Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4664

Appeal MA23-00338

London Police Services Board

June 11, 2025

Summary: This appeal deals with an access request for all records relating to the police's use of Clearview AI technology during a specified period of time. The police provided access to records either in whole or in part to the individual who made the request, but denied access to other records, claiming the exemptions in sections 8(1) (law enforcement), 9(1) (relations with other governments) and 12 (solicitor-client privilege), as well as the employment or labour relations exclusion under section 52(3) of the *Municipal Freedom of Information and Protection of Privacy Act*. The requester also raised the issue of whether the public interest override in section 16 applies to the withheld information.

In this order, the adjudicator finds that the employment or labor relations exclusion in section 52(3)3 does not apply. She upholds the police's refusal to disclose records that were received in confidence by a government agency and other records that are protected by solicitor-client privilege. She also partly upholds the police's claim that some of the records, if disclosed, would reveal investigative techniques and procedures currently in use or likely to be used by law enforcement, and that the public interest override does not apply to these. The adjudicator orders the police to issue a new access decision with respect to the records that are not excluded from the *Act* and to disclose those records she finds are not exempt.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 8(1)(c), 9(1)(d), 12, 16, 17 and 52(3)3.

Orders Considered: MO-2660.

Cases Considered: *Ontario* (*Solicitor General*) *v. Ontario* (*Assistant Information and Privacy Commissioner*) (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507;

Ontario (*Ministry of Correctional Services*) *v. Goodis*, (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).

OVERVIEW:

[1] This order disposes of the issues raised in this appeal of an access decision made by the London Police Services Board (the police). The police received an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for all records pertaining to the use of facial recognition technology by the police force and/or any of its members between January 1, 2017 and the date of the request, including receipts, correspondence (sent and received), briefs, memorandums, solicitations for software trial(s) and instructions.

[2] The police located records and issued a decision to the requester granting partial access to them. The police withheld records, either in whole or in part, claiming the application of the mandatory exemptions in sections 10(1)(b) (third party information) and 14(1) (personal privacy), as well as the discretionary law enforcement exemptions in sections 8(1)(c) (reveal investigative techniques and procedures), 8(1)(e) (endanger life or safety) and 8(1)(l) (facilitate commission of an unlawful act). The police also claimed the discretionary exemptions in sections 11(d) (economic and other interests), 11(g) (proposed plans, projects or policies of an institution) and 12 (solicitor-client privilege), as well as the employment or labour relations exclusion in section 52(3)3 of the *Act*. In addition, the police advised that they withheld certain pages in their entirety because they were either blank pages or not responsive to the access request.[1]

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

[4] During the mediation of the appeal, the appellant raised the application of the public interest override in section 16, which was added as an issue. The appellant continued to seek access to all of the withheld information, with the exception of any telephone numbers in the records.

[5] Also, during mediation, the police issued a revised decision to the appellant, granting further access to records, but also denying access to one record, claiming the mandatory exemption in section 9(1)(d) (relations with other governments). The police also identified some of the information as being non-responsive to the request.

[6] The file then moved to the adjudication stage of the appeals process, where I

[1] Pages 72, 416, 420, 422, 426, 432, 434, 436, 438, 446, 458, 496, 502, 508, 510, 512, 518, 520, 522, 530, 534, 538, 540, 542, 552, 562, 570, 576, 578, 584, 586, 588, 590, 594, 596, 598, 600, 602, 604, 606, 608, 634, 642. While the police's decision letter refers to "pages" of non-responsive information, the Index of Records refers to records by the record number. In this order, I will refer to records by their record number as opposed to the page number.

conducted an inquiry. I sought and received representations from the police and the appellant.[2] In their representations, the police advised that they were no longer relying on the exemptions in sections 10 and 11. In addition, the police claimed the personal privacy exemption in section 14(1) for only the telephone numbers in certain records[3] and section 8(1)(l) for only the telephone numbers in other records.[4] Because the appellant advised that he was no longer seeking access to any telephone numbers, I will not consider them further in this order and the exemptions in sections 8(1)(l) and 14(1) are no longer at issue.[5]

[7] In addition, the police issued a second revised decision letter to the appellant, advising that some information in records 46 and 115 was not responsive to the request, and that they were disclosing records 2, 43, and 215-216 in full to the appellant.

[8] After the conclusion of the inquiry, the appellant agreed to remove the information that had been withheld under section 8(1)(e) – the names of undercover police officers - from the scope of the appeal. As a result, this information and exemption are no longer at issue.[6]

[9] For the reasons that follow, I find:

- The portions of records the police claim are not responsive to the request are in fact not responsive to the request,
- The labour relations and employment exclusion in section 52(3)3 does not apply to the records,
- The law enforcement investigative techniques and procedures exemption in section 8(1)(c) applies to some of the records,
- The relations with other governments exemption in section 9(1)(d) applies to record 1,
- The solicitor-client privilege in section 12 applies to the records,
- The police properly exercised their discretion under sections 8(1) and 12, and
- The public interest override in section 16 does not apply to the information exempt under section 9(1)(d).

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[2] The police provided initial and reply representations. The appellant provided initial representations but declined to provide sur-reply representations.
[3] Records 44, 46, 115, 164 and 167.
[4] Records 4, 7, 9-10, 18-23, 31-35, 37-42, 47, 51-57, 60-61, 63-65, 67-98, 111, 114, 118, 120-132, 134-136, 139, 141-145, 162-163, 170-172, 181-182, 184, 197, 199-200 and 202-214.
[5] The appellant has already received all of the records listed in this paragraph in part.
[6] The appellant has already received records 16, 71, 72, 77, 78 and 79 in part.

RECORDS:

[10] There are 124 records remaining at issue[7] either in whole or in part, consisting of emails, a summary and a note relating to an internal investigation.

ISSUES:

A. Which records are responsive to the request?

B. Does the section 52(3)3 exclusion for records relating to labour relations or employment-related matters apply to the records?

C. Does the discretionary exemption at section 8(1)(c) related to law enforcement activities apply to the records?

D. Does the mandatory exemption at section 9(1)(d) for information received from other governments apply to record 1?

E. Does the discretionary solicitor-client privilege exemption at section 12 of the *Act* apply to the records?

F. Did the police exercise their discretion under sections 8(1) and 12? If so, should the IPC uphold the exercise of discretion?

G. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 9(1)(d) exemption?

DISCUSSION:

Issue A: Which records are responsive to the request?

[11] The police claim that portions of records 5, 6, 13, 14, 25-29, 44, 46, 115, 164, 167, 169, 196 and 197 are not responsive to the appellant's access request.

[12] To be considered responsive to the request, records must "reasonably relate" to the request.[8] Institutions should interpret requests liberally, in order to best serve the purpose and spirit of the *Act*. Generally, if there is ambiguity in the request, this should

[7] At the conclusion of the inquiry, of the 216 records originally at issue, 20 records had been disclosed in full and 72 records were no longer at issue because the withheld information consisted of information the appellant had removed from the scope of the appeal – telephone numbers and the names of undercover police officers. Where records were withheld in part, the remaining parts of these records were disclosed to the appellant.

[8] Orders P-880 and PO-2661.

be resolved in the requester's favour.[9]

Representations

[13] The police state that after they received the access request, they contacted the appellant to clarify the request. The police submit that some of the responsive emails they located are "embedded" within email threads that address topics wholly unrelated to facial recognition technology. The police provided examples of information that they withheld as not responsive, including a media inquiry received and an internal update about an investigation not involving facial recognition technology, and budget information about a mobile phone that does not involve facial recognition technology.

[14] The appellant submits that one would "rightfully assume" that if the police included a record in the Index of Records, it is an acknowledgement of the relevance of the record.

Analysis and findings

[15] I find that the portions of records the police claim are not responsive to the request – many of which are duplicates - are, in fact not responsive because they do not relate at all to the subject matter of the appellant's access request. In particular, I find that the withheld information does not contain any information about the use of facial recognition technology, and refers to wholly unrelated investigations. In addition, on my review of the records, I find that the portions of records 56, 64 and 115 for which section 8(1)(c) was claimed in fact not responsive to the access request because they do not relate to the subject matter of the request – the use of facial recognition technology.

[16] I also find that the records were included in the Index because, as a whole, they were relevant to the access request and that the police withheld only the portions of these records that are not responsive.

[17] Finally, I note that certain pages of the records are completely blank.[10] As a result, I find they are not responsive to the request and I have removed them from the scope of the appeal.

Issue B: Does the section 52(3)3 exclusion for records relating to labour relations or employment-related matters apply to the records?

[18] The police claim that the exclusion in section 52(3)3 applies to record 1 in full, and records 3, 8-11, 15, 17-23, 30, 59, 69, 74-76, 99-109, 114, 116-118, 124, 126-129 and 196-200 in part. The IPC has consistently taken the position that the application of the exclusions in the *Act* is record specific. This means that when determining whether an exclusion applies, the record is examined as a whole rather than by individual pages,

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[9] Orders P-134 and P-880.
[10] Pages 416, 426, 432, 434, 446, 458, 496, 502, 508, 510, 512, 518, 530, 534, 538, 540, 552, 562, 570, 586, 588 and 600.

paragraphs, sentences or words. This whole-record method of analysis has also been described as the "record by record approach."[11] Therefore, while the police have applied the exclusion to portions of records, I will consider whether the records as a whole are excluded from the *Act*.

[19] Section 52(3)3 of the *Act* excludes certain records held by an institution that relate to labour relations or employment matters. If the exclusion applies, the record is not subject to the access scheme in the *Act*, although the institution may choose to disclose it outside of the *Act*'s access scheme.[12] The purpose of this exclusion is to protect some confidential aspects of labour relations and employment-related matters.[13]

[20] Section 52(3)3 states:

> Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[21] If section 52(3) applies to the records, and none of the exceptions found in section 52(4) applies, the records are excluded from the scope of the *Act*. If the exclusion applied at the time the record was collected, prepared, maintained or used, it does not stop applying at a later date.[14]

[22] The type of records excluded from the *Act* by section 52(3) are those relating to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue.[15]

[23] For the collection, preparation, maintenance or use of a record to be "in relation to" "meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest", there must be "some connection" between them.[16] The "some connection" standard must involve a connection relevant to the scheme and purpose of the *Act*, understood in their proper context.

[24] The term "labour relations" refers to the collective bargaining relationship between

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[11] See, for example, Orders M-352, PO-3642, MO-3798-I, MO-3927 and MO-3947.
[12] Order PO-2639.
[13] *Ontario (Ministry of Community and Social Services) v. John Doe*, 2015 ONCA 107 (CanLII).
[14] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 509.
[15] *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.). The CanLII citation is "2008 CanLII 2603 (ON SCDC)."
[16] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

an institution and its employees, as governed by collective bargaining legislation, or to similar relationships. The meaning of "labour relations" is not restricted to employer-employee relationships.[17]

[25] For section 52(3)3 to apply, the police must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or use was in relation to meetings, consultations, discussions or communications; and

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

[26] The phrase "in which the institution has an interest" means more than a "mere curiosity or concern," and refers to matters involving the institution's own workforce.[18]

Representations

[27] The police submit that the three-part test in section 52(3)3 is met because the records were collected, prepared, maintained or used by them in relation to meetings, discussions and communications about a labour relations or employment-related matter in which they have an interest.

[28] By way of background, the police explain that in response to a media inquiry in February 2020, the Chief of Police issued a statement that the police did not use Clearview AI facial recognition technology. The police then received correspondence from the Toronto Star suggesting that they had data showing that police employees had accessed Clearview AI. Based on this information, the police issued a second public statement that an internal investigation was commenced into employee access and use of Clearview AI.

[29] The records, the police submit, pertain to an internal investigation into potential employee misconduct under the *Police Services Act*, which the IPC has found qualifies as an employment-related matter. The police argue that where misconduct is substantiated, the employee may be subject to disciplinary actions including suspension and/or termination of employment, and that an investigation into an employee's performance or misconduct is clearly a matter in which the police have an interest that is more than a mere curiosity or concern.

[30] The appellant submits that the police have not provided sufficient evidence to justify the wholesale withholding of these records and that the information could be

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[17] *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.); see also Order PO-2157.
[18] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

severed from the records.

[31] In reply, the police submit that the IPC has consistently found that the application of section 52(3) is record-specific and, if found to apply, excludes the record as a whole from the scope of the *Act*.

Analysis and findings

[32] I find that the exclusion in section 52(3)3 does not apply to any of the records because the police have not met the requirements of the three-part test in section 52(3)3. On my review of the police's representations - including the confidential ones - and the records themselves, I find that parts one and two of the test have been met - the records were prepared by the police and the preparation of the records was in relation to communications. However, I find that the third part of the test is not met because the communications were not about labour relations or employment-related matters in which the police have an interest.

[33] In *Ontario* (*Ministry of Correctional Services*) *v. Goodis*,[19] the Divisional Court confirmed that section 65(6)3 – the provincial equivalent of section 52(3)3 - must be interpreted narrowly in light of the purposes of the *Act* so as to exclude only those records that actually relate to employment matters in which the institution has an interest.

[34] The Court stated that "the type of records excluded from the *Act* by section 65(6) are documents related to matters in which the institution is *acting as an employer, and terms and conditions of employment or human resources questions are at issue*."[20] The Court also noted that whether or not a particular record is employment-related would depend on an examination of the particular record.[21]

[35] Applying this reasoning in Order MO-2660, the IPC found that an organizational review, for example, did not qualify for the exclusion, noting:

> All institutions operate through their employees. Employees are the means by which all institutions provide services to the public. In this appeal, the record was not created to address matters in which the institution is acting as an employer, *and the terms and conditions of employment or human resources questions are at issue*, in the sense intended by section 52(3). The record is an operational review of the Toronto Fire Service's dispatch system focusing on the efficient and timely response to communications from an operational standpoint.[22] (emphasis added)

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[19] *Ontario* (*Correctional Services*) *v. Goodis*, (cited above) at para. 23.
[20] *Ibid.* at para. 24.
[21] *Ibid.* at para. 29.
[22] This reasoning has been followed in subsequent orders, including, most recently, in Order PO-4095, at para. 36.

[36] I agree with the reasoning in *Ontario* (*Ministry of Correctional Services*) *v. Goodis* and Order MO-2660 and apply it to the records in this appeal. The records are all emails in which the use of Clearview AI is discussed by police employees either amongst themselves or directly with Clearview AI. In my view, the issue is not whether the records simply include information relating to the police's workforce but whether the records address matters in which the police are acting as an employer, and the terms and conditions of employment or human resources questions are at issue. I find that the records do not meet this threshold. I find that the records are about and contain discussions about the use of facial recognition technology in the course of law enforcement, but not in the context of labour relations or employment-related matters in which the police have an interest, including employment-related investigations. As a result, I find that the third part of the test is not met and these records are not excluded from the scope of the *Act*.

[37] The police did not claim any other exemptions for records 3, 9-11, 15, 18-23, 30, 69, 75, 99-109, 114, 116, 118, 124, 126 and 196-200.[23] As a result, I will order the police to issue an access decision to the appellant regarding these records.

[38] The police have claimed exemptions in the alternative for portions of records 1, 3, 8, 17, 59, 74, 76, 117 and 127-129, which I consider below.

Issue C: Does the discretionary exemption at section 8(1)(c) related to law enforcement activities apply to the records?

[39] The police claim the application of the discretionary exemption in section 8(1)(c) to portions of records 3, 8, 17, 59, 63, 74, 76, 77, 112, 117, 127-131, 134, 138 and 191. Section 8(1)(c) states:

> (1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,
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> […]
>
> (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement[.]

[40] The term "law enforcement"[24] is defined in section 2(1) and includes "policing." The IPC has found that "law enforcement" can include a police investigation into a possible violation of the *Criminal Code*.[25] Many of the exemptions listed in section 8 apply where a certain event or harm "could reasonably be expected to" result from disclosure

[23] The police originally claimed section 8(1)(l) to some of these records; this exemption is no longer at issue in the appeal.
[24] The term "law enforcement" appears in many, but not all, parts of section 8.
[25] Orders M-202 and PO-2085.

of the record.

[41] 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.[26]

[42] However, the exemption does not apply just because a continuing law enforcement matter exists.[27] 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.*[28]

[43] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.[29] 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.[30]

Representations

[44] The police submit that they are a law enforcement agency mandated under the *Police Services Act* to investigate offences – including under the *Criminal Code of Canada* – meeting the definition of "law enforcement" in section 2(1) of the *Act*.

[45] The police submit that portions of records 3, 8, 17, 59, 63, 74, 76, 77, 112, 117, 127-131, 134, 138 and 191 are exempt under section 8(1)(c) because they contain investigative techniques that are not generally known to the public, and that the disclosure of these techniques could reasonably be expected to interfere with their effective use. The police go on to describe the techniques that are set out in the records, which I will not reproduce here, and indicate that the techniques are not solely related to the use of Clearview AI.

[46] The appellant argues that since Clearview AI has not been used by the police since 2020, there is no reasonable expectation that the disclosure of the records would have any meaningful or substantive impact on current, ongoing or future law enforcement activities.

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[26] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[27] Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.
[28] Orders MO-2363 and PO-2435.
[29] *Merck Frosst Canada Ltd.* v. *Canada (Health)*, [2012] 1 S.C.R. 23.
[30] *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.

[47] In reply, the police submit that the information they withheld is not limited in application to Clearview AI, and that this information includes investigative techniques that are currently in use by the police and not known to the public.

Analysis and findings

[48] I find that all of the records were created as part of policing which is included in the definition of law enforcement in section 2(1).

[49] For section 8(1)(c) to apply, the institution must show that disclosing the investigative technique or procedure to the public could reasonably be expected to interfere with its effective use. The exemption normally will not apply where the technique or procedure is generally known to the public.[31]

[50] The technique or procedure must be "investigative" - that is, it must be related to investigations. The exemption will not apply to techniques or procedures related to "enforcing" the law.[32]

[51] I further find that all of the information withheld by the police under section 8(1)(c) in records 3 and 117 and some information in record 59 is exempt from disclosure under section 8(1)(c). Specifically, record 3 is a two-page email between a police officer and a detective. I find that there are two sentences in this email that, if disclosed, could reasonably be expected to reveal an investigative technique currently in use that is not known to the public and would interfere with its effective use. Record 59 is an email between police employees, attaching a summary of the police's use of Clearview AI. The first page of the summary contains an exact duplicate of the information I found exempt in record 3. As a result, I find that this portion of the record is exempt under section 8(1)(c). Record 117 is a 3-page email between police employees, also containing an exact duplicate of the information I found exempt in records 3 and 59. As a result, I find that this same information is also exempt from disclosure under section 8(1)(c).

[52] I further find that the investigative technique set out in these records relates to additional tools and techniques used by the police other than Clearview AI and that the disclosure of this technique could reasonably be expected to interfere with its effective use. As a result, and subject to my findings regarding the police's exercise of discretion, I find that portions of these records are exempt from disclosure under section 8(1)(c). I note that the public interest override in section 16, which the appellant raised generally in this appeal, does not apply to information I find to be exempt under section 8.

[53] With respect to the information withheld in records 8, 17, 63, 74, 76, 77, 112, 127-131, 134, 138 and 191, and the remaining information in record 59, I find that it is not exempt under section 8(1)(c). All of these records are emails between police employees, with the exception of record 191 which is a note written by a police employee. They

[31] Orders P-170, P-1487, MO-2347-I and PO-2751.
[32] Orders PO-2034 and P-1340.

contain discussions of the police's use of Clearview AI. The note refers to an access request made under the *Act* regarding the police's use of Clearview AI. On my review of the records, I find that the withheld portions are not exempt under section 8(1)(c) because the police have not established that disclosure of the withheld information in these records would reveal any investigative techniques that are not known to the public. Further, based on the police's representations and the nature of the withheld information I am unable to find that disclosure of the withheld information could reasonably be expected to interfere with the use of any investigative techniques.

[54] The police are not claiming any other exemptions with respect to records 8, 17, 59, 63, 74, 76, 77, 112, 127, 128, 129 and 191. As a result, I will order the police to disclose the information in these records that is not exempt under section 8(1)(c) to the appellant.

[55] With respect to the remaining records - 130, 131, 134 and 138 – the police are claiming solicitor-client privilege over these records, which I consider in Issue E.

Issue D: Does the mandatory exemption at section 9(1)(d) for information received from other governments apply to record 1?

[56] The police claim that section 9(1)(d) applies to record 1, which is an email they received from the Ontario Provincial Police (the OPP). Section 9 protects certain information that an institution has received from other governments.[33] Section 9(1) states in part:

> A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,
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> (a) the Government of Canada;
>
> (b) the Government of Ontario or the government of a province or territory in Canada;
>
> (c) the government of a foreign country or state;
>
> (d) an agency of a government referred to in clause (a), (b) or (c)[…]

[57] The purpose of this exemption is to ensure that institutions under the *Act* can continue to receive confidential information that other governments might not be willing

[33] The IPC has issued several orders on the purpose of a similar exemption under section 15 of the provincial *Freedom of Information and Protection of Privacy Act*: see Orders PO-2247, PO-2369-F, PO-2715, PO-2734. See also Order P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.); and Orders PO-1927-I, PO-2569, PO-2647, and PO-2666.

to provide without some assurance that it will not be disclosed.[34]

[58] For a record to qualify for this exemption, the institution must establish that:

1. the information was received by the institution in confidence; and
2. disclosure of the record could reasonably be expected to reveal information that it received from one of the governments, agencies or organizations listed in the section.[35]

[59] The exemption is meant to protect the interests of the organization that provided the information, not the institution that received it. Whether the provider of the information is concerned about its disclosure or not in a specific case can be important in deciding whether the information was received "in confidence."[36]

[60] The exemptions found in section 9 apply where disclosure of the record "could reasonably be expected to" reveal information received from the other government. Disclosing a record "reveals" the information received from another government if disclosure would permit the drawing of accurate inferences about the information received from the other government.[37]

Representations

[61] The police submit that the record was received in confidence from the OPP, which qualifies as an agency of the Ontario government for the purpose of section 9(1)(d). The police further submit that the disclosure of this record could reasonably be expected to reveal confidential information it received from the OPP. The police provide confidential representations about the record itself, which I will not discuss further, because to do so would reveal the content of the record.

[62] The appellant submits that any information about the police's use of Clearview AI could be severed from the record and disclosed to him and that there is nothing in section 9(1) that justifies the wholesale withholding of the record.

[63] In reply, the police submit that severing the record would not be appropriate because the record as a whole – as opposed to discrete information within the record – was received in confidence from an agency of government – namely the OPP.

Analysis and findings

[64] I am satisfied that record 1 – a two-page email sent from the OPP to the police -

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[34] Order M-912.
[35] Orders MO-1581, MO-1896 and MO-2314.
[36] Orders M-844 and MO-2032-F.
[37] Order P-1552.

is exempt from disclosure under the mandatory exemption in section 9(1)(d).

[65] As previously stated, for record 1 to qualify for exemption under section 9(1)(d) the police must show that they received the record in confidence and that its disclosure could reasonably be expected to reveal the confidential information they received - in these circumstances - from an agency of the provincial government.

[66] Past IPC orders have found that the OPP qualifies as an agency of the provincial government for the purposes of section 9(1)(d).[38] I agree with and adopt the approach taken in these orders. I find, based on the police's representations and my review of the record itself that the email was provided to the police by an agency of the provincial government, namely the OPP.

[67] I further find that the OPP provided this email to the police "in confidence." The email was explicitly marked as confidential and received by the police in confidence. I also find based on my review of the record and the confidential representations submitted by the police that disclosure of the record could reasonably be expected to reveal information that the police received in confidence from an agency of the provincial government. I also find that the exception in section 9(2) does not apply, as the OPP has not provided consent to disclose the record. As a result, I find that record 1 qualifies for exemption under the mandatory exemption in section 9(1)(d).

[68] Because the appellant has raised the possible application of the public interest override in section 16, I will address whether it applies to record 1 under Issue G below.

Issue E: Does the discretionary solicitor-client privilege exemption at section 12 of the *Act* apply to the records?

[69] The police claim that the solicitor-client communication privilege in section 12 applies to records 37, 39, 44-46, 49-57, 130, 131, 133-136, 138-144, 146-161, 164-168, 172-179, 183 and 185-189 either in whole or in part. Section 12 exempts certain records from disclosure, either because they are subject to solicitor-client privilege or because they were prepared by or for legal counsel for an institution. Section 12 states:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

[70] Section 12 contains two different exemptions, referred to in previous IPC decisions as "branches." The first branch ("subject to solicitor-client privilege") is based on common law. The second branch ("prepared by or for counsel employed or retained by an institution…") is a statutory privilege created by the *Act*. The institution must establish that at least one branch applies. The police claim that the solicitor-client communication

[38] See, for example, Orders MO-1896, MO-1987, MO-2953-R and MO-3466.

privilege in both branches 1 and 2 apply to the records.

[71] The rationale for the common law solicitor-client communication privilege is to ensure that a client may freely confide in their lawyer on a legal matter.[39] This privilege protects direct communications of a confidential nature between lawyer and client, or their agents or employees, made for the purpose of obtaining or giving legal advice.[40] The privilege covers not only the legal advice itself and the request for advice, but also communications between the lawyer and client aimed at keeping both informed so that advice can be sought and given.[41]

[72] Confidentiality is an essential component of solicitor-client communication privilege. The institution must demonstrate that the communication was made in confidence, either expressly or by implication.[42]

Representations

[73] The police submit that the records are subject to the solicitor-client communication privilege in both branches of section 12 because they consist of communications between the police's Director of Legal Services and the police's senior leadership team, made for the purpose of obtaining and/or giving legal advice. The police further submit that they have not waived their solicitor-client privilege.

[74] The appellant's position is that the "parameters" in section 12 do not justify the wholesale withholding of the records and that they can be severed.

[75] In reply, the police submit that the solicitor-client privilege in section 12 is a "class-based" privilege that protects privileged communications in their entirety - not merely specific items within those communications that involve actual legal advice.[43]

Analysis and findings

[76] I am satisfied that all of the information the police withheld under section 12 is exempt from disclosure because it is subject to the common-law solicitor-client communication privilege. All of the withheld records are email communications between the police's legal counsel and the police's senior leadership team in which the senior leadership team sought legal advice and legal counsel in turn provided legal advice, including reviewing, revising and commenting on draft emails.[44] Some of them are explicitly marked solicitor-client privileged.

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[39] Orders PO-2441, MO-2166 and MO-1925.
[40] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[41] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.); *Canada (Ministry of Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104.
[42] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[43] *Ontario (Ministry of Finance) v. Information and Privacy Commissioner*, [1997] OJ No. 1465.
[44] I note that there is extensive duplication of content in these emails.

[77] I find that all of these emails are exempt from disclosure under the solicitor-client communication privilege in section 12 because they are direct communications of a confidential nature between the police's in-house legal counsel and the police's senior leadership team, made for the purpose of obtaining or giving legal advice, including reviewing draft emails.

[78] Furthermore, there is no evidence to suggest that the police waived their solicitor-client privilege with respect to the information they withheld. As a result, I uphold the police's claim that the exemption in section 12 applies to these emails, subject to my findings regarding the police's exercise of discretion, below.

[79] I further note that the public interest override in section 16, which the appellant raised generally in this appeal, does not apply to information I find to be exempt under section 12.

Issue F: Did the police exercise their discretion under sections 8 and 12? If so, should the IPC uphold the exercise of discretion?

[80] The law enforcement and solicitor-client privilege exemptions in sections 8 and 12 are discretionary (the institution "may" refuse to disclose), meaning that the institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[81] In addition, the IPC may find that the institution erred in exercising its discretion where, for example, it does so in bad faith or for an improper purpose, it takes into account irrelevant considerations, or it fails to take into account relevant considerations.

[82] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.[45] The IPC cannot, however, substitute its own discretion for that of the institution.[46]

[83] Some examples of relevant considerations are listed below. However, not all of these will necessarily be relevant, and additional considerations may be relevant:[47]

- the purposes of the *Act*, including the principles that information should be available to the public, exemptions from the right of access should be limited and specific, and the privacy of individuals should be protected,
- the wording of the exemption and the interests it seeks to protect,

[45] Order MO-1573.
[46] Section 43(2).
[47] Orders P-344 and MO-1573.

- whether the requester has a sympathetic or compelling need to receive the information,
- whether the requester is an individual or an organization,
- whether disclosure will increase public confidence in the operation of the institution,
- 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,
- the age of the information, and
- the historic practice of the institution with respect to similar information.

Representations

[84] The police submit that they exercised their discretion and that they did not do so bad faith or for an improper purpose. They say they considered relevant factors such as the source of the information, the type of record under consideration, the nature of the information and the extent to which it is significant and/or sensitive to the police, the appellant or other affected persons and any impact or harm that could be related to disclosure. After considering these factors, the police state they determined that the appellant's rights and interests were outweighed by the "concerns" related to disclosure.

[85] The appellant submits that the police exercised their discretion in bad faith, due to the fact they initially denied access to all of the records and only disclosed further records as a result of an interim decision issued by the adjudicator. The appellant's position is that the police's conduct has been "evasive" since received his access request.

[86] In reply, the police submit that the appellant is mistaken on two counts. First, the police did not deny access to all of the records in response to the access request, but actually granted partial access. Second, the police submit that the IPC did not issue an interim decision, and that perhaps the appellant meant that the police issued a supplementary access decision.

Analysis and findings

[87] Based on the police's representations, I find that they properly exercised their discretion. They took into account relevant considerations and did not take into account irrelevant considerations. I find that the police turned their minds to the appellant's interests in the disclosure of the records, balancing those interests with the importance of the law enforcement and solicitor-client communication privilege. I also find that the police disclosed as much information as possible to the appellant, both at the request stage and throughout the appeals process, withholding only limited and specific information that qualified for exemption under the *Act.* Moreover, the police made further

disclosures of their own accord, and not as a result of any order issued by the IPC, as claimed by the appellant. I find all of this evidence demonstrates that the police exercised their discretion in good faith. As a result, I uphold the police's exercise of discretion to the information that I have found to be exempt from disclosure under sections 8(1)(c) and 12.

Issue G: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 9(1)(d) exemption?

[88] Section 16 of the *Act*, the "public interest override," provides for the disclosure of records that would otherwise be exempt under another section of the *Act*. It states:

> An exemption from disclosure of a record under sections 7, 9, 9.1, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[89] For section 16 to apply, two requirements must be met:

- there must be a compelling public interest in disclosure of the records; and
- this interest must clearly outweigh the purpose of the exemption.

[90] The *Act* does not state who bears the onus to show that section 16 applies. The IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure that clearly outweighs the purpose of the exemption.[48]

[91] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[49] In previous orders, the IPC has stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[50]

[92] A "public interest" does not exist where the interests being advanced are essentially private in nature.[51] However, if a private interest raises issues of more general application, the IPC may find that there is a public interest in disclosure.[52] The IPC has

[48] Order P-244.
[49] Orders P-984 and PO-2607.
[50] Orders P-984 and PO-2556.
[51] Orders P-12, P-347 and P-1439.
[52] Order MO-1564.

defined the word "compelling" as "rousing strong interest or attention".[53]

[93] The IPC must also consider any public interest in not disclosing the record.[54] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling."[55]

[94] The existence of a compelling public interest is not enough to trigger disclosure under section 16. This interest must also clearly outweigh the purpose of the exemption in the specific circumstances, which in this case, is section 9(1)(d).

[95] An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.[56]

Representations

[96] The appellant states that he is an academic, writing a book about the use of freedom of access legislation in researching the use of Clearview AI's facial recognition technology by police forces in Ontario. The appellant further submits that since the initial and limited press's interest in the police's use of this technology in 2020, there has been virtually no sustained public discussion or dissemination of information pertaining to the topic. Further, there has been almost no published discussion of the use of Clearview AI from an academic perspective. The appellant concludes that the disclosure of the records will assist his academic research and publication of a holistic, balanced and localized discussion of the police's use of Clearview AI and, as a result, there is a significant public interest in the disclosure of the records.

[97] The police submit that there is not a compelling public interest in the disclosure of the record because there has already been wide public coverage of the use of Clearview AI by police services and the disclosure of the record would not shed further light on the matter. The police go on to argue that the public coverage of the use of Clearview AI includes extensive media coverage, as well as the joint investigation by the Privacy Commissioners of Canada, Quebec, British Columbia and Alberta.

Analysis and findings

[98] I acknowledge the appellant's concern and find that there is a compelling public interest in disclosure of information about police use of facial recognition technology, particularly the use of Clearview AI. I am also attuned to the public policy concerns about the use of Clearview AI. For example, there has been significant enforcement action against Clearview AI in Canada, the UK, Europe and Australia in relation to its practice of

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[53] Order P-984.
[54] *Ontario Hydro v. Mitchinson,* [1996] O.J. No. 4636 (Div. Ct.).
[55] Orders PO-2072-F, PO-2098-R and PO-3197.
[56] Order P-1398, upheld on judicial review in *Ontario v. Higgins,* 1999 CanLII 1104 (ONCA), 118 OAC 108.

harvesting billions of photographs of individuals from the internet without lawful authority and, in turn, offering its intelligence and investigative services, including these photographs, to law enforcement agencies.[57]

[99] While I agree that there is a compelling public interest in the privacy and safety implications of the use of Clearview AI technology as a whole, I must also consider the specific records at issue in this appeal. In particular, I must consider first whether there is a compelling public interest in disclosure of the records and second, whether that compelling public interest outweighs the purpose of the exemption – in this appeal the provision of information in confidence from one government to another (section 9).

[100] Regarding record 1, which I found to be exempt under section 9(1)(d), I find that there is a compelling public interest in the disclosure of the information contained in the record. However, I also find that the compelling public interest in the disclosure of the record is not outweighed by the purpose of the exemption in section 9, which is to protect information received in confidence from another government, or government agency. Allowing the public interest override would undermine the potential willingness of other governments to supply information that would be of importance and assistance to the institution in the conduct of its public affairs. In these circumstances, this is of particular importance given that record 1 contains information explicitly provided in confidence to the police by the OPP relating to highly sensitive investigations. For all of these reasons, I find that the public interest override in section 16 does not apply to the information I have found to be exempt under section 9(1)(d).

ORDER:

1. I order the police to issue an access decision to the appellant regarding the information they withheld under section 52(3)3 in records 3, 9, 10, 11, 15, 18-23, 30, 69, 75, 99-109, 114, 116, 118, 124, 126 and 196-200, treating the date of this order as the date of the request.

2. I order the police to disclose records 8, 17, 59, 63, 74, 76, 77, 112, 127, 128, 129 and 191 in part to the appellant by **July 16, 2025** but not before **July 11, 2025**. I have included copies of these records with the order sent to the police. The highlighted areas are to be disclosed to the appellant.

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[57] See, for example, Order MO-4286 where the IPC noted that Commissioner Patricia Kosseim, along with her federal, provincial and territorial counterparts, had issued a joint statement on the use of facial recognition technology by law enforcement agencies. That statement noted that the use of facial recognition technology by police agencies involves the potential collection and processing of highly sensitive personal information, which raises the possibility of serious privacy harms unless appropriate protections are in place. See also https://www.forbes.com/sites/roberthart/2024/09/03/clearview-ai-controversial-facial-recognition-firm-fined-33-million-for-illegal-database/.

3. I reserve the right to require the police to provide to the IPC copies of the records they disclose to the appellant.

Original Signed by: June 11, 2025

Cathy Hamilton
Adjudicator