Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4439

Appeal MA18-00723

Hamilton Police Service

September 12, 2023

Summary: The Hamilton Police Service (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to an incident involving the requester. The police conducted a search for responsive records and issued an access decision. The requester challenges the adequacy of that access decision in this appeal, as well as the police's proposed method of access. In addition, he seeks access to the information withheld by the police in the responsive police reports and officers' notes, and 911 calls. He also raised the issue of reasonable search. In this order, the adjudicator upholds the adequacy of the police's access decision and finds that their proposed method of access is consistent with the *Act*. She also upholds the police's decision to withhold police codes, under the discretionary exemption at section 38(a) (discretion to withhold requester's own personal information), read with section 8(1)(l) (facilitate commission of an unlawful act). She finds that the personal information withheld in the records is exempt under the discretionary exemption at section 38(b) (personal privacy). She also upholds the reasonableness of the police's search. As a result, the appeal is dismissed.

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"), 8(1)(l), 14(3)(b), 17, 19, 23, 38(a), and 38(b); General, R.R.O. 1990, Reg. 823, section 2.

Order Considered: Order MO-2910.

OVERVIEW:

[1] This order resolves an appeal regarding a request for records under the

Municipal Freedom of Information and Protection of Privacy Act (the *Act*) relating to an incident investigated by police, where the requester was involved. The Hamilton Police Service (the police) received a request, under the *Act*, for records relating to the requester's interaction with the police on a certain date. The full 10-part request is set out in the appendix to this order.

[2] The police issued a decision with respect to three categories of records (occurrence details reports and officers' notes, 911 calls, and radio transmissions involving a certain incident).[1] The police provided further information in their decision letter by responding to the 10 items listed in the request. For example, the police stated the names of the databases used, in response to one of the items.

[3] The police granted full access to radio transmissions involving a particular incident.[2] The police withheld the occurrence details reports and officers' notes (in part) and the 911 calls (in full),[3] under the following discretionary exemptions:

- section 38(a) read with section 8(1)(e) (discretion to refuse requester's own information/endanger life or safety),
- section 38(a) read with section 8(1)(l) (discretion to refuse requester's own information/facilitate commission of an unlawful act), and
- section 38(b) (personal privacy).[4]

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

[5] The IPC appointed a mediator to explore resolution. During mediation, the scope of the appeal changed (access to non-responsive information was removed, but the issues of reasonable search,[5] adequacy of the police's access decision,[6] and the method of access were added). The police also shared a revised index of records and clarified one aspect of their decision.[7] Consent for disclosure could not be obtained from the two

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[1] In response to the request, but before issuing an access decision, the police conducted a search and located certain records and sought consent from two affected parties regarding disclosure, but consent could not be obtained.

[2] The police also deemed some information in the radio transmissions as non-responsive to the request.

[3] Portions of the occurrence details reports and officers' notes were also withheld as non-responsive to the request. However, non-responsiveness is no longer within the scope of the appeal, having been removed by the appellant at IPC mediation.

[4] Taking into consideration the presumption at section 14(3)(b) (investigation into a possible violation of law) and the factors at sections 14(2)(f) (highly sensitive) and 14(2)(h) (supplied in confidence).

[5] Under section 17 of the *Act*.

[6] Under section 22 of the *Act*.

[7] The police revised their index of records with respect to "911 CALLS" and "Radio Transmissions" .WAV audio files containing the word "preamble" in the file name are withheld under sections 38(a), read with sections 8(1)(e) and 8(1)(l). The remaining audio files at issue were being withheld under section 38(b), taking into consideration the presumption at section 14(3)(b), and the factors at sections 14(2)(f) and

affected parties. The appellant informed the mediator that he is appealing the police's application of the exemptions.

[6] Mediation could not resolve the dispute, and the appeal moved to the adjudication stage, where an adjudicator may conduct an inquiry.

[7] As the adjudicator of this appeal, I began a written inquiry under the *Act* by sending a Notice of Inquiry, setting out the facts and issues on appeal, to the police. I sought and received written representations from the police in response. I then sought written representations from the appellant in response to the Notice of Inquiry and the non-confidential portions of the police's representations.[8] In response, the appellant did not address five of the issues on appeal (the exemptions and reasonable search) because he takes the position that he cannot fully address these issues without the matter of the adequacy of the police's decision letter, under section 22 of the *Act*, being resolved. I address the appellant's argument in this regard below.

[8] For the reasons that follow, I uphold the police's decision and the reasonableness of their search, and dismiss the appeal.

RECORDS:

[9] The records at issue are set out in the police's revised index of records.[9] They relate to three incident numbers and a number of 911 calls. Where section 38(b) was claimed, the police did so considering the presumption at section 14(3)(b) and the factor at section 14(2)(f).[10] Also, given my finding under Issue C (that the records all contain the appellant's "personal information," as defined in section 2(1) of the *Act*), I indicate any claims of section 8(1)(e) and 8(1)(l) as claims of section 38(a), below.

Incident 1	Page 1 – section 38(a), read with sections 8(1)(e) and 8(1)(l).

14(2)(h) of the *Act*. The police further clarified that they relied on the exemption at section 38(a), read with sections 8(1)(e) and 8(1)(l) to withhold particular information on record pages 3, 5, and 7. They also clarified that they were relying on section 38(b), taking into consideration the presumption at section 14(3)(b), and the factors at sections 14(2)(f) and 14(2)(h) of the *Act* to withhold a portion of the information on page 5.

[8] Portions of the police's representations and supporting evidence have been withheld due to confidentiality concerns, under *Practice Direction 7* of the IPC's *Code of Procedure*. Both the police and the appellant were granted significant extension requests to provide representations, due to the particular circumstances prevalent, which further contributed to the delay in resolving this appeal.

[9] I have not distinguished between the various incident or call numbers specified by the police, for simplicity, as these numbers do not have a bearing on the findings in this order. I have not included information about non-responsive portions of records, as this issue was removed by the appellant during mediation.

[10] In addition, for page 12 (incident 3) and for the 911 calls, the police also relied on the factor at section 14(2)(h), however under Issue E, I determined that it is not necessary to discuss this factor, given my other findings.

	Page 2 – sections 38(a), read with sections 8(1)(e) and 8(1)(l), and section 38(b).
Incident 2	Pages 3-4, and 7 – section 38(a) read with sections 8(1)(e) and 8(1)(l). Page 5, 6, 9, and 10 - 38(a), read with sections 8(1)(e) and 8(1)(l), and section 38(b).
Incident 3	Page 11 - 38(a) read with sections 8(1)(e) and 8(1)(l). Page 12 - 38(a) read with sections 8(1)(e) and 8(1)(l), and section 38(b).
911 calls	38(a) read with sections 8(1)(e) and 8(1)(l), and section 38(b).

ISSUES:

A. Was the police's decision letter adequate in the circumstances?

B. Is the method by which the police have chosen to provide access consistent with the *Act*?

C. Does the record contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

D. 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)(l) exemption, apply to the information at issue?

E. Does the discretionary personal privacy exemption at section 38(b) apply to the information at issue?

F. Did the institution conduct a reasonable search for records?

DISCUSSION:

Issue A: Was the police's decision letter adequate in the circumstances?

[10] The appellant disputes the adequacy of the police's decision letter, but for the reasons that follow, I find that the letter complies with the requirements of the *Act* and is therefore adequate in the circumstances.

Section 22(1)(a) – requirements of a decision letter where it is determined that no responsive record exists

[11] The appellant makes passing references to the non-existence of records in relation to the adequacy of the decision letter. However, the Notice of Inquiry, which sets out the facts and issues on appeal, covered section 22(1)(b), which addresses the requirements for a letter when an institution has withheld a record or part of a record. The requirements for an institution's letter stating that no record exists is covered by section 22(1)(a), which was not in the scope of this appeal.

[12] In any event, I observe that the police stated that there was no record, and that an appeal could be made to the IPC. While the letter does not specify that it could be made on "the question of whether such a record exists," per section 22(1)(a)(ii), any defect is satisfied by the inclusion of the issue of reasonable search in my inquiry (and discussed below, under Issue F).

Section 22(1)(b) – requirements of a decision letter when a record is being refused

[13] Section 22(1)(b) of the *Act* sets out the requirements of an access decision where an institution is refusing access to a record (or part of a record). Under section 22(1)(b), such an access decision must state:

- the section of the *Act* under which access is refused,
- the reason that section applies,
- the name and office of the person responsible for making the decision to refuse access, and
- the fact that an appeal may be made to the IPC.[11]

[14] The police submit that their letter meets these requirements.

[15] The appellant disagrees for two reasons.

[16] The first is that the appellant believes the police were required to (but did not) address "any circumcision of the presumptive right of access to any responsive general

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[11] Section 22(1)(b) of the *Act* states:

> Notice of refusal to give access to a record or part under section 19 shall set out,
>
> (b) where there is such a record,
>
> (i) the specific provision of this Act under which access is refused;
>
> (ii) the reason the provision named in clause (a) applies to the record;
>
> (iii) the name and office of the person responsible for making the decision to refuse access; and
>
> (iv) that the person who made the request may appeal to the Commissioner for a review of the decision.

records that either do or do not exist." To the extent that this is a challenge to the portion of the decision where the police say that there are no responsive records, this is governed by section 22(1)(a) and the discussion above applies.

[17] The second reason the appellant disagrees that the decision letter is adequate is that he believes that reasons were not given for why the exemptions claimed apply. He submits, in summary: "The practice wherein institutions simply cite a statutory provision of *FIPPA* and masquerade that as "reasons" has already attracted the ire of the Supreme Court of Canada."

[18] Having reviewed the police's access decision, I disagree with the appellant's position. In my view, to understand why I disagree, it is useful to set out the relevant portions of the access letter:

> . . . a decision has been made to grant partial access to the officer's notes as disclosure would constitute an unjustified invasion of another individual's personal privacy **as consent for disclosure was not obtained.**
>
> After careful consideration of section 38 (a) (b), a decision has been made to deny access to the requested 911 audio recording. It was determined that you did not make the call therefore disclosure would constitute an unjustified invasion of another individual's personal privacy **consent for disclosure was not obtained** however you have been granted full access to the Radio Transmissions pertaining to Incident [number]. [Emphasis in the original.]
>
> ....
>
> The following were considered in making this decision:
>
> 14(2)(f) the personal information is highly sensitive
>
> 14(3)(b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation
>
> The following sections were used to exempt the 10-codes, patrol zone information and /or statistical codes from the records:
>
> 8(1)(e) endanger the life or physical safety of a law enforcement officer or any other person.

[19] I find that first two paragraphs, above, set out reasons that the police applied the exemptions, and that the police also explained the considerations they took into account to do so below that (the nature of the information – for example that it is

highly sensitive, or that it constituted police codes).[12] While I acknowledge that the first paragraph does not specifically cite the exemption at section 38(b), I observe that it uses language from that exemption. In any event, I am satisfied that any defect has been remedied by my inquiry because the Notice of Inquiry set out and explained the issues, and gave the parties an opportunity to comment on them.

[20] Therefore, considering the parties' representations, the wording of the letter, and the wording of section 22, I find that the letter meets the requirements of the *Act* and is adequate in the circumstances. I am also satisfied, in any event, that any defect has been remedied by the inquiry into the appeal itself. I also do not accept the appellant's arguments that he was unable to properly make representations on Issues C, D, E, and F (below), given the inadequacy of the police's decision letter. As discussed, I have found that any defects in the police's decision letter were remedied by the inquiry. Given that the appellant was also provided significant time extensions to submit representations, I find that his arguments about being unable to submit representations to be without merit.

Issue B: Is the method by which the police have chosen to provide access consistent with the *Act*?

[21] Based on the police's decision letter, the police indicated that the appellant must attend the police's Records Office to obtain the record, and the appellant disputed this method of access. However, as I explain below, I find that the method by which the police chose to provide access is consistent with the *Act*.

Sections 19 and 23

[22] Sections 19 and 23 of the *Act* outline an institution's obligations when providing access to general records, including requests for another individual's personal information.

[23] If an institution decides that access to a record should be granted, section 19 of the *Act* requires the institution to give the requester access to the record.

[24] There may be circumstances where, although access is "granted," the method for the delivery of the records is so onerous that it amounts to denial of access.[13]

[25] Section 23 requires an institution to provide the requester with a copy of the record (or part the record) unless it would not be reasonably practicable to reproduce it

[12] For the police's future reference, it would have been more helpful to group wording about section 38(b) together with the parts of section 14 that were considered, and then to group section 38(a) with section 8(1)(e) together.
[13] Order MO-2910.

by reason of its length or nature.[14]

[26] Section 23 of the *Act* must be read in conjunction with section 2 of Regulation 823 enacted pursuant to the *Act*, which states, in part:

> (2) A head may require that a person who is granted access to an original record examine it at premises operated by the institution.
>
> (3) A head shall verify the identity of a person seeking access to his or her on personal information before giving the person access to it.

[27] In addition to inviting representations on the above in the Notice of Inquiry, I asked the parties to explain whether the reasoning in Order MO-2910 is relevant to the circumstances here.[15] Order MO-2910 dealt with an appeal by a requester who requested records from a police service located in a different community from his residence. He did not wish to travel in order to pick up the records, but wanted to have them mailed to his home. The police granted access and requested that the requester either send notarized identification if he wished them to be mailed, or attend at the offices of the police service in his community to receive them. The police sent the records to the other police service in a sealed envelope. The requester in Order MO-2910 appealed the method of access, asserting that the police had an obligation to mail the records to him without the requirement of notarized identification. In Order MO-2910, the senior adjudicator upheld the decision of the police on the manner of giving access to the records.

The police's position

[28] The police state that they processed the request and issued an access decision that clearly indicates that they decided to give the appellant access to records.

[29] The police explain that, in line with standard practice in Ontario for police records (given the sensitivity of police records), they required verification of the appellant's identity to provide him with the records, as the records contain his personal information (and that of others).

[30] The police further explain that the appellant chose not to pick up his records and pay the outstanding fees, and instead appealed the police's decision to the IPC.

[31] The police say that if the appellant was unable to attend the police station to pick up his records, an exception could have been made to mail the records with the appellant's permission by registered mail. However, the police say that the appellant did not raise any concerns in regards to having to attend the station to obtain the redacted

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[14] If it is not reasonably practicable to reproduce the record, section 23(1) requires the institution to allow the person an opportunity to examine the record.

[15] I included a copy of the order, for ease of reference.

records, nor did he contact the police to discuss alternate arrangements. The police's position is that the onus was on the appellant to do so.

[32] The police state that at no point did they refuse to provide the appellant a copy of the records, and submit that the method of access is consistent with the *Act*.

The appellant's position

[33] The appellant submits that the *Act* was not intended to be applied "by interpreting component provisions of the overall disclosure obligation in an overly technical or deferential manner." He argues that presumptive disclosure obligations permeate through all stages of the access scheme of the *Act*.[16]

[34] The appellant argues that the police's method of access was unwarranted and unreasonable in two ways.

[35] First, the appellant argues that it was an unwarranted burden placed upon the right of access that has no basis in the *Act*. He asserts that the police's proposed method of providing access is "not tethered to the operation of Regulation 823." He states that the method of proposed access:

a. imposes a second method of access to personal information granted as a result of the same request, stating that the police granted access to some personal information by way of including it in their decision letter; he argues that neither the *Act* nor Regulation 823 indicate that more than a single method of verification of identity may be demanded following the granting of access;

b. is not used when a requester's legal representative makes a request, which he says is apparent from an earlier request made to the police by his legal representative;

c. is not used to facilitate access when a requester does not appear to the institution to reside locally; and

d. was not used as a method of giving access to any of the personal information to which access was granted to any requester by the institution during the COVID-19 lockdowns.

[36] Second, the appellant argues that "the giving of access to information to which access is granted on a take it or leave it basis is, in itself, unsupportable and constitutes an unreasonable interpretation of the giving of access provisions in [the *Act*]." He acknowledges, however, that some previous IPC orders have upheld an institution

[16] He also presents arguments regarding interpretation of the federal access to information law, and refers to similar legislation in other provinces, but this appeal only concerns Ontario's freedom of information law.

providing a requester with two options for obtaining records to which access as meeting the requirements for the giving of access to those records under the *Act*.

[37] Furthermore, the appellant states that he has submitted payment in full for the records that the police claim to have given access to, along with a "copy of personal identification sufficient to establish the identity of the appellant under Regulation 823." He says that in response, the police simply mailed the payment back to him, "disregarding the establishment of identity." The appellant then characterizes the police's statement in their representations that "the appellant chose not to pick up his records and pay the outstanding fees" as an unintelligible claim.

[38] The appellant sees the police as putting the onus on him to address any issues with picking up the records from them. He submits that the police did not establish "anything of merit" on the issue of method of access by sufficient evidence. He states that the police failed to address the issue of reasonable practicability as they were asked to do in the Notice of Inquiry.

Analysis/findings

[39] As I explain below, I find that the police's proposed method of access was consistent with the *Act*.

[40] With respect to the appellant's assertion that the police disclosed personal information to him in the body of the access decision letter itself, I do not accept that this is the case, having reviewed the letter.

[41] Furthermore, while the appellant asserts that the police use (or used) other methods of access in other circumstances, I am not persuaded that the alleged methods of access listed by the appellant are relevant to whether the actual proposed method under review here was inconsistent with the *Act*. In my view, the mere existence of another method does not necessarily or sufficiently establish that the method of access proposed here was inconsistent with the *Act*. I also observe that if the method of access proposed here is not used with a legal representative, the legal representative's professional obligations present a distinguishing factor. Regarding the examples of methods listed at paragraphs 37 (b) and (c) in this order, there is no supporting evidence for this, and I am not persuaded that a change in procedure (assuming there was any during the lockdowns) is a reason to find fault with the method of access put to the appellant years before.

[42] Furthermore, in my view, for the appellant to assert that what he sent to the police is sufficient to establish his identity is, essentially, to pre-decide the issue of verification that the police were legally obligated to satisfy themselves with under section 2 of Regulation 823. I find no basis in the *Act* or the Regulation that permits a requester to do so.

[43] In addition, I agree with the police that if the appellant was unable to attend at

the station in person, it was his responsibility to contact the police for an alternate arrangement. However, since he did not raise any concerns to them about attending in person, I am not persuaded that there is a basis to find the method of access inconsistent with the *Act* in the circumstances.

[44] The appellant notes that the police did not discuss the reasonable practicability of providing a copy of the records. However, in the circumstances, having reviewed the police's representations, I am satisfied that they did not need to address this beyond discussing the nature of the records and why they could not be released without verification of the requester's identity.

[45] Finally, I disagree with the appellant's characterization of the fee issue. The fee that was returned was the $5 filing fee because the appellant paid two such fees in relation to one request. The appellant, however, did not pay the fees that the police charged the appellant to process the request set out in the decision letter ($11.40).

[46] For these reasons, I find that the police's proposed method of access is consistent with the *Act*.

Issue C: Do the records contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

[47] 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. If the record contains the requester's own personal information, their access rights are greater than if it does not.[17] Also, if the record contains the personal information of other individuals, one of the personal privacy exemptions might apply.[18]

[48] As noted, the appellant did not address this substantive issue in his representations. However, in the context of this appeal, I find that the presence of his personal information in the records is not a matter of dispute.

[49] The police submit that the records contain information relating to the name, address, telephone number, age, sex, employment information, and views or opinions of involved individuals, including the appellant. Based on my review of the records, I agree with this characterization. The police submit, and I find, that this information is the personal information of the individuals to whom it relates. I also find that the records reveal the fact of interactions with police and/or being subject to a police investigation. This is personal information of the appellant and the affected parties, under the introductory wording of the definition of that term ("recorded information

[17] 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.
[18] See sections 14(1) and 38(b).

about an identifiable individual").

[50] Since each of the records contains the appellant's "personal information," I must consider any right of access that the appellant may have in relation to the information withheld under sections 38(a) and 38(b), as the case may be.

Issue D: 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)(l) exemption, apply to the information at issue?

[51] 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.

[52] 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.

[53] Section 8 contains several exemptions from a requester's right of access, mostly related to the law enforcement context.

[54] 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.[19]

[55] However, the exemption does not apply just because a continuing law enforcement matter exists,[20] 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.*[21]

[56] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.[22] 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

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[19] *Ontario* (*Attorney General*) *v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[20] Order PO-2040 and *Ontario* (*Attorney General*) *v. Fineberg*, cited above.
[21] Orders MO-2363 and PO-2435.
[22] *Merck Frosst Canada Ltd. v. Canada* (*Health*), [2012] 1 S.C.R. 23.

information.[23]

[57] There is no dispute, and I find, that the context of the information at issue under section 38(a) is a law enforcement context.[24]

[58] The police rely on section 38(a), read with section 8(1)(l).[25] Section 8(1)(l) states: "A head may refuse to disclose a record if the disclosure could reasonably be expected to, facilitate the commission of an unlawful act or hamper the control of crime[.]"

[59] The police submit:

> Section 38(a) was used in conjunction with the law enforcement exemptions 8(1)(e) and 8(1)(l). Although section 36(1) allows an individual right to access their personal information; section 38(a) allow the exemption of that right due to the use of exemptions at section 8. These law enforcement exemptions were used to withhold the 10-codes, patrol zone information and/or statistical codes from the records.

[60] Having reviewed the police's representations and the records themselves, I uphold the police's decision to withhold the 10-codes, patrol zone information and/or statistical codes under section 38(a), read with section 8(1)(l). The IPC has held in past decisions that the use of operational codes by law enforcement is an effective and efficient means of conveying a specific message without publicly identifying its true meaning, and that if the public were to learn these codes and their meanings, the effectiveness of the codes would be compromised. This could result in the risk of harm to police personnel and/or members of the public with whom the police engage, such as victims and witnesses.[26] I accept that these important considerations remain relevant here, and there is no basis to vary the approach taken to the operational codes withheld in this appeal. Therefore, I uphold the police's decision to withhold certain information in the records under section 38(a), read with section 8(1)(l).

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[23] *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.

[24] The term "law enforcement"[24] 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).

[25] Given my finding that the police operations codes upheld under section 38(a) read with section 8(1)(l), are exempt from disclosure, it is not necessary to also consider the police's reliance on section 38(a), read with section 8(1)(e).

[26] See, for example, Orders MO-3622, MO-3815, and MO-3977.

Exercise of discretion

[61] 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.[27] 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.

[62] Here, the police state that they exercised their discretion in good faith; I find no basis for finding otherwise. The police submit that it is "paramount" to consider this exercise "when dealing with an institution's records vs. a person's right to access their personal information." I understand this to mean, in light of the information withheld, that the police considered both the requester's right to records containing his own personal information, and the police's right to withhold their operational codes. These are relevant, not irrelevant factors. I find no basis for concluding that irrelevant factors were considered. As a result, I uphold the police's exercise of discretion under section 38(a).

Issue E: Does the discretionary personal privacy exemption at section 38(b) apply to the information at issue?

[63] As noted, 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 right. The police submit that the personal information withheld in the records is exempt under section 38(b), and for the reasons that follow, I uphold that decision.

[64] Under the section 38(b) exemption, if a record contains the personal information of both the requester and another individual, the institution may refuse to disclose the other individual's personal information to the requester if disclosing that information would be an "unjustified invasion" of the other individual's personal privacy.

[65] If disclosing another individual's personal information would not be an unjustified invasion of personal privacy, then the information is not exempt under section 38(b).

Would disclosure be "an unjustified invasion of personal privacy" under section 38(b)?

[66] In deciding whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), the decision-maker[28] must consider and weigh the factors and presumptions in sections 14(2) and

[27] Order M-352.
[28] The institution or, on appeal, the IPC.

(3) and balance the interests of the parties.[29] Sections 14(1) and (4) provide guidance in deciding whether disclosure would be an unjustified invasion of the other individual's personal privacy, but neither of these sections is relevant in the circumstances of this appeal.[30]

Section 14(3) - is disclosure presumed to be an unjustified invasion of personal privacy?

[67] Sections 14(3)(a) to (h) list several situations in which disclosing personal information is presumed to be an unjustified invasion of personal privacy under section 38(b).

[68] The police rely on the presumption at section 14(3)(b).

[69] The presumption at section 14(3)(b) (investigation into a possible violation of law) requires only that there be an investigation into a *possible* violation of law.[31] So, even if criminal proceedings were never started against the individual, section 14(3)(b) may still apply.[32]

[70] I find that it is clear from the circumstances, and the records themselves (police details reports, officers' notes, and 911 calls), that the personal information in these records was compiled and is identifiable as part of an investigation into a possible violation of law. Therefore, the presumption at section 14(3)(b) applies.

Section 14(2) - do any factors in section 14(2) help in deciding if disclosure would be an unjustified invasion of personal privacy?

[71] Section 14(2) lists several factors that may be relevant to determining whether disclosure of personal information would be an unjustified invasion of personal privacy.[33] Some of the factors weigh in favour of disclosure, while others weigh against disclosure.

[72] The appellant did not identify factors weighing in favour of disclosure, not having addressed section 38(b) in his representations.

[73] I have considered whether there are factors favouring disclosure in these circumstances, where there are 911 calls, police reports and notes, and no consent for

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[29] Order MO-2954.
[30] If any of the section 14(1)(a) to (e) exceptions did apply, disclosure would not be an unjustified invasion of personal privacy and the information would not be exempt from disclosure under section 38(b). Section 14(4) lists situations where disclosure would *not* be an unjustified invasion of personal privacy, in which case it is not necessary to decide if any of the factors or presumptions in sections 14(2) or (3) apply.
[31] Orders P-242 and MO-2235.
[32] The presumption can also apply to records created as part of a law enforcement investigation where charges were laid but subsequently withdrawn (Orders MO-2213, PO-1849 and PO-2608).
[33] Order P-239.

disclosure of the affected parties' personal information. In the circumstances, I am satisfied that there are no factors favouring disclosure.

[74] Since no factors favouring disclosure apply, and the presumption at section 14(3)(b) applies, it is not necessary for me to consider the police's representations about two section 14(2) factors not favouring disclosure.

Weighing any presumption(s), factor(s), and interests

[75] Given the application of section 14(3)(b), the absence of factors favouring disclosure, and the interests of the parties, I am satisfied that disclosure of the withheld personal information would constitute an unjustified invasion of another individual's personal privacy. As a result, the information withheld is exempt from disclosure under section 38(b).

Exercise of discretion

[76] The section 38(b) exemption is discretionary. This means that the institution can decide to disclose another individual's personal information to a requester even if doing so would result in an unjustified invasion of the other individual's personal privacy.

[77] The police submit that they exercised their discretion under section 38(b) in good faith, taking into consideration a requester's right to access their personal information, and the police's ability to act as "mediators" in situations such as the ones in the context of these records, documenting both sides of the story and letting each party speak freely without fear of reprisal. The police also state that information collected from individuals by the police must be safeguarded in order to protect police processes. The police note that they tried to obtain consent twice from the two affected parties, but consent could not be obtained from either party.

[78] I agree that the police clearly exercised their discretion, and I accept that they did so considering only factors that are relevant, not irrelevant ones. In particular, based on my review of the police's representations, the released information, as well as the redacted information, I accept that the police considered that the records contain the appellant's personal information, the purpose of the exemption, and the nature of the information and the extent to which it is significant and/or sensitive to the police, the appellant, and the affected parties. There is no evidence before me that the police exercised their discretion in bad faith or for an improper purpose. As a result, I uphold the police's exercise of discretion under section 38(b) of the *Act*.

Issue F: Did the institution conduct a reasonable search for records?

[79] If a requester claims that additional records exist beyond those found by the institution, the issue is whether the institution has conducted a reasonable search for

records as required by section 17 of the *Act*.[34] If the IPC is satisfied that the search carried out was reasonable in the circumstances, it will uphold the institution's decision. Otherwise, it may order the institution to conduct another search for records. For the following reasons, I uphold the reasonableness of the police's search.

[80] The *Act* does not require the institution to prove with certainty that further records do not exist. However, the institution must provide enough evidence to show that it has made a reasonable effort to identify and locate responsive records;[35] that is, records that are "reasonably related" to the request.[36]

[81] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request makes a reasonable effort to locate records that are reasonably related to the request.[37] The IPC will order a further search if the institution does not provide enough evidence to show that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[38]

[82] The police provided affidavit evidence regarding their search efforts, describing the employee involved (who has over 28 years experience in freedom of information requests working for the police), the database searched, and the search terms used. It is not necessary to set out these details here because they were shared with the appellant.

[83] The appellant did not provide comment on these details, flagging anything for me to consider as unreasonable in the circumstances, or providing me with any representations on this issue. Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, they still must provide a reasonable basis for concluding that such records exist.[39] I find that the appellant did not do so here.

[84] In the circumstances, having reviewed the police's representations and affidavit evidence, I uphold the police's search as reasonable in the circumstances.

ORDER:

I uphold the adequacy of the police's decision letter, their method of proposed access, their access decision, and the reasonableness of their search. Accordingly, I dismiss the appeal.

Original signed by: September 12 2023

[34] Orders P-85, P-221 and PO-1954-I.
[35] Orders P-624 and PO-2559.
[36] Order PO-2554.
[37] Orders M-909, PO-2469 and PO-2592.
[38] Order MO-2185.
[39] Order MO-2246.

Marian Sami
Adjudicator

APPENDIX

The request was as follows:

> The following record or information, from all locations, in respect of purported complaint from the occupants of a motor vehicle bearing [a particular Ontario license plate number] made to either 911 or [the police], or both, on January 25, 2018 and the ensuing interaction between the applicant and [the police] during the evening hours of January 25, 2018, including but not limited to an interaction on [a particular street] in the City of Hamilton and any included or further "investigation",
>
> 1. The names of the two uniformed officers of the institution and their respective badge numbers, that were present at the interaction and conducted the purported "investigation" of the applicant by stopping and questioning the applicant on [a particular street] at approximately 10:00 pm on January 25, 2018.
>
> 2. The name of the offence (or offences, as they case may be) that was subject of the said "investigation", including the name of the statute prescribing the offence (or offences, as the case may be),
>
> 3. A copy of the recording of the 911 emergency call made, (or calls made, if more than one) in respect of the complaint spurring the officers' attendance on [a particular street],
>
> 4. An account of who, within the institution, viewed, used or otherwise dealt with, in any manner, the information produced by the 911 operator who took the complaint,
>
> 5. Copies of all notes made by each of the two uniformed officers, in their notebooks or elsewhere, in respect of the complaint, the interaction and the "investigation",
>
> 6. A true copy of the incident report, occurrence report, or the like, in respect of the complaint, the interaction and the "investigation",
>
> 7. An account of who, within the institution viewed, used or otherwise dealt with, in any manner, the information produced by the two officers in respect of the complaint, interaction and "investigation",

8. The names of all databased into which any information in respect of, or arising out of, the January 25, 2018 complaint, interaction or "investigation" has been entered, including the date and time of entry and the name of the individual entering the information.

9. An account of whether the information in para. 8 has, at any time, been accessed by "category one, two and three agencies" (within the meaning of those terms as defined by Assistant Commissioner Francois Bidal of the RCMP on October 26, 2016, in his testimony to the Senate Standing Committee on Legal and Constitutional Affairs – See Schedule A), whether through the Police Information Portal or through any other means.

10. A list of the dates, times, name of database or portal through which the information was made available, and the identifying particulars of all individuals who accessed the information in para. 8.