

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-4351

Appeal MA21-00708

Peel Regional Police Services Board

March 24, 2023

**Summary:** The appellant requested access to occurrence reports where he is mentioned from the Peel Regional Police Services Board (the police). The police identified responsive records relating to an occurrence and withheld all of the information under section 38(a) (discretion to refuse access to requester's own personal information), read with section 8(1)(a) and (b) (law enforcement) of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). In this order, the adjudicator upholds the police's decision and finds that section 38(a) read with section 8(1)(a) applies to exempt all of the information in the records from disclosure. The appeal is dismissed.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 2(1) (definition of personal privacy), 38(a) read with 8(1)(a).

**Cases Considered:** *Ontario (Attorney General) v. Fineberg*, [1994] O.J. No. 1419 (Div. Ct.).

### OVERVIEW:

[1] A requester made the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Peel Regional Police Services Board (the police) relating to two occurrence reports where he is identified:

Disclosure, as well as any and all documents pertaining to this case: [2 specified occurrence numbers]

[2] The police issued a decision to deny the information contained in records relating to one of the specified occurrences, pursuant to subsections 38(a) (discretion to refuse access to requester's own personal information,) read with 8(1)(a) and (b) (law enforcement), and section 38(b) (personal privacy) of the *Act*. As to the other specified occurrence, the police noted in its decision that the type of information referred to in the request is outside the scope of the *Act*.<sup>1</sup>

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

[4] During mediation, the police maintained their access decision and confirmed the nature of the responsive records. The police clarified that section 38(a) and 8(1)(a) and (b) were applied to the records concerning the specified occurrence, as the investigating officer advised that although the appellant is not a person of interest, the investigation is ongoing and charges are likely to be laid. After being provided with some relevant orders by the mediator, the appellant subsequently advised that he would like to proceed with the appeal, seeking access to additional information about himself in one of the specified occurrence reports.

[5] As no further mediation was possible this appeal was transferred to the adjudication stage of the appeals process, in which an adjudicator may conduct an inquiry under the *Act*. The original adjudicator decided to conduct an inquiry into this matter. She began by inviting representations from the police. Subsequently, I was assigned to this appeal. I shared the non-confidential portion of the police's representations with the appellant who provided his own representations in response. Representations were shared in accordance with the IPC's *Code of Procedure*.

[6] In this order, I uphold the police's decision that section 38(a) read with section 8(1)(a) applies to exempt the records from disclosure and dismiss the appeal.

## **RECORDS:**

[7] The records, withheld, in full, relate to one specified occurrence number and are:

- An occurrence report (57 pages)
- Police officers' notes (198 pages)
- Police interviews (15 DVD recordings).

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<sup>1</sup> It was confirmed at mediation that the only occurrence report at issue was the one where the police are claiming exemptions apply.

## ISSUES:

- A. Does the discretionary exemption at section 38(a), allowing an institution to refuse access to a requester's own personal information, read with the section 8(1)(a) exemption related to law enforcement activities, apply to the records?
- B. Did the institution exercise its discretion under section 38(a)? If so, should the IPC uphold the exercise of discretion?

## DISCUSSION:

### **Issue A: Does the discretionary exemption at section 38(a), allowing an institution to refuse access to a requester's own personal information, read with the section 8(1)(a) exemption related to law enforcement activities, apply to the records?**

[8] Based on my review of the records and the parties' representations, I find that section 38(a) read with section 8(1)(a) applies to exempt the information at issue from disclosure. As a result, it is not necessary for me to consider the other exemptions the police rely on.

[9] As the information in the records constitutes the personal information of the appellant, I must determine the police's claim under section 38(a)<sup>2</sup>, which 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.<sup>3</sup>

[10] In this case, the police rely on section 38(a) read with section 8(1)(a), which states:

A head may refuse to disclose a record if the disclosure could reasonably be expected to interfere with a law enforcement matter;

[11] The term "law enforcement"<sup>4</sup> is defined in section 2(1) of the *Act*:

"law enforcement" means,

(a) policing,

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<sup>2</sup> Section 38(a) of the *Act* 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, 9.1, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

<sup>3</sup> Order M-352.

<sup>4</sup> The term "law enforcement" appears in many, but not all, parts of section 8.

(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)

***Sections 8(1)(a): interfere with a law enforcement matter***

[12] The exemption does not apply just because a continuing law enforcement matter exists,<sup>5</sup> 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*.<sup>6</sup>

[13] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.<sup>7</sup> 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.<sup>8</sup>

***Representations***

[14] In addition to its confidential representations, which were not shared with the appellant because they would disclose sensitive details of the ongoing investigation, the police submit that the records wholly relate to an active and ongoing criminal investigation pursuant to the definition of law enforcement in section 2(1) of the *Act*. They refer to *Ontario (Attorney General) v. Fineberg*<sup>9</sup> and submit that the law enforcement exemption must be approached in a sensitive manner, because it is hard to predict future events in a law enforcement context and care must be taken not to harm ongoing investigations.

[15] The police submit that section 8(1)(a) applies to all of the information in the records as they pertain to a specific law enforcement matter that is active and ongoing, and may result in criminal charges. They indicate that the investigation concerns illegal possession and use of firearms, contrary to the *Criminal Code of Canada*. The police submit that they have contacted the officer in charge of the investigation, and confirmed the status of the investigation.

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<sup>5</sup> Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

<sup>6</sup> Orders MO-2363 and PO-2435.

<sup>7</sup> *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

<sup>8</sup> *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.

<sup>9</sup> [1994] O.J. No. 1419 (Div. Ct.).

[16] The police submit that the records include detailed descriptions of investigative steps taken to date, including areas searched, evidence obtained, and witness interviews conducted. They confirm that the records also include the names and detailed personal information of victims, witnesses, and suspects. Accordingly, the police submit that disclosure of the records to the appellant – particularly given the fact that he was a potential witness who the police attempted to interview pursuant to the investigation – is likely to interfere with an active law enforcement investigation.

[17] The police submit that disclosing the records, which consist of the intimate details of an active and serious police investigation, could impede that investigation in several important ways. They submit that this is particularly apt, considering that the *Act* does not impose any restrictions or limits on what a requester can do with the records that they receive. The police submit that disclosure could reveal suspects who are still being investigated, which could lead those individuals to flee the jurisdiction, take steps to conceal evidence, intimidate other witnesses, or otherwise hinder the police's investigation.

[18] The police submit that disclosing the records could also feasibly taint the credibility and reliability of witnesses, and/or courtroom testimony pertaining to any prosecutions pursuant to this investigation. They submit that if the status of the existing investigation is publicized, police investigators will have no way of knowing when an individual comes forward with information whether that individual learned of the information through the release of records, or because of something they actually witnessed first-hand.

[19] The police submit that given that the investigation is ongoing, they cannot necessarily determine the relevance of a specific portion of the records to the overall investigation. Further, they submit that disclosure of the records containing third party personal information could make other individuals more hesitant to come forward, out of concern that their personal information would also be disclosed – thus impeding the progress of the investigation, and the police's ability to ultimately lay criminal charges.

[20] The appellant provided limited representations in this appeal, and did not specifically address the issues set out in the Notice of Inquiry including the possible application of section 38(a) read with section 8(1)(a). He submits that he wants all information that pertains to himself disclosed and that information revealing the identity of affected parties should be redacted.

### ***Analysis and finding***

[21] For the following reasons, I find that section 38(a), read with section 8(1)(a) applies to exempt from disclosure the information at issue in this appeal.

[22] The IPC has found that "law enforcement" can include a police investigation into

a possible violation of the *Criminal Code*.<sup>10</sup> Given the subject matter of the records, namely the police's investigation and responses to possible violations of law, I am satisfied that the records relate to law enforcement.

[23] For section 8(1)(a) to apply, the law enforcement matter must still exist or be ongoing.<sup>11</sup> This exemption does not apply once the matter is completed, nor where the alleged interference is with "potential" law enforcement matters.<sup>12</sup> The police have demonstrated that there is an active and ongoing law enforcement investigation and that disclosure of the records from that investigation is likely to interfere with the police's ability to initiate law enforcement proceedings.

[24] The Divisional Court's decision in *Ontario (Attorney General) v. Fineberg*<sup>13</sup> is relevant in this appeal. In that decision, the Court held that the law enforcement exemption must be approached in a sensitive manner, because it is hard to predict future events in a law enforcement context and care must be taken not to harm ongoing investigations.

[25] Having regard to the records themselves along with the representations of the police, including its confidential submissions, I am satisfied that they have demonstrated that the risk of harm is real and that disclosure of the withheld information could reasonably be expected to interfere with an ongoing law enforcement matter. I accept that disclosure of the records could reasonably result in the disclosure of information to potential witnesses or suspects and taint credibility of other witnesses to the detriment of the ongoing law enforcement matter. I uphold the police's decision to withhold the records from the appellant. Next, I will review the police's exercise of discretion.

**Issue B: Did the institution exercise its discretion under section 38(a)? If so, should the IPC uphold the exercise of discretion?**

[26] The section 38(a) exemption is discretionary and permits the police to disclose information, despite the fact that it could be withheld. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[27] In addition, the IPC 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

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<sup>10</sup> Orders M-202 and PO-2085.

<sup>11</sup> Order PO-2657.

<sup>12</sup> Orders PO-2085 and MO-1578.

<sup>13</sup> [1994] O.J. No. 1419 (Div. Ct.).

- it fails to take into account relevant considerations.

[28] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>14</sup> The IPC cannot, however, substitute its own discretion for that of the institution.<sup>15</sup>

[29] The police submit that in exercising their discretion under section 38(a), given the nature of the records, they determined that section 8(1) was clearly applicable, and that the disclosure of any of the records could reasonably be expected to interfere with an ongoing law enforcement matter/investigation.

[30] The police submit that they complied with the relevant provisions of the *Act*. It submits that it considered the severance provision under section 4(2), and that the records contain the appellant's personal information, and ultimately exercised its discretion appropriately in determining that disclosure of the records would interfere with a law enforcement investigation.

[31] The appellant does not address the police's exercise of discretion.

[32] Based on my review of the police's representations and the information that I have found to be exempt under section 38(a), read with section 8(1)(a), I find that the police exercised their discretion in a proper manner, taking into account relevant considerations and not taking into account irrelevant considerations.

[33] Accordingly, I uphold the police's exercise of discretion not to disclose the information at issue in the records that I have found to be exempt by reason of section 38(a) (with section 8(1)(a)).

## **ORDER:**

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

Original Signed by: \_\_\_\_\_

Alec Fadel  
Adjudicator

March 24, 2023  
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<sup>14</sup> Order MO-1573.

<sup>15</sup> Section 43(2).