

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2748

Appeal MA11-172

Ottawa Police Services Board

June 7, 2012

Summary: The appellant sought access to records relating to a motor vehicle accident that was investigated by the police. The police issued a decision letter granting access to the responsive records, in part. The police denied access to the personal information of individuals other than the appellant, claiming the discretionary exemptions in sections 38(a), in conjunction with section 8(1)(l) and 38(b), in conjunction with section 14(1) of the *Act*. In this order, the police's decision to deny access to the withheld records was upheld, in part, on the basis of section 38(b). The exemption in section 8(1)(l) was not upheld, and the police were ordered to disclose portions of two records which do not contain personal information.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 2(1) (definition of personal information), 8(1)(l), 14(1), 38(a) and 38(b).

OVERVIEW:

[1] This order disposes of the issues raised as a result of an access request made by the requester under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ottawa Police Service (the police) for the following information:

My name is [requester's name] I wish to make a formal FOI request for any witness statements regarding your file #07-20655 & any other documents.

[2] In response, the police located responsive records which relate to a motor vehicle accident in which the requester was involved. The police subsequently attempted to notify a witness to the accident, and an individual who attended the scene after the collision. The witness did not respond to the police's notification letter. Conversely, the individual who attended the scene after the collision consented to release her personal information, in part, to the requester.

[3] The police subsequently disclosed the records, in part, and denied access to the remaining portions, claiming the application of section 38(a), in conjunction with section 8(1)(l) (facilitate commission of an unlawful act) and section 38(b), in conjunction with the application of section 14(1) (personal privacy) and the presumptions in sections 14(3)(a) and 14(3)(b) of the *Act*.

[4] The requester, now the appellant, appealed the police's decision to this office.

[5] During the mediation of the appeal, the police maintained their position that no additional information could be disclosed to the appellant. The mediator attempted to contact the witness (the affected party) that the police had attempted to contact, but did not receive a response either.

[6] The appellant confirmed that she is seeking access to all portions of the records that were withheld, specifically a witness statement.

[7] The appeal then moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. Representations were received from the police and the appellant and were shared in accordance with this office's *Practice Direction 7*. The witness (the affected party) was notified but did not provide representations.

[8] For the reasons that follow, I uphold the police's decision, in part, and order the police to disclose other portions of the information at issue.

RECORDS:

[9] The records consist of a police officer's notes, a witness statement and a general occurrence report.

ISSUES:

- A: Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B: Does the mandatory exemption at section 14(1) or the discretionary exemption at section 38(b) apply to the information at issue?
- C: Does the discretionary exemption at section 38(a), in conjunction with the section 8(1)(l) exemption, apply to the information at issue?
- D: Did the institution exercise its discretion under sections 38(a) and 38(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A: Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[10] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

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

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,

- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name where 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;

[11] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.¹

[12] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.²

[13] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.³

[14] The police state that the records contain the personal information of the appellant and of witnesses to the accident and to other individuals who were interviewed as part of the accident investigation. The withheld portions of the records, the police state, contain the personal information of individuals other than the appellant. In particular, the police submit, the records contain the name, date of birth, race, origin, contact information and employment history of these individuals.

[15] The appellant's representations do not address whether the records contain personal information.

¹ Order 11.

² Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

³ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[16] I have reviewed the records and, in my view, the records as a whole contain the appellant's personal information along with that of other individuals. The withheld portions of records solely contain the personal information of identifiable individuals other than the appellant.

[17] In particular, the records contain the following information about other individuals:

- information relating to the race, national origin, colour, age, sex, marital or family status, which falls within the ambit of paragraph (a) of the definition of that term in section 2(1);
- information relating to the employment or medical history, which falls within the ambit of paragraph (b) of the definition;
- an address and telephone number, which falls within the ambit of paragraph (d) of the definition; and
- an individual's name where it appears with other personal information relating to the individual, which falls within the ambit of paragraph (h) of the definition.

[18] However, I also find that portions of pages 5 and 10 do not meet the definition of personal information as set out in the *Act*. These portions describe the damage to one of the vehicles involved in the accident, which cannot be described as consisting of personal information. However, I will determine if the exemption in section 8(1)(l) applies to this information, below.

B: Does the mandatory exemption at section 14(1) or the discretionary exemption at section 38(b) apply to the information at issue?

[19] In their decision letter and representations, the police denied access, in whole or in part, to the records at issue, relying on the mandatory exemption in section 14(1) or the discretionary exemption in section 38(b).

[20] 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 a number of exemptions from this right, including section 38(b). Section 38(b) introduces a balancing principle that must be applied by institutions where a record contains personal information of both the requester and another individual. In this case, the police must look at the information and weigh the appellant's right of access to his own personal information against the other individuals' right to the protection of their privacy. If the police determine that release of the information would constitute an unjustified invasion of the other individuals' personal privacy, then section 38(b) gives the police the discretion to deny access to the appellant's personal information.

[21] In determining whether the exemption in section 38(b) applies, sections 14(1), (2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of another individual's personal privacy. Section 14(2) provides some criteria for the police to consider in making this determination; section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. In addition, if the information fits within any of paragraphs (a) to (e) of section 21(1), disclosure is not an unjustified invasion of personal privacy under section 38(b).

[22] Where a record contains personal information only of an individual other than the requester, the institution must refuse to disclose that information unless disclosure would not constitute an "unjustified invasion of personal privacy".

[23] In their decision letter, the police rely on the presumption in section 14(3)(b) to deny access to the personal information contained in the records. Section 14(3)(b) states:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

. . .

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;

. . .

[24] Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.⁴

[25] Once a presumed unjustified invasion of personal privacy is established under section 14(3) to apply to records that are subject to a section 21(1) exemption claim, it cannot be rebutted by one or more factors or circumstances under section 14(2).⁵

[26] The police submit that the personal information contained in the records was compiled and identifiable as part of an investigation into a possible violation of the law. Therefore, they argue that disclosure of the information at issue would constitute a

⁴ Orders P-242 and MO-2235.

⁵ *John Doe*, cited above.

presumed invasion of the personal privacy of other individuals as set out in section 14(3) of the *Act*. They state that they examined the factors in section 14(2) and 14(4) and concluded that none applied to mitigate the presumption in section 14(3).

[27] Lastly, the police state that they attempted to contact all parties to obtain their consent to disclose their personal information to the appellant. The police advise that one affected party consented to the release of her witness statement, but not her contact information. Another witness could not be contacted because the police state that they did not have a current address.

[28] The appellant submits that she was charged with failing to stop at a red light, but that the charge was subsequently dismissed in a court proceeding. In addition, the appellant submits that the information at issue should have been made available to her by the Crown prior to the court proceeding. Given her right to have this information provided to her by the Crown, the appellant argues, the police cannot refuse her access request. Lastly, the appellant states that she requires the records, as her insurance company claims that she is 50 percent liable and will only review its decision when it can be shown that she was not responsible for the accident.

[29] I have carefully reviewed the records that were withheld from the appellant either in whole or in part. I note that all of the appellant's personal information has been disclosed to her by the police and that all of the personal information that has been withheld from her consists of the personal information of other individuals, as identified above.

[30] In my view, all of the records at issue in this appeal were compiled by the police and are identifiable as part of an investigation into a possible violation of the law occurring as a result of a motor vehicle accident. I am, therefore, satisfied that the personal information remaining at issue falls within the ambit of the presumption in section 14(3)(b). The appellant submits that she requires full disclosure in order to prove to her insurance company that she was not responsible for the accident and is, therefore, not liable.

[31] Although the appellant did not specifically raise the application of the factor favouring disclosure in section 14(2)(d) of the *Act*, she has by inference argued that it may apply to the records at issue. For section 14(2)(d) to apply, the appellant must establish that:

- (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and
- (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and

- (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.⁶

[32] Based on the appellant's representations, I am satisfied that all of the above requirements have been met by the appellant because she is involved in an ongoing dispute with her insurance company concerning the accident, which is also the subject matter of the information contained in the records and she requires the records to have her insurance liability reduced. Therefore, I find that the factor at section 14(2)(d), which favours disclosure, applies.

[33] Consequently, I find that the factor favouring disclosure in section 14(2)(d), as well as the presumption in section 14(3)(b) applies to all of the personal information at issue. Balancing the single factor under section 14(2)(d) which favours disclosure against the presumption in section 14(3)(b) which favours privacy protection, I am satisfied that the disclosure of this information would constitute an unjustified invasion of the personal privacy of the other individuals whose personal information is contained in the records.

[34] The portions of the records that were withheld contain only the personal information of other individuals. I am satisfied that the disclosure of this information would constitute an unjustified invasion of their personal privacy. Therefore, I uphold the application of the discretionary exemption at section 38(b) with respect to those records, subject to my finding in regard to the police's exercise of discretion.

C: Does the discretionary exemption at section 38(a) in conjunction with the section 8(1)(l) exemption, apply to the information at issue?

[35] Section 36(1) gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right.

[36] Section 38(a) reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

⁶ Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).

if section 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

[37] Section 38(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information [Order M-352].

[38] Where access is denied under section 38(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

[39] Sections 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.

[40] The term "law enforcement" is used in several parts of section 8, and is defined in section 2(1) as follows:

"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)

[41] The term "law enforcement" has been found to apply to a police investigation into a possible violation of the *Criminal Code*.⁷

[42] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.⁸

⁷ Orders M-202, PO-2085.

⁸ *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

[43] Except in the case of section 8(1)(e), where section 8 uses the words “could reasonably be expected to”, the institution must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm”. Evidence amounting to speculation of possible harm is not sufficient.⁹

[44] The police did not provide any representations on the exemption in section 8(1)(l).

[45] With respect to this exemption, not only have the police not provided “detailed and convincing” evidence that disclosure of these records may reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime, they have not provided any evidence at all.

[46] Under section 42 of the *Act*, where an institution refuses access to a record or part of a record, the burden of proof that the record or part of the record falls within one of the specified exemptions in the *Act* lies upon the institution.

[47] The police have not met the burden of proof with respect to the records for which they have claimed section 8(1)(l). Therefore, I do not uphold the exemption and will order the police to disclose to the appellant the information on pages 5 and 10, describing the damage done to the second vehicle involved in the accident.

D: Did the institution exercise its discretion under sections 38(a) and 38(b)? If so, should this office uphold the exercise of discretion?

[48] The section 38 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[49] In addition, the Commissioner 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.

⁹ Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

[50] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁰ This office may not, however, substitute its own discretion for that of the institution.¹¹

[51] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹²

- the purposes of the *Act*, including the principles that information should be available to the public, individuals should have a right of access to their own personal information, 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;
- whether the requester is seeking his or her own personal information;
- whether the requester has a sympathetic or compelling need to receive the information;
- whether the requester is an individual or an organization;
- the relationship between the requester and any affected persons;
- 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.

[52] The police submit that they properly exercised their discretion by balancing the appellant's right of access with other individuals' personal privacy in favour of privacy protection. The police state that although the appellant may have an interest in the disclosure of the information that has been supplied to the police by other individuals,

¹⁰ Order MO-1573.

¹¹ Section 43(2).

¹² Orders P-344, MO-1573.

these individuals have the right to privacy and to be assured that the police will safeguard their information.

[53] The appellant reiterated her view that she should be entitled to all of the records that were generated as a result of the motor vehicle accident. Her representations do not specifically address the police's exercise of discretion, other than to express her skepticism that witnesses to the accident exist.

[54] I have reviewed the circumstances surrounding this appeal and the police's representations on the manner in which they exercised their discretion. I note that much of the information in the records was disclosed to the appellant and that none of the appellant's personal information was withheld from her. The majority of the information that was withheld was the personal information of other individuals. I am satisfied that that police weighed the appellant's interest in access to information against the protection of other individuals' personal privacy. Accordingly, I am satisfied that the police did not err in the exercise of their discretion to refuse to disclose the remaining personal information contained in the records to the appellant.

[55] Consequently, I find that the withheld portions of personal information in the records qualify for exemption under section 38(b) of the *Act*.

ORDER:

1. I order the police to disclose the information contained on pages 5 and 10, regarding the damage done to the second vehicle to the appellant by **July 13, 2012** but not before **July 9, 2012**.
2. In order to verify compliance with order provision 1, I reserve the right to require the police to provide me with a copy of the records that are disclosed to the appellant.

Original Signed by: _____
Cathy Hamilton
Adjudicator

_____ June 7, 2012