

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2714

Appeal MA11-200

South Simcoe Police Services Board

April 5, 2012

Summary: The appellant made a request to the South Simcoe Police Services Board (the police) for copies of any complaints made against him during a specified period. The police initially refused to confirm or deny the existence of any responsive record(s) pursuant to section 8(3) and 14(5) of the *Act*. The appellant appealed the police's decision. During adjudication, the police withdrew their reliance on sections 8(3) and 14(5), instead relying on sections 8(1)(a), (b) and (d) and sections 38(a) and (b) to deny the appellant access to the record. The police's decision is upheld in part.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 8(1)(a), (b) and (d) and sections 38(a) and (b).

Orders and Investigation Reports Considered: MO-1928

OVERVIEW:

[1] The South Simcoe Police Services Board (the police) received the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

Please provide copies of any complaint made against me [the requester] since Nov. 15, 2009 to date [March 12, 2011].

[2] In response, the police initially refused to confirm or deny the existence of any responsive record(s) pursuant to sections 8(3) and 14(5) of the *Act*.

[3] The requester (now the appellant) appealed the decision. Mediation was not successful in resolving the issues in the appeal and the file was moved to the adjudication stage of the process, where an adjudicator conducts an inquiry under the *Act*.

[4] I sought and received representations from the police, initially. In their submissions, the police withdrew their reliance on sections 8(3) and 14(5) and indicated that they were relying on the law enforcement exemptions in sections 8(1)(a), (b) and (d) of the *Act*, in conjunction with section 38(a) instead. The police also advised that they were relying on the invasion of privacy exemption in section 38(b) of the *Act*.

[5] I also provided the appellant with a Notice of Inquiry and a summary of the representations of the police, inviting him to make representations. However, the appellant did not do so.

[6] In the discussion that follows, I find that the record contains the personal information of the appellant and other identifiable individuals and that those portions of the records containing these individuals' personal information qualify for exemption under section 38(b). However, I order the remaining portions of the record to be disclosed, as section 38(a), in conjunction with section 8(1)(a), (b) and (d), do not apply to them.

RECORD:

[7] The record consists of a single page occurrence report.

ISSUES:

- A. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the discretionary exemption at section 38(b) apply to the information at issue?
- C. Does the discretionary exemption in section 38(a) apply to the information at issue?

DISCUSSION:

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

[8] In order to determine whether the exemptions at section 38(a) and/or (b) of the *Act* applies, it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates.

[9] "Personal information" 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,
- (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;

[10] 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

[11] 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

¹ Order 11.

individual.² As such, the reporting officer's name, title and division which appear on the record at issue in this appeal are not considered to be his personal information.

[12] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.³

[13] The police submit that the record contains the personal information of identifiable individuals other than the appellant and includes their contact information (names, addresses and phone numbers), as well as other personal information about themselves that they provided to the police.

[14] Based on my review of the record, I find that the record contains the personal information of the appellant, as it relates to an incident involving him. The record also contains information that reveals other personal information about the appellant, specifically his name, address and contact telephone number, as contemplated by paragraphs (d) and (h) of the definition of "personal information" in section 2(1). In addition, the record includes the personal views and opinions of other individuals about the appellant, and thereby qualifies as his personal information under paragraph (e) of the definition.

[15] I also find that the record contains the personal information of other identifiable individuals, including their birth dates [paragraph (a)], addresses and telephone numbers [paragraph (d)], their own personal views and opinions [paragraph (e)], and their names, along with other personal information relating to them [paragraph (h)].

[16] With regard to the narrative portion of the record, I find that it contains the personal information of the appellant and two identified individuals. Although this information relates to the appellant and the identified individuals in their employment capacity, it also reveals something of a personal nature about these individuals, as it concerns a complaint that arose as a result of the appellant's conduct.⁴ As such, the information contained in the portion of the record that describes the incident includes the personal information of both the appellant and the identified individuals.

[17] I find that the remaining information, consisting of the reporting officer's name and division, date/time the incident was reported and committed, complaint type, incident type, location of the incident and occurrence number, does not fall within the definition of "personal information" under section 2(1) of the *Act* and cannot, therefore, qualify for exemption under section 38(b).

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

³ Orders P-1409, R-980015, PO-2225.

⁴ Orders PO-2225, PO-2524 and PO-2633.

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

[18] 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.

[19] 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.

[20] If 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.

[21] Sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met. If the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under sections 14 or 38(b).

[22] The factors and presumptions in sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 14(1)(f). If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 38(b). In *Grant v. Cropley* [2001] O.J. 749, the Divisional Court said the Commissioner could:

. . . consider the criteria mentioned in s.21(3)(b) [the equivalent provision in the provincial *Act* to section 14(3)(b)] in determining, under s. 49(b) [which is equivalent to section 38(b)], whether disclosure . . . would constitute an unjustified invasion of [a third party’s] personal privacy.

[23] In the circumstances, it appears that the presumption at section 14(3)(b) could apply. This section 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, as was the case in this situation, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law [Orders P-242 and MO-2235].

[25] The police argue that one of the identified individuals in this case made allegations against the appellant and these allegations could have resulted in charges being laid under the *Criminal Code*, if the individual had wished to do so.

[26] Although the police did not make representations on the application of the section 14(3) presumptions specifically, I find that section 14(3)(b) applies to exempt the personal information contained in the record that relates solely to the identified individuals, as well as to the narrative portion of the occurrence report which contains both their and the appellant's personal information. Based on my review of the record, I find that it was compiled by the police and formed part of its investigation into the allegations made against the appellant by one of the identified individuals. As noted above, even if no criminal proceedings are commenced against any individuals, this office may still conclude that section 14(3)(b) applies to the information compiled as part of that investigation. The presumption only requires that there be an investigation into a possible violation of law.⁵

[27] In conclusion, I find that the personal information in the record that does not relate exclusively to the appellant qualifies for exemption under section 38(b) as its disclosure would constitute a presumed unjustified invasion of the personal privacy of the other individuals whose personal information is also contained in the record. In addition, I find that the disclosure of those portions of the record which relate solely to the appellant would not give rise to an unjustified invasion of another individual's personal privacy and this information, which I have highlighted on a copy of the record provided to the police with this order, can be disclosed to the appellant.

Severance

[28] Section 4(2) of the *Act* obliges institutions to disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt from disclosure. Having found that portions of the record qualify under section 38(b), I must now determine whether any portions of those records can be reasonably severed.

⁵ Orders P-242 and MO-2235.

[29] The key question raised by section 4(2) is one of reasonableness. Where a record contains exempt information, section 4(2) requires a head to disclose as much of a record as can reasonably be severed without disclosing the exempt information. A head will not be required to sever the record and disclose portions where to do so would reveal only "disconnected snippets", or "worthless", "meaningless" or "misleading" information. In addition, severance would not be considered reasonable where an individual could ascertain the content of the withheld information from the information disclosed.⁶

[30] Applying the analysis of Adjudicator Frank DeVries in MO-1928 to the first part of the record, I find that it is possible to sever it in such a way that the personal information relating to the individuals other than the appellant is not disclosed; but the personal information relating solely to the appellant is. As noted above, the record contains the personal information of the other individuals, including their names, addresses, contact numbers and birthdates, along with similar personal information relating to the appellant. I find that it is possible to sever the names of these individuals, along with all other personal information contained in the record that relates solely to them, in such a way as to ensure that none of their personal information is disclosed, while still providing the appellant with access to his own personal information.

[31] With regard to the narrative summary portion of the record, I found above that it contains both the appellant's and the identified individuals' personal information which is inextricably intertwined. As a result, I find that the appellant's personal information cannot reasonably be severed from that of the other individuals in the narrative portion of the record. To do so would result in the disclosure of only "disconnected snippets", or "worthless", "meaningless" or "misleading" information. Therefore, I conclude that the entire narrative portion of the record is exempt under section 38(b) and ought not to be disclosed.

[32] After severing the information relating to these identifiable individuals, the remaining information relates solely to the appellant, and does not qualify under section 38(b) as its disclosure to him would not result in an unjustified invasion of another individual's personal privacy.

[33] With regard to these severed portions of the record, I have reviewed the circumstances surrounding the appeal in conjunction with the police's representations. I am satisfied that the police have exercised their discretion not to disclose the severed portions of the records under section 38(b) in an appropriate manner and have not relied upon improper or irrelevant considerations.

⁶ Orders MO-1928 and PO-1663, *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C 71 (Div. Ct).

C. Does the discretionary exemption at section 38(a), taken in conjunction with those at sections 8(1)(a), (b) or (d), apply to the information at issue?

[34] As I have already found that the identified individuals' personal information and the narrative portion of the record are exempt under section 38(b) of the *Act*, I will only consider whether section 38(a) applies to the following information: the appellant's name, address and contact number, the reporting officer's name and division, the date/time the incident was reported and committed, the complaint type, the incident type, the location of the incident and the occurrence number which remain at issue in the record.

[35] The police claim that section 38(a) applies to exempt the entire record. As stated above, section 36(1) gives individuals a general right of access to their own personal information held by an institution. Section 38(a) is another exemption from this right and it reads:

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

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

[36] 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.⁷

[37] 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.

[38] The police submit that the entire record is exempt under section 38(a) as sections 8(a), (b) and (d) apply to the information at issue.

[39] Section 8 reads:

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

(a) interfere with a law enforcement matter,

⁷ Order M-352.

- (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result,
- (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source.

[40] The term "law enforcement" is used in several parts of section 8, and is defined in section 2(1) of the *Act* 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, and
- (c) the conduct of proceedings referred to in clause (b).

[41] 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

[42] For the purposes of each of sections 8(1)(a), (b) and (d), the Police must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm." Evidence amounting to speculation of possible harm is not sufficient.⁹

[43] 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.¹⁰

[44] The police claim that sections 8(a) and (b) apply to the record because one of the individuals made allegations against the appellant that could have resulted in charges being laid, if the individual wished to do so. The police submit that this possibility was sufficient to trigger the application of the section 8(1)(a) and/or (b) exemptions.

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

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.).

¹⁰ Orders MO-2312 and PO-2040; *Ontario (Attorney General) v. Fineberg*, *supra* note 12.

[45] With regard to section 8(d), the police argue that the individual who reported the incident involving the appellant to the police did so for informational purposes only and did not wish for any further action taken. The police indicate that this suggests that the individual "did not want the information known" and that the individuals who provided the information only sought advice from the police on the situation. As such, the police state that the identified individuals are, in effect, a confidential source, and that they did not want their names disclosed to the appellant.

[46] As I have already found the names and other personal information of the identified individuals' to be exempt under section 38(b), I need only consider whether section 38(a), in conjunction with sections 8(1)(a), (b) and (d), applies to the personal information of the appellant that is contained in the record, including his name, address and contact number, along with the reporting officer's name and division, the date/time the incident was reported and committed, the complaint type, the incident type, the location of the incident and the occurrence number. I note that the police did not specifically address the application of these exemptions to the specific information that is not subject to exemption under section 38(b) in their representations.

[47] With regard to section 8(1)(a), I find that the police have not provided evidence which is sufficiently "detailed and convincing" to establish that the disclosure of the remaining portions of the records could reasonably be expected to interfere with a law enforcement matter¹¹ because it only consists of general information about the nature of the complaint and the police response to it.

[48] Further, I find that the police failed to provide "detailed and convincing" evidence to demonstrate that the disclosure would reasonably interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result, as is required under section 8(1)(b).

[49] Finally, I find that the disclosure of the remaining information at issue could not reasonably be expected to disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source, in accordance with the requirements of section 8(1)(d).

[50] As indicated above, the information remaining at issue, consisting of the appellant's name, address and contact number, the reporting officer's name and division, the date/time the incident was reported and committed, the complaint type, the incident type, the location of the incident and the occurrence number, is all of a general nature and its disclosure would not reveal the identity of the source of the information, that is, the individuals who brought the complaint to the police.

¹¹ Order MO-1928.

Accordingly, I find that the exemption in section 8(1)(d) does not apply to the remaining information at issue.

[51] Because none of the exemptions in sections 8(1)(a), (b) or (d) apply to the appellant's name, address and contact number, the reporting officer's name and division, the date/time the incident was reported and committed, the complaint type, the incident type, the location of the incident and the occurrence number, I find that it cannot qualify for exemption under section 38(a) and I will order that it be disclosed to the appellant.

ORDER:

1. I order the police to disclose to the appellant the highlighted information in the copy of the records provided to the police with this order by **May 14, 2012** and not before **May 9, 2012**.
2. I uphold the police's decision to withhold the remaining information in the records.
3. In order to verify compliance with provision 1 of this order, I reserve the right to require the police to provide me with a copy of the information disclosed to the appellant.

Original signed by: _____
Donald Hale
Adjudicator

_____ April 5, 2012