Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4487

Appeal MA22-00092

Peel Regional Police Services Board

February 1, 2024

Summary: The Peel Regional Police Services Board (the police) received an access request under the *Act* for records relating to certain police records involving the requester. The police provided partial access to the responsive records. They withheld information under the discretionary exemptions at section 38(a) (discretion to refuse a requester's own personal information), read with section 8(1)(g) (intelligence information), as well as section 38(b) (personal privacy). On appeal, these exemptions were challenged, along with the reasonableness of the police's search for responsive records, under section 17. In this order, the adjudicator upholds the police's application of the exemptions and the reasonableness of their search. Therefore, 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) (personal information), 8(1)(g), 14(3)(b), 38(a) and 38(b).

OVERVIEW:

[1] An individual who had certain interactions with the Peel Regional Police Services Board (the police) requested records related to those interactions through the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). This order explains why the Information and Privacy Commissioner of Ontario (IPC) upholds a decision by the police to withhold portions of records from disclosure.

[2] The request made to the police was for access to:

> …any and all records, event logs, incident logs, dispatch logs, notes, reports, follow-up notes and police agency records (digital, visual or audio) for the period from [specified date] to the current date of productions of records. This includes any and all records written or recorded via audio or video, including but not limited to 911, non-emergency line, body camera recordings (visual and audio): request includes ***but not limited to*** [specified number] [specified date], etc.

[3] The police issued a decision granting partial access to records relating to two specified occurrence numbers, officers' notes, and body worn camera video footage.

[4] The police denied access to portions of these records under discretionary exemptions, including those at:

- section 38(a) (discretion to refuse requester's own personal information) read with section 8(1)(g) (intelligence information), and
- section 38(b) (personal privacy).

[5] The police granted full access to the audio recording relating to one occurrence number and released the recording to the requester. The police indicated that no audio calls to the police or body worn camera video exist for another occurrence number.

[6] The requester (now appellant) appealed the police's decision to the IPC.

[7] The IPC appointed a mediator to explore resolution. During mediation, some issues were narrowed, but the dispute over the exemptions at sections 38(b) and 38(a) read with section 8(1)(g) could not be resolved. The appellant also raised the issue of whether the police conducted a reasonable search (which is considered under section 17 of the *Act*).

[8] Since further mediation was not possible, the appeal moved to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry.

[9] I began a written inquiry under the *Act* by sending a Notice of Inquiry, setting out the facts and issues on appeal, first to the police and then to the appellant (with a copy of the police's non-confidential representations).[1] After reviewing the appellant's representations,[2] I determined that I did not need to seek further representations.

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

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[1] Portions of the police's representations were withheld due to confidentiality concerns, under the *Practice Direction 7* of the IPC's *Code of Procedure*.

[2] The appellant's representations include references to the lawfulness of the police's interactions with him and/or his children, including an investigation that he states was unlawful. As these matters are outside the scope of the IPC's jurisdiction, I do not discuss them in this order.

RECORDS:

[11] The records at issue are: occurrence reports regarding two specified occurrence numbers, a confidential event chronology regarding one specified occurrence number, police officers’ notes, and body worn camera videos.

ISSUES:

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

B. 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)(g) intelligence information exemption, apply to the information at issue?

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

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

DISCUSSION:

Issue A: Does the record contain “personal information” as defined in section 2(1) and, if so, whose personal information is it?

[12] 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.

What is “personal information”?

[13] Section 2(1) of the *Act* defines “personal information” as “recorded information about an identifiable individual.”

Recorded information

[14] “Recorded information” is information recorded in any format, such as paper records, electronic records, digital photographs, videos, or maps.[3]

About

[15] Information is “about” the individual when it refers to them in their personal capacity, which means that it reveals something of a personal nature about the

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[3] See the definition of “record” in section 2(1).

individual.

Identifiable individual

[16] Information is about an "identifiable individual" if it is reasonable to expect that an individual can be identified from the information either by itself or if combined with other information.[4]

What are some examples of "personal information"?

[17] Section 2(1) of the *Act* gives a list of examples of personal information, including information relating to the age or marital or family status of the individual, to the medical, psychiatric, psychological, criminal or employment history of the individual, and an individual's address.[5] Other listed examples of personal information include: the personal opinions or views of the individual except if they relate to another individual, the views or opinions of another individual about the individual, and an individual's name, if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.[6]

[18] The list of examples of personal information under section 2(1) is not a complete list. This means that other kinds of information could also be "personal information."[7] For example, records reflecting interactions with the police can constitute "personal information" under the introductory wording of the definition of that term ("recorded information about an identifiable individual") in that they would show the *fact of* the individual's interaction with the police.

Whose personal information is in the record?

[19] 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.[8] Also, if the record contains the personal information of other individuals, one of the personal privacy exemptions might apply.[9]

Analysis/findings

[20] Having reviewed the various police records, I agree with the police's position,

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[4] Order PO-1880, upheld on judicial review in *Ontario* (*Attorney General*) *v. Pascoe*, [2002] O.J. No. 4300 (C.A.).
[5] The definition of "personal information" at section 2(1), at paragraphs (a), (b), and (d), respectively.
[6] *Ibid*, at paragraphs (e), (g), and (h), respectively.
[7] Order 11.
[8] 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.
[9] See sections 14(1) and 38(b).

and I find that the records contain the personal information of the appellant and other identifiable individuals.

[21] It is not disputed, and I find, that this appeal involves recorded information about individuals in their respective personal capacities.

[22] The appellant notes that the police have withheld the names of children, and references custody issues. I understand the appellant to mean that the information withheld about these children is limited to their names, and that he is entitled to them as a custodial parent. He does not address the police's representations about the presence of the personal information of other individuals in the withheld records.

[23] However, based on my review of the records, I find that each record contains personal information about the appellant and one or more identifiable individuals. To the extent that some of this information relates to his children, I find that it is inextricably mixed with personal information belonging to one or more other identifiable individual(s). As a result, it cannot be separated from that other personal information and released to the appellant (assuming he would have a right to it, as he argues).

[24] In addition, I find that the records contain many types of personal information about several identifiable individuals. Some examples of this personal information are listed in section 2(1) of the *Act* (such names and address information). Other information withheld qualifies as "personal information" under the introductory language of the definition of that term ("recorded information about an identifiable individual"), such a record revealing *the fact of* interactions of an individual with police.

[25] Since the records contain the personal information of both the appellant and other individuals, I must consider any right of access under the *Act* that he may have to the information withheld under the discretionary exemptions at sections 38(a) and 38(b).

Issue B: 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)(g) intelligence information exemption, apply to the information at issue?

[26] The police withheld small portions of three of the records at issue[10] under section 38(a), read with section 8(1)(g) of the *Act*. For the following reasons, I uphold that decision.

[27] 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.

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[10] More specifically, two "Occurrence Details" records (each regarding a different specified occurrence number) and the record entitled "Confidential – Event Chronology [specified occurrence number]."

[28] 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.

Section 8

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

"Could reasonably be expected to"

[30] 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.

[31] 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.[11]

[32] 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.*[12]

[33] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.[13] 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.[14]

Does the discretionary exemption at section 8(1)(g) related to law enforcement activities apply to the information at issue?

[34] Section 8(1)(g) says:

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[11] *Ontario* (*Attorney General*) *v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[12] Orders MO-2363 and PO-2435.
[13] *Merck Frosst Canada Ltd. v. Canada* (*Health*), [2012] 1 S.C.R. 23.
[14] *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.

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons[.]

[35] 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.

[36] The term "intelligence information" has been defined in the caselaw 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.[15]

Analysis/findings

[37] There is no dispute, and I find, that the records at issue relate to "law enforcement," as that term is defined in section 2(1) of the *Act*.[16]

[38] The police provided detailed evidence about their application of section 38(a), read with section 8(1)(g), to the information at issue, mostly in confidential representations due to confidentiality concerns. While I cannot set out these details here, I have reviewed them and find that they sufficiently establish that disclosure of the information at issue could reasonably be expected to interfere with the gathering of law enforcement intelligence information about organizations or persons and/or could reasonably be expected to reveal law enforcement intelligence information about organizations or persons.

[39] The appellant's response refers to custodial matters and contains an assertion about the status of a law enforcement investigation (that it has been completed). Such considerations are not relevant to where section 8(1)(g) applies to the information here. While I appreciate that the appellant was not able to review the police's confidential representations and provide direct responses to them, he was presented with the questions that the police were about section 8(1)(g) during the inquiry, which were:

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[15] 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).

[16] The term "law enforcement"[16] 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).

- Could disclosure of the record reasonably be expected to interfere with the gathering of law enforcement intelligence information about organizations or persons? Please explain.

- Could disclosure of the record reasonably be expected to reveal law enforcement intelligence information about organizations or persons? Please explain.

[40] In summary, I find that the exemption at section 38(a), read with section 8(1)(g), applies to the limited portions of the three records where it was claimed. I will also review the police's exercise of discretion to claim this exemption.

Exercise of discretion

[41] The discretionary nature of section 38(a) 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.[17]

[42] 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. Based on the police's representations, I am satisfied that they did so here.

[43] I also accept that the police considered other relevant factors such as the wording of the exemption and the interests it seeks to protect, the nature of the information and the extent to which it is significant and/or sensitive (to the police, the requester or any affected person), and the historic practice of the police with respect to similar information. In the circumstances, I also accept that the police exercised their discretion in good faith.

[44] As a result, I uphold the police's decision to withhold portions of three records under section 38(a), read with section 8(1)(g).

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

[45] Under the section 38(b) exemption,[18] 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.[19] For the reasons set out below, I uphold the police's decision to withhold the

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[17] Order M-352.

[18] 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.

[19] The requester's own personal information, standing alone, cannot be exempt under section 38(b) as its disclosure could not, by definition, be an unjustified invasion of another individual's personal privacy (Order PO-2560).

remaining information at issue in this appeal under section 38(b).

[46] 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.

[47] 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)?

Analysis/findings

[48] Sections 14(1) to (4) provide guidance in deciding whether disclosure would be an unjustified invasion of the other individual's personal privacy.

[49] However, in this appeal, neither section 14(1) nor section 14(4) is relevant.[20] The appellant did not claim that any of the exceptions at sections 14 (1)(a) – (e) apply, and there is no basis for me to find otherwise on the evidence before me. None of the section 14(4) situations are relevant here. Therefore, I will consider and weigh the presumptions at section 14(3) and the factors at 14(2) and 14(3), and balance the interests of the parties, below.

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

[50] 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).

[51] Here, the police submit that the presumption at section 14(3)(b) (investigation into possible violation of law) applies to all the information withheld under section 38(b).

[52] The police submit that the records were compiled and identifiable as investigations into possible violation(s) of law. They further explain that the records (including video recordings captured from the police's body worn cameras) contain a "litany of sensitive personal information captured by the police, while they were conducting domestic custodial/child protection investigations, pursuant to provincial and federal statutes." In addition, the police explain they were investigating pursuant to the *Criminal Code of Canada*, the *Children's Law Reform Act*, and/or the *Trespass to Property Act*.

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[20] If any of the section 14(1)(a) to (e) exceptions apply, disclosure would not be an unjustified invasion of personal privacy and the information is not exempt from disclosure under section 38(b).

[53] I find that the police have sufficiently established that section 14(3)(b) applies. The presumption at section 14(3)(b) requires only that there be an investigation into a *possible* violation of law.[21] So, even if criminal proceedings were never started against the individual, section 14(3)(b) may still apply.[22] From my consideration of the nature and content of the records themselves, it is clear that the personal information compiled and is it identifiable as part of an investigation into a possible violation of law.

[54] The fact that the presumption at section 14(3)(b) applies weighs significantly against disclosure of the withheld information.

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

[55] 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.[23] The list of factors under section 14(2) is not a complete list.

[56] Some of the section 14(2) factors weigh in favour of disclosure, while others weigh against disclosure. The institution must also consider any other circumstances that are relevant, even if these circumstances are not listed under section 14(2).[24]

[57] Each of the first four factors, found in sections 14(2)(a) to (d), if established, would tend to support disclosure of the personal information in question. These factors relate to:

- subjecting the activities of government to public scrutiny – section 14(2)(a)
- promoting public health and safety – section 14(2)(b)
- the purchasing of goods and services – section 14(2)(c), and
- the fair determination of rights – section 14(2)(d).

[58] The appellant does not cite any of these factors as relevant, and based on the evidence before me, I see no basis for finding that any of them are.

[59] The appellant argues that because the interactions with police occurred in public there is "no expectation" that the "mere presence" of police allows the police to withhold any information they gather. I do not accept this argument or find that it raises a factor favouring disclosure. The appellant's argument does not consider that one of the main purposes of the *Act* is to preserve the privacy of individuals in relation

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[21] Orders P-242 and MO-2235.
[22] 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).
[23] Order P-239.
[24] Order P-99.

to personal information held by government institutions, including police services – and the personal privacy exemptions that exist towards achieving that purpose.

[60] Based on my review of the personal information withheld in the records, the appellant's representations, and the interests of the parties, there is no basis for me to find that there are any factors favouring the disclosure of the personal information withheld. It is not necessary to consider the police's representations about the factors favouring non-disclosure, in the circumstances.

[61] In the absence of factors favouring disclosure, and with the presumption of section 14(3)(b) weighing against disclosure, and balancing the interests of the parties, I find that the disclosure of the personal information withheld would be an unjustified invasion of personal privacy of the parties whose personal information has been withheld under section 38(b).

Exercise of discretion

[62] The appellant submits that the police have not acted in good faith since they are "still" withholding information, leading to his need to appeal that decision. However, the fact that the police applied exemptions to portions of the information in the responsive records is not evidence of bad faith. There is no evidence before me that the police exercised their discretion in bad faith, and I find that they exercised it in good faith.

[63] I uphold the police's exercise of discretion under section 38(b) for similar reasons that I did under section 38(a). I accept that the police considered only relevant factors in deciding which portions of the records to withhold, such as: the presence of the appellant's personal information in the records, the wording of the personal privacy exemption and the interests it seeks to protect, and the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person.

Absurd result – the section 38(b) exemption may not apply

[64] An institution might not be able to rely on the section 38(b) exemption in cases where the requester originally supplied the information in the record, or is otherwise aware of the information contained in the record. In this situation, withholding the information might be absurd and inconsistent with the purpose of the exemption.[25]

[65] For example, the "absurd result" principle has been applied when:

- the requester sought access to their own witness statement,[26]

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[25] Orders M-444 and MO-1323.
[26] Orders M-444 and M-451.

- the requester was present when the information was provided to the institution,[27] and
- the information was or is clearly within the requester's knowledge.[28]

[66] However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply.[29]

[67] The police submit that the absurd result principle does not apply in the circumstances. They explain that many of the withheld portions of the records do not directly pertain to the appellant, and that the appellant was not present when the bulk of the information contained in the redacted records was collected by the police. Therefore, the police submit that disclosure in these sensitive circumstances is inconsistent with the purpose of the personal privacy exemption.

[68] The appellant does not directly cite the absurd result principle or directly address the police's submissions about it.

[69] Based on my review of the police's representations and the records themselves, I find that the evidence does not establish that the appellant was present when most of the information in the records was collected by police. In light of this, and the sensitive nature of the underlying circumstances, I find that it would not be absurd to withhold the personal information at issue. Therefore, section 38(b) continues to apply.

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

[70] 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*.[30] 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.

[71] 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.[31]

Analysis/findings

[72] The police provided details about their efforts to search for responsive records, including information about the employees involved and the databases searched. Since these details were shared with the appellant, it is not necessary to set out them out

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[27] Orders M-444 and P-1414.
[28] Orders MO-1196, PO-1679 and MO-1755.
[29] Orders M-757, MO-1323 and MO-1378.
[30] Orders P-85, P-221 and PO-1954-I.
[31] Orders M-909, PO-2469 and PO-2592.

here.

[73] 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.[32]

[74] The appellant points to the police's use of the word "covert" when they set out the language of section 8(1)(g) in their representations. He argues that the analyst who searched the database in question would "not have access to the 'covert' information gathered." However, the fact that the police directly quoted the language of the law in their representations does not mean that a database could not yield information collected covertly.

[75] In addition, the appellant asserts that the police have not done a reasonable search for any and all records, and that they must do so. He also asserts that there were other interactions between himself and the police (including written and phone communication) that has not been disclosed.

[76] I find that the appellant's assertions do not establish that additional records would reasonably be expected to exist. Nor do they address the elements of the police's search efforts (for example, with respect to the experience of the employees engaged to search, or the locations searched).

[77] In any event, the *Act* does not require the police to prove with certainty that further records do not exist. The police had to provide enough evidence to show that they made a reasonable effort to identify and locate responsive records;[33] that is, records that are "reasonably related" to the request.[34] I am satisfied that the police have done so here. Having reviewed the details about their search efforts, I find that the police engaged an experienced employee knowledgeable about the subject matter of the request to conduct a search of the relevant police record holdings.

[78] For these reasons, I uphold the police's search as reasonable.

ORDER:

I uphold the police's decision and the reasonableness of their search and dismiss the appeal.

Original signed by:	February 1, 2024
Marian Sami	
Adjudicator	

[32] Order MO-2246.
[33] Orders P-624 and PO-2559.
[34] Order PO-2554.