Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4402

Appeal MA21-00159

London Police Services Board

June 23, 2023

Summary: The London Police Services Board (the police) received a request under the *Act* for access to information about the appellant. The police issued a decision denying access in full to the responsive record under section 38(a) read with section 8(1)(g) of the *Act*. The appellant appealed the police's access decision to the IPC and also raised reasonable search as an issue. In this order, the adjudicator upholds the police's access decision, finds that the police conducted a reasonable search, and dismisses the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of *personal information*), 17, 38(a), and 8(1)(g).

OVERVIEW:

[1] This order determines the issue of access to a list of every time the London Police Services Board (the police) searched for the appellant in a police database from 2009- 2020. The police received a request, under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for information about the requester, including dates and times the requester's information was searched by the police; what information was searched; how long the information was viewed; and the person(s) who were present during the searches over a 16-year period. The requester also sought information about any admission of wrongdoing or improper use of their personal information by the police.

[2] The police responded initially by issuing a 60-day time extension decision. The police then denied access to a 14-page record, in full, under section 38(a) (discretion to refuse access to requester's own personal information) read with sections:

- 8(1)(a) (law enforcement matter);
- 8(1)(c) (reveal investigative techniques and procedures);
- 8(1)(d) (confidential source of information);
- 8(1)(e) (life or physical safety);
- 8(1)(l) (facilitate commission of an unlawful act);
- 9(1)(d) (relations with other governments); and
- 13 (threat to safety or health) of the *Act*.

[3] The police also stated that certain information requested by the appellant does not exist.

[4] The appellant appealed the police's decision to the Information and Privacy Commissioner of Ontario (IPC) and a mediator was appointed to explore resolution.

[5] During mediation, the police issued a new decision claiming the discretionary exemption at section 8(1)(g) (intelligence information) in addition to the exemptions previously claimed. The police also maintained their position with respect to search. The appellant advised that he seeks access to the record and that he believes further records responsive to his request should exist.

[6] As a mediated resolution was not possible, the appeal was transferred to the adjudication stage, where an adjudicator may conduct an inquiry under the *Act*. I decided to commence an inquiry by inviting representations from the police, initially. I received representations from the police and shared their non-confidential representations with the appellant,[1] and invited representations from me. The appellant submitted representations, which I shared with the police. I then invited reply representations from the police, but they declined to submit any.

[7] In this order, I find that the police conducted a reasonable search for responsive records, uphold the police's access decision, and dismiss the appeal.

[1] Some portions were withheld in accordance with the confidentiality criteria in IPC Practice Direction 7 and section 7 of the IPC's *Code of Procedure*.

RECORD:

[8] The record at issue is a 14-page record created by the police in response to the appellant's request. The record is a list (search list) of every time the police searched the appellant's name within the police Records Management System (RMS) or the Canadian Police Information Centre (CPIC) system from 2009 until 2020. The record includes the date, time, name and payroll number of the officer, and database searched.

ISSUES:

A. Did the police conduct a reasonable search for responsive records?

B. Does the search list contain the appellant's "personal information" as defined in section 2(1)?

C. Does the discretionary exemption at section 38(a), read with the section 8(1)(g) exemption, apply to the search list?

DISCUSSION:

Issue A: Did the police conduct a reasonable search for responsive records?

[9] The appellant claims that further records responsive to his request should exist. Where a requester claims additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.[2] If I am satisfied the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[10] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show it has made a reasonable effort to identify and locate responsive records.[3] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related (responsive) to the request.[4]

[11] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable

[2] Orders P-85, P-221 and PO-1954-I.
[3] Orders P-624 and PO-2559.
[4] Orders M-909, PO-2469 and PO-2592.

basis for concluding such records exist.[5]

Representations, analysis and findings

[12] Based on the representations of the parties, I am satisfied that the police conducted a reasonable search for responsive records.

[13] The appellant takes the position that further records responsive to his request should exist. However, the appellant's representations do not specifically address the police's search for records, nor do they outline what further records the appellant believes may exist.

[14] The police submit that an experienced employee, knowledgeable in the subject matter of the request conducted a reasonable search for responsive records. In support of their position, the police provided an affidavit from the Freedom of Information (FOI) analyst that conducted the search. In the affidavit, the FOI analyst described the search she conducted for records in response to the appellant's request. She described the staff involved in the search, the places that were searched, and the results of the search. She also described how the search list was created based on the information she compiled during her search.

[15] The police have described the staff involved in the search, where they searched, and the results of the search. I am satisfied that the police carried out a search involving experienced employees knowledgeable in the subject matter of the request and that those employees expended a reasonable effort to locate records which are reasonably related to the request.[6] I am satisfied that the police have provided sufficient evidence to establish the reasonableness of their efforts. The police's search was sufficiently thorough and logical, and they have also described how the search list was created in response to the appellant's request.

[16] As noted above, although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding such records exist.[7] The appellant's representations do not address the police's search, so he has not indicated what further records he believes should exist. Therefore, I am not persuaded that ordering the police to conduct another search will locate further records responsive to the appellant's request.

[17] The *Act* does not require the police to prove with absolute certainty that further records do not exist. However, the police must provide sufficient evidence to show they have made a reasonable effort to identify and locate responsive records, and I find that

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[5] Order MO-2246.
[6] Orders M-909, PO-2469 and PO-2592.
[7] Order MO-2246.

they have done so.[8]

[18] For the reasons above, I find that the police conducted a reasonable search for responsive records.

Issue B: Does the search list contain the appellant's "personal information" as defined in section 2(1)?

[19] In order to decide which sections of the *Act* may apply to a specific case, the IPC must first decide whether the record contains "personal information," and if so, to whom the personal information relates. It is important to know whose personal information is in the record. If the record contains the requester's own personal information, their access rights are greater than if it does not.[9] Also, if the record contains the personal information of other individuals, one of the personal privacy exemptions might apply.[10]

[20] Personal information is defined in section 2(1). The relevant portions are as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> > (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,

[21] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[11]

Representations, analysis and findings

[22] Based on my review of the record and the representations of the parties, I find that the record contains the personal information of the appellant.

[23] As noted above, the police submitted confidential representations in this appeal, which I have reviewed in full, but will not set out below, since I accepted that they met the confidentiality criteria in Practice Direction 7.

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[8] Orders P-624 and PO-2559.
[9] Under sections 36(1) and 38 of the *Act,* a requester has a right of access to their own personal information, and any exemptions from that right are discretionary, meaning that the institution can still choose to disclose the information even if the exemption applies.
[10] Sections 14(1) and 38(b), as discussed below.
[11] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[24] The police submit that the search list was created in response to the appellant's request and reflects each instance in which the appellant's name was queried within the police RMS or the CPIC system from 2009 until 2020.

[25] The appellant's representations do not specifically address whether the record contains personal information.

[26] As the police submits, the search list reflects each instance in which the appellant's name was queried within the police RMS or CPIC system from 2009 until 2020. I find this information fits within paragraph (b) of the definition of "personal information" in section 2(1) of the *Act*.

[27] Having found that the search list contains the appellant's personal information, I must now determine whether the exemption at section 38(a), read with the section 8(1)(g) exemption, apply to exempt the search list from disclosure.

Issue C: Does the discretionary exemption at section 38(a), read with the section 8(1)(g) exemption, apply to the search list?

[28] 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.

[29] 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.

[30] 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.[12]

[31] 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.

[32] In this case, the police rely on section 38(a) read with sections 8(1)(a), 8(1)(c), 8(1)(d), 8(1)(e), 8(1)(g), and 8(1)(l). The police also rely on sections 9(1)(d) and 13. However, since I find that section 38(a), read with section 8(1)(g), applies to the search list at issue, I will not address the police's alternative exemption claims.

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[12] Order M-352.

[33] Section 8 contains several exemptions from a requester's right of access, mostly related to the context of law enforcement. The relevant parts of section 8(1) state:

> (1) 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;

[34] The term "law enforcement"[13] is defined in section 2(1):

> "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)

[35] 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.

[36] 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.[14]

[37] However, the exemption does not apply just because a continuing law enforcement matter exists,[15] 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. Harm can sometimes be inferred from the records themselves or the surrounding circumstances.[16]

Representations, analysis and findings

[38] Based on my review of the search list and the representations of the police, I find that section 38(a), read with section 8(1)(g), apply to exempt the information contained in the search list from disclosure.

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[13] The term "law enforcement" appears in many, but not all, parts of section 8.
[14] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[15] Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.
[16] Orders MO-2363 and PO-2435.

Section 8(1)(g): intelligence information

[39] For section 8(1)(g) to apply, there must be a reasonable basis for concluding that disclosure of the information at issue could be expected to interfere with the gathering of or reveal law enforcement intelligence information.

[40] The term "intelligence information" has been defined 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.[17]

[41] The police submit that disclosure of the information contained in the search list could reasonably be expected to interfere with the gathering of, or reveal law enforcement intelligence information. As noted above, some of the police's representations were withheld as confidential. I have reviewed all of the police's representations, but will only outline the non-confidential portions below.

[42] The police submit that the search list was created in response to the appellant's request and reflects each instance in which the appellant's name was queried within the police RMS or CPIC system from 2009 until 2020. The police submit that the appellant has been arrested and charged on several occasions, and has also been the victim of and witness to criminal conduct. The police submit that on many of those occasions, there have been multiple parties involved.

[43] The police argue that if the information contained in the search list were disclosed, the appellant, and other individuals associated with the appellant, could use this information, in conjunction with other information they already know, to draw conclusions with respect to police involvement, investigation, or intelligence information that is not otherwise publicly known. The police argue that this would include the subject(s) of the intelligence information and the confidential source(s) of that information. The police submit that disclosure of the search list would reveal intelligence information which could reasonably be expected to undermine the police's ability to detect, prosecute, and prevent future violations of the law.

[44] In support of their position, the police rely on the definition of "intelligence information" above, as well as Order M-202, which cites the following excerpt from The Williams Commission Report:

> Speaking very broadly, intelligence information may be distinguished from investigatory information by virtue of the fact that the former is generally

[17] 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).

> unrelated to the investigation of the occurrence of specific offenses. For example, authorities may engage in surveillance of the activities of persons whom they suspect may be involved in criminal activity in the expectation that the information gathered will be useful in future investigations. In this sense, intelligence information may be derived from investigations of previous incidents which may or may not have resulted in trial and conviction of the individual under surveillance. Such information may be gathered through observation of the conduct of associates of known criminals or through similar surveillance activities.[18]

[45] The appellant's representations do not specifically address the sections 38(a) or 8(1) exemptions. His representations make allegations against the police and specific police staff members. They also outline his concerns about white supremacist groups and an organization that he alleges is a white supremacist group (the organization), and their relationship with the police. The appellant's representations go on to make allegations of a conflict of interest against the FOI analyst processing his request because he alleges that she is part of the organization. Given the appellant's claims are unsupported by any evidence, I make no finding about the organization or his specific claims against the FOI analyst.

[46] Based on my review of the search list and the police's representations, including the confidential portions, I find that the police have provided sufficiently detailed arguments to support the application of section 8(1)(g) to exempt the search list from disclosure. I accept that disclosure of the information contained in the search list could reasonably be expected to interfere with the gathering of, or reveal law enforcement intelligence information. I am unable to elaborate further on the risks of harm because to do so would reveal information that I agree is exempt from disclosure. In reaching this conclusion, I have taken into consideration that the section 8(1) exemption must be approached in a sensitive manner due to the difficulty of predicting future events in the law enforcement context. For these reasons, I find that the search list is exempt from disclosure under section 38(a) read with section 8(1)(g) of the *Act*.

Exercise of discretion

[47] 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. On appeal, I may determine whether the institution failed to do so.

[48] The police state that they properly exercised their discretion to withhold the search list under section 38(a) read with section 8(1)(g) of the *Act*, and I should uphold their exercise of discretion. The police state that they balanced the appellant's right of

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[18] *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy/1980*, vol. 3 (Toronto: Queen's Printer, 1980) at 709-710.

access with the consequences of disclosure and determined that the exemptions, and the interests they seek to protect, outweighed the appellant's right of access. The police state that they also considered that disclosure of the search list would hinder police operations, techniques, procedures, and the confidence of the public in assisting in police investigations.

[49] The appellant's representations do not specifically refer to the police's exercise of discretion. However, the appellant made allegations of bad faith against various police staff members and submitted audio recordings of his telephone conversations with them in support of his position. I have listened to all four audio recordings and I find that they do not support the appellant's allegations of bad faith.

[50] After considering the representations of the parties and the circumstances of this appeal, I find that the police did not err in their exercise of discretion with respect to their decision to deny access to the search list under section 38(a) read with section 8(1)(g) of the *Act*. I am satisfied that the police considered relevant factors, and did not consider irrelevant factors in the exercise of discretion. In particular, I am satisfied that the police did not exercise their discretion to withhold the search list from the appellant in bad faith.

[51] Accordingly, I find that the police exercised their discretion in an appropriate manner in this appeal, and I uphold it.

ORDER:

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

Original Signed By: June 23, 2023
Anna Truong
Adjudicator