

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-2720

Appeal MA11-247

Peel Regional Police Services Board

April 25, 2012

**Summary:** The appellant made a request to the police for information about himself for a specified date and occurrence. The police located two responsive occurrence reports and denied access to portions of them, relying on the exemptions in sections 38(a), in conjunction with section 8(1)(e), and 38(b). The police's decision to deny access to portions of the records is upheld.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 2(1) (definition of "personal information"); 8(1)(e), 14(2)(a), (f), (h), 14(3)(b), 38(a) and (b).

### OVERVIEW:

[1] The appellant made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Peel Regional Police Service (the police) for access to:

[a]ny and all information on myself or address since [specified date]. Particularly, regarding [second specified date] visit, but not limited to this event.

[2] The police located two responsive occurrence reports and issued a decision granting partial access to them. The undisclosed information was withheld pursuant to the discretionary exemption in section 38(a), with reference to the law enforcement

exemption in section 8(1)(e), and the discretionary personal privacy exemption in section 38(b) with reference to the presumption in section 14(3)(b).

[3] During my inquiry into this appeal, I sought and received representations from the police and the appellant. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[4] In this decision, I uphold the police's decision and dismiss the appeal.

## **RECORDS:**

[5] The records remaining at issue are the withheld portions of two occurrence reports.

## **ISSUES:**

- A. Does the records contain "personal information" within the meaning of section 2(1) of the *Act*?
- B. Does section 38(a) in conjunction with section 8(1)(e) apply to the information at issue?
- C. Does the section 38(b) exemption apply to the information at issue?
- D. Was the police's exercise of discretion proper?

## **DISCUSSION:**

### **A. Does the records contain "personal information" within the meaning of section 2(1) of the *Act*?**

[6] In order to determine which section of the *Act* applies, it is necessary for me to decide whether the record contains "personal information" and, if so, to whom it relates. Under section 2(1), "personal information" is defined, in part, to mean recorded information about an identifiable individual, including the individual's name where it appears with other personal information relating to the individual or whether disclosure of the name would reveal other personal information about the individual [paragraph (h)].

[7] 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) of the section 2(1) definition of that term may still qualify as personal information [Order 11].

[8] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

[9] The police submit that the records contains the personal information of the appellant and other identifiable individuals. The appellant submits that he is aware of the identity of the complainant listed in the records and thus the information about this individual is not personal information for the purposes of the *Act*. Further, the appellant submits that any information in the records provided by the complainant should be considered within the context of the appellant's relationship with this individual.

[10] Based on my review of the records I find that records contain the personal information of the appellant and another identifiable individual (the affected person). The information relating to the affected person includes his name, date of birth, address, phone number and his views and opinions. This information is "personal information" for the purposes of section 2(1) of the *Act*, specifically paragraphs (a), (c), (d), (e) and (h).

[11] The personal information relating to the appellant is the affected person's views and opinions of him which are the appellant's personal information within the meaning of paragraph (g) of the definition of that term in section 2(1). However, I find that the appellant's personal information is inextricably linked with that of the affected person and cannot be severed in such a way that it could be disclosed to him.

[12] As I have found the records at issue contain the personal information of the appellant and another identifiable individual, I will now proceed to consider whether the information is exempt under section 38(a) and (b) of the *Act*.

**B. Does section 38(a) in conjunction with section 8(1)(e) apply to the information at issue?**

[13] 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. Section 38(a) reads:

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

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

[14] 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].

[15] 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.

[16] In this case, the institution relies on section 38(a) in conjunction with section 8(1)(e) to withhold a sentence from one of the occurrence reports. Section 8(1)(e) states in part:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,

endanger the life or physical safety of a law enforcement officer or any other person;

[17] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)].

[18] In the case of section 8(1)(e), the institution must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the institution must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated [*Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.)].

[19] It is not sufficient for an institution to take the position that the harms under section 8 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfillment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

[20] The police's representations on the application of section 38(a) and 8(1)(e) contain confidential information about the content of the withheld information at issue. The police submit that disclosure of this information could reasonably be expected to endanger the life or physical safety of a law enforcement officer.

[21] The appellant argues that there is no personal information in the records and that any personal information relating to him would be false. He argues that he is not a danger to anyone.

[22] As stated above, the appellant has been granted access to almost all of the responsive records. The information withheld under section 38(a) in conjunction with section 8(1)(e) is one sentence in one of the occurrence reports. Based on my review of the withheld information and the representations of the police, I find that section 8(1)(e) applies to the severance for which it is claimed. I am satisfied that disclosure of

this information could reasonably be expected to endanger a law enforcement officer. As I have found that section 8(1)(e) applies, I find that section 38(a) applies to exempt the information from disclosure, subject to my finding on the police's exercise of discretion.

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

[23] As stated above section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

[24] If the information falls within the scope of section 38(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

[25] 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 the affected person'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 14(1), disclosure is not an unjustified invasion of personal privacy under section 38(b).

[26] The police submit that the presumption in section 14(3)(b) and the factors in section 14(2)(f) and (h) are relevant to my consideration of whether disclosure of the personal information would result in an unjustified invasion of the affected person's personal privacy. The appellant submits that I should consider the factor favouring disclosure in section 14(2)(a). These sections of the *Act* state as follows:

(2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

- (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;
- (f) the personal information is highly sensitive;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence; and

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

- (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

[27] The police submit that the personal information was compiled and is identifiable as part of an investigation into a possible violation of law. The police submit that their investigation of the incident between the appellant and the affected person was initiated by a complaint by the affected person about the appellant's actions.

[28] The police further submit that the personal information in the records is highly sensitive within the meaning of section 14(2)(f) for the confidential reasons which they relied upon for section 8(1)(e). Finally, the police submit that the withheld personal information was provided in confidence as contemplated by the factor in section 14(2)(h). They argue that the information was essential to the police in order to properly investigate the possible violation of law.

[29] The appellant submits that the accusations of the affected person and the police's statements about him are false and disclosure is necessary to bring police's biased actions to light. Accordingly, the appellant argues that I should consider the fact that disclosure of the personal information is necessary to subject the activities of the institution to public scrutiny, within the meaning of section 14(2)(a).

[30] I have reviewed the withheld portions of the records. As stated above, much of the appellant's personal information has been disclosed to him and the withheld information relates to either the affected person alone or is intermingled information about both the appellant and the affected person.

[31] It is evident that the information at issue was compiled by the police in the course of an investigation into an incident between the appellant and the affected person, which may have resulted in the laying of charges for a possible violation of the *Criminal Code*. Based on my review of the information at issue and the police's

representations, I find that the personal information at issue was compiled and is identifiable as part of the police investigation into a possible violation of law and falls within the section 14(3)(b) presumption. Moreover, in the present circumstances, I am not satisfied that disclosure of the personal information is necessary to subject the activities of the police to public scrutiny and I find that section 14(2)(a) does not apply. In addition, I accept that the information was provided to the police in confidence and I consider section 14(2)(h) to be relevant to my determination of whether disclosure would result in an unjustified invasion of personal privacy.

[32] Because of the application of the presumption in section 14(3)(b) and the finding that the factors in section 14(2)(f) and (h) are relevant, I conclude that disclosure of the personal information at issue could result in an unjustified invasion of personal privacy and section 38(b) applies to exempt the information from disclosure, subject to my finding on the police's exercise of discretion.

#### **D. Was the police's exercise of discretion proper?**

[33] The sections 38(a) and (b) exemptions are discretionary, and permit 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.

[34] 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
- it fails to take into account relevant considerations.

[35] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

[36] The police submit that in exercising their discretion to withhold the information at issue under sections 38(a) and (b), they attempted to balance the appellant's right to access with the affected person's right to privacy. The police state:

It is the position of the police that disclosure should be provided wherever possible within both the letter and spirit of the *Act*. The appellant did receive information and redactions were limited and specific to the circumstance of his request and the content of the record.

[37] The police submitted that they also considered the following in the exercise of discretion:

- The nature of the record and context in which the information appears.
- The relationship between the appellant and the affected person.
- The law enforcement exemption and the rights sought to be protected by that exemption.

[38] The appellant submitted extensive representations in favour of his position that the police exercised their discretion improperly in withholding the information at issue. The appellant submits that the police are attempting to cover up falsehoods about him in the records and the *Act* should not be used to protect false statements made by the affected person about the appellant. The appellant also argues that the police itself made false statements about the appellant and these statements should be subjected to public scrutiny.

[39] Based on my review of the information at issue and the parties' representations, I find the police's exercise of discretion to be proper. The appellant's allegations about the police and the affected person are not substantiated in the content of the records which I have reviewed. The appellant's personal information has been disclosed to him and the remaining information relates to the affected person only or consists of personal information relating to both individuals that cannot be severed. Furthermore, I find that the police properly considered the public safety interests which are to be protected under the law enforcement exemption for the information withheld under section 38(a).

[40] Accordingly, I find that the withheld portions of the records qualify for exemption under section 38(a) and (b).

**ORDER:**

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

Original signed by: \_\_\_\_\_  
Stephanie Haly  
Adjudicator

\_\_\_\_\_ April 25, 2012