), currently seconded to the Ontario Provincial Police (OPP)'s Provincial Weapons Enforcement Unit (PWEU). "We want to know the story of that gun: who made it, who sold it, who purchased it? Those stories provide investigators with a wealth of information."
>
> "Ballistics testing is an important part of every gun investigation. O'Brien says …"
>
> "Ballistics is the key tool to getting to the bottom of crimes," says Klym" – Insp. Bill Klym [14]

[32] The police submit that:

> As demonstrated above, ballistics and forensics are instrumental in solving crimes, and integral to providing Police with information to further and solve investigations. An abundance of information can be gained from the ballistics and forensics of just one firearm. In the hands of an individual with ill intent, this information can endanger the life or physical safety of a law enforcement officer or any other person, as well as facilitate the commission of an unlawful act or hamper the control of crime.

[33] The police state that the appellant is currently serving a sentence in a correctional facility for a murder he committed with a firearm and that due to the appellant's serious criminal homicidal behaviour, disclosure of the records (if they exist) poses a risk to possible furtherance of criminal acts, to individuals and to the general public. The police add that the information, should it exist, could be disclosed to other individuals or members of criminal organizations, which could then lead to retaliation, or unlawful acts being committed. The police submit that the safety of individuals far outweighs the appellant's right of access to information of this nature (if it exists), especially because it relates to an incident in which he was not involved.

[34] The police provided confidential representations in support of their position that responsive records, if they exist, fall within the scope of section 8(2)(a) of the *Act*.

[35] In response to the appellant's assertion that there was a miscarriage of justice in his case and he is attempting to gather evidence in support of proving his innocence, the police submit that he should:

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[14] New Technology (Vol. 77, No. 1), from the Gazette, an RCMP publication.

> … redirect his efforts to the Appeals Court and bring forth evidence believed to be instrumental in solving the crime of which he has been convicted, as the access to information process under the *Municipal Freedom of Information and Protection of Privacy Act* is not equipped to handle these types of inquiries.

The appellant's representations

[36] The appellant also provides confidential and non-confidential representations in support of his position that section 8(3) does not apply.

[37] The appellant argues that the detail in his request demonstrates that he has prior knowledge of the seizure of the firearm. He submits however, that:

> … my request solely deals with the lines and grooves forensic officers would have learned this firearm places on an individual casing once discharged. I'm not interested in who came up with the findings, or who led them to this firearm either. It is simply impossible that the forensic findings retrieved in a forensic science lab could possibly lead me to a confidential source, endanger the life or physical safety of individuals, and facilitate the commission of an unlawful act or hamper the control of crime.
>
> It should also be noted that it is an extremely rare case where disclosure of the mere existence of a record would frustrate an ongoing investigation or intelligence gathering activity. It would be even less likely under these circumstances where the firearm in question was seized roughly 15 years ago, and any investigations stemming from its seizure would most likely have been long over with.

[38] The appellant acknowledges that it is fair for police to say that at the time of the receipt, and subsequent processing of his request, no information was apparent or came to light indicating that he had any involvement or knowledge of the matter of which he is basing his position. He adds:

> They are also correct when they say that having knowledge of a particular incident, does not give one the right of access. What having knowledge of a particular incident does do in appeals like this is give institutions less to hold onto when it comes to their reasoning behind withholding information.

[39] The appellant also asserts that he knows more than the "skeletal details" of the seizure of the subject firearm.

> I am fully aware of the fact that it was an informant that led the police to the home of [the individual named in the request], and informed them

> that the 22 calibre was within the home. I also know that this informant gave information that also led to the searching of [another named individual's] home, which would have taken place around the same time and date as [the individual named in the request]. More 22 calibre bullets were found in [another named individual's] home. FYI, [another named individual] was also a witness (for the defence) in my case. I was able to gather all this information without having any involvement in the case where this 22 was seized, because as life continuously proves to us policing is often done inadequately.

[40] With respect to the possible application of section 8(1)(d) the appellant submits that the officer who did the ballistics testing could not be considered a confidential source, and his or her findings would normally be a part of the disclosure provided to an accused in a criminal proceeding. He adds that, "[i]f the institution does not feel comfortable releasing the identity of the officer, I am perfectly fine with that."

[41] Referencing the excerpts from the article set out above, the appellant agrees that "[e]very gun tells a story", but that sometimes that story may be one the police may or may not want to be told to others for a number of different reasons. He submits that:

> We must also recognize that institutions like the Toronto Police Service can sometimes hide behind information and privacy protection regulations, using them in ways one might not find ethical.

[42] The appellant acknowledges that he is currently serving a sentence in a correctional facility for a murder which was committed with a firearm, but asserts that he has "always declared my innocence which is part of the reason for requesting this forensic information to begin with." He submits:

> As pointed out by the institution, ballistic and forensics are instrumental in solving crimes, and integral to providing Police with information to further and solve investigations. …

[43] With respect to the possible application of sections 8(1)(e) and 8(1)(l), the appellant states that he is not looking for any information that could endanger anyone and that his "reasons for requesting this information surely outweighs any potential risk simply because there isn't any."

[44] Finally, the appellant submits that the information being requested would not satisfy the section 8(2)(a) three-part test:

> … Although the information was prepared by the police, who have the function of enforcing and regulating compliance with law, the forensic/ballistic findings are more of a common preparation used by law enforcement and often, as in [the individual named in the request's] case,

> adds nothing to the ongoing investigation. It is also not "a formal statement or account of the results of the collation and consideration of information". It can be seen more as "test results".

[45] Finally, with respect to the police's suggestion that he pursue the information through alternative means the appellant submits:

> In many cases of the past individuals have gotten breaks in cases leading to their exoneration through information not disclosed during the court process, but obtained through access to information. I thank the institution for its advice, but in order to redirect my efforts to the Appeal Court and bring forth evidence believed to be instrumental in solving the crime I must first gather the evidence. It's laughable how the institution can now make it seem like my request for information is somehow my way of using the *Municipal Freedom of Information and Protection and Privacy Act* to replace the appeal process.

Analysis and findings

[46] As I noted at the outset, the appellant's access request was a narrow one, and seeks ballistics information about a particular firearm. I am not satisfied that the disclosure of the fact that a record exists, or does not exist, would in itself convey information to the appellant which could reasonably be expected to harm one of the interests sought to be protected by sections 8(1)(d), (e), (l) or 8(2)(a).

[47] With respect to section 8(1)(d), the ballistics information, if it exists, would likely have been compiled or created by the police, rather than by any confidential source that may have led to the firearm being seized. Furthermore, although I acknowledge the concerns of the police set out in their confidential and non-confidential representations, the police also acknowledge that the appellant already has some knowledge about the circumstances that led to the seizure of the firearm at issue.

[48] The police submit that "in the hands of an individual with ill intent, this information can endanger the life or physical safety of a law enforcement officer or any other person, as well as facilitate the commission of an unlawful act or hamper the control of crime." However, this is a conclusion, not a reason. The police have not, in either their confidential or non-confidential representations, set out a chain of events that could reasonably be expected to occur, from disclosure of the mere fact that a record exists (or does not exist), and how these events could lead to the harms set out in section 8(1)(e) or (l). In my view, the police have simply not established that either harm could reasonably be expected to result from confirming or denying the existence of a responsive record.

[49] Accordingly, considering the evidentiary threshold set out in *Ontario* (*Community*

Safety and Correctional Services) *v. Ontario* (*Information and Privacy Commissioner*)[15], I am not satisfied that simply disclosing the fact that a record containing ballistic information exists, or does not exist, could reasonably be expected to result in any of the harms set out in sections 8(1)(d), (e) or (l).

[50] Section 8(2)(a) is a class exemption for law enforcement reports. Disclosing the fact that a report exists or does not exist, is not the same as disclosing the report itself. In my view, and considering the appellant's knowledge of the matter, there is no harm to the interests protected by section 8(2)(a) by simply disclosing that a responsive record exists or does not exist.

[51] In conclusion, I have found that the police have not satisfied Part 2 of the section 8(3) test. As both parts must be satisfied, I find that section 8(3) does not apply. Accordingly, it is not necessary for me to consider the police's exercise of discretion.

[52] For the reasons set out above, I do not uphold the police's reliance on section 8(3) and order the police to produce another decision in response to the appellant's access request.

ORDER:

1. I do not uphold the police's reliance on section 8(3) of the *Act*.
2. I order the police to issue another decision in response to the appellant's access request, without relying on section 8(3) of the *Act*. The police are to send me a copy of the decision letter when it is sent to the appellant.

Original Signed by: June 14, 2022
Steven Faughnan
Adjudicator

[15] 2014 SCC 31 at paragraphs 52 to 54.