Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2743

Appeal MA10-281

Niagara Regional Police Services Board

May 29, 2012

Summary: The appellant sought access to records relating to a home invasion that was investigated by the police. The police issued three decision letters, granting access to the responsive records, in part. The police denied access to "ten code" information, and the personal information of the appellant and other individuals, 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.

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).

Orders Considered: PO-1665, PO-2563.

OVERVIEW:

[1] This order disposes of the issues raised as a result of a request to the Niagara Regional Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following:

> I am the solicitor for [a named individual] who was arrested . . . in a home invasion incident in [a named municipality]. At this time we are requesting the police report in this matter.

[2] The police identified responsive records and provided access to them, in part. The police denied access to other portions of the records, claiming the discretionary exemption in section 38(b), in conjunction with section 14(1) (personal privacy) of the *Act*.

[3] After receiving the police's decision, the requester's representative made a second request to the police, seeking additional records as follows:

> I confirm that we received a copy of the robbery report #2008-82107. However, the report refers to the involvement of [a named Detective], whose notes and statements have not been included. Furthermore, I note that the information within the officers statements have been severed to the extent that it is no longer possible to determine the identities of the officers involved in the investigation. As such, I would appreciate receiving a copy of notes and statements of [the named Detective] as well as a copy of the report with the officers' information intact.

[4] The requester's representative also sent a third letter to the police, requesting:

> Please provide me with the investigating officers' notes and statements in this matter as well as a copy of the occurrence/robbery report with the officers' information intact.

[5] The police sent a second decision letter to the requester's representative, providing the names of the officers involved in the investigation, and identifying which officers' notes, reports and/or statements were already disclosed to the appellant. The police also identified further responsive records and provided access to them, in part. The police denied access to other portions of the records, claiming the discretionary exemptions in section 38(a), in conjunction with section 8(1)(l) (facilitate the commission of an unlawful act), and section 38(b), in conjunction with section 14(1) of the *Act*.

[6] The requester (now the appellant) appealed the police's decision to this office. During the mediation of the appeal, the appellant's representative advised the mediator that the appellant was appealing both decisions, and was seeking access to all the information that was withheld by the police.

[7] Following the completion of mediation, the police issued a third decision letter to the appellant's representative, identifying further responsive records. The police granted access to these records, in part, but denied access to other portions, claiming the discretionary exemptions in section 38(a), in conjunction with section 8(1)(l), and section 38(b), in conjunction with section 14(1) of the *Act*.

[8] The matter then moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. This order is based on a review of the records responsive to all three decision letters issued by the police.

[9] The police did not provide representations, initially. However, they did provide reply representations in response to the appellant's representations, which were shared in accordance with this office's *Practice Direction 7*. The police's reply representations were shared with the appellant, who did not provide sur-reply representations.

[10] For the reasons that follow, I uphold the police's decision and dismiss the appeal.

RECORDS:

[11] The records at issue consist of general occurrence reports, witness statements and officers' notes.

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:

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

[12] In order to determine whether sections 38(a) or (b) 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;

[13] 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]

[14] 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]

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[1] Order 11.
[2] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

[15] 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]

[16] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[4]

[17] The police submit that some of the records contain both the appellant's personal information and the personal information of other identifiable individuals. In addition, the police state that other records do not contain the appellant's personal information, but contain only the personal information of other individuals.

[18] I have reviewed the records and, in my view, some of them contain the personal information of a number of individuals and the appellant. Other records only contain the personal information of individuals other than the appellant. In particular, the records contain information of identifiable individuals, including the appellant, relating to their race, ethnic origin, age, sex and family status, which falls within the ambit of paragraph (a) of the definition of the term "personal information" in section 2(1).

[19] In addition, the records contain information relating to the psychiatric and criminal history of some individuals, including the appellant, which falls within the ambit of paragraph (b) of the definition of that term in section 2(1). The records also contain the address and telephone number of several individuals, which falls within the ambit of paragraph (d) of that term in section 2(1). One record contains an individual's opinion of the appellant, which would qualify as the appellant's personal information, falling within the ambit of paragraph (g) of that term in section 2(1). Lastly, several of the records contain an individual's name, along with other personal information relating to the person, which falls within the ambit of paragraph (h) of the definition of that term in section 2(1).

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

[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.

[21] 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

[3] Orders P-1409, R-980015, PO-2225 and MO-2344.
[4] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

"unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

[22] 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.

[23] Under section 14, 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".

[24] In both these situations, sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met.

[25] The police submit that disclosure of the records would constitute an unjustified invasion of privacy and, therefore, section 14(1) applies to exempt the records from disclosure. Further, the police submit that the presumption in section 14(3)(b) applies to the information contained in the records. The personal information in the records, the police argue, was compiled and is identifiable as part of a police investigation into a robbery, forcible confinement, and break and enter, which are all possible violations of the law under the *Criminal Code of Canada*. The police also submit that none of the factors in section 14(2) favouring disclosure apply, and that none of the exceptions in section 14(4) apply to the records.

[26] The appellant submits that disclosure of the personal information at issue would not constitute an unjustified invasion of other individual's privacy. The appellant states that he is involved in civil litigation and requires the records to further the litigation. He states:

> Specifically, this information is required to further the interest of [j]ustice in a court proceeding which is although civil, has criminal elements too and as such the evidence required before the court must be inclusive and thorough to properly allow the court to adjudicate on these serious issues.
>
> As such there is a public purpose in the entire record be disclosed given the seriousness of the case and the type of allegation that the court is being asked to adjudicate in. Which serves an important public purpose.
>
> The individual's right in this case is overshadowed by the public purpose and the harm that will come to the individual should he not be able to properly inform the court.

> As such the disclosure is not [an] unjustified invasion of personal privacy.
> . . .
>
> These records are being requested as part of an investigation into the violation of the law . . . The law being investigated is the law of assault and *Charter of Rights*.
>
> [emphasis added]

[27] 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 either sections 38(b) or 14. Once a presumed unjustified invasion of personal privacy under section 14(3) is established for records which are claimed to be exempt under section 14(1), it can only be overcome if section 14(4) or the "public interest override" at section 16 applies.[5]

[28] With respect to records claimed to be exempt under section 38(b), in *Grant v. Cropley* [2001] O.J. 749, the Divisional Court said that the Commissioner could:

> . . . consider the criteria mentioned in s.21(3)(b) [the provincial equivalent to section 14(3)(b)] in determining, under s.49(b) [the equivalent to section 38(b)], whether disclosure . . . would constitute an unjustified invasion of personal privacy.

[29] 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.[6]. The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.[7]

[30] As set out above, the police submit that the presumption in section 14(3)(b) applies, as the records were compiled as part of a police investigation into a possible violation of the law. Section 14(3)(b) states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> . . .
>
> was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that

[5] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.
[6] Orders P-242 and MO-2235.
[7] Orders MO-2213, PO-1849 and PO-2608.

> disclosure is necessary to prosecute the violation or to continue the investigation;
> . . .

[31] I have carefully reviewed the withheld portions of the records. I note that most of the appellant's personal information has already been disclosed to him by the police. The portions of the records which the police claim qualify for exemption under section 38(b) consist of extensive amounts of personal information of other individuals and limited personal information of the appellant.

[32] It is clear that the records at issue in this appeal were compiled by the police in the course of their criminal investigation of a particular incident. On the basis of the representations provided by the police, I am satisfied that the personal information remaining at issue was compiled and is identifiable as part of the police investigation into a possible violation of law, and that it falls within the ambit of the presumption in section 14(3)(b).

[33] Although the appellant did not specifically raise the application of the factor favouring disclosure in section 14(2)(d) of the *Act*, he 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.[8]

[34] Based on the appellant's representations, I am satisfied that all of the above requirements have been met by the appellant because he is involved in an ongoing civil action concerning the incident, which is also the subject matter of the information contained in the records and he requires the records to "properly inform the court" of

[8] 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.).

the facts of the case. Therefore, I find that the factor at section 14(2)(d), which favours disclosure, applies.

[35] 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. Accordingly, I find that the withheld portions of the records are exempt from disclosure under either section 14(1) or 38(b), subject to my review of the police's exercise of discretion.

Absurd result

[36] In addition, I find that the absurd result principle does not apply in this instance. Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under sections 14 or 38(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption.[9]

[37] This principle is often applied in circumstances where the only exemption claim is that the disclosure of the information would constitute an unjustified invasion of the personal privacy of another individual under section 38(b). On occasion, this principle has also been applied to support access to a requester's own information which might otherwise be exempt from disclosure under section 38(a) of the *Act*.[10]

[38] The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement;[11]
- the requester was present when the information was provided to the institution;[12]
- the information is clearly within the requester's knowledge.[13]

[39] If disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.[14]

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[9] Orders M-444 and MO-1323.
[10] Order MO-1314.
[11] Orders M-444 and M-451.
[12] Orders M-444 and P-1414.
[13] Orders MO-1196, PO-1679 and MO-1755.

[40] The police submit that it would not be an absurd result to withhold the information from the appellant. The information in the records, the police argue, is extremely sensitive and was not supplied by the appellant, not provided in the appellant's presence, and is not within the appellant's knowledge.

[41] The appellant states that although he is not aware of the specific nature of the information at issue, he is aware of its general nature and to deny the particulars would result in an absurd result.

[42] In the circumstances of this appeal, I find that the principle of "absurd result" is not applicable because, in my view, there is a compelling reason for non-disclosure of the records at this time. The information in the records was not provided by the appellant, he was not present when it was provided to the police; nor is he aware of the content of the information. I have found that disclosure of the records would result in an unjustified invasion of other individuals' privacy under sections 14(1) and 38(b). In the circumstances, I find that the "absurd result" principle is not applicable and does not support the appellant's request for access to the records at this time, as disclosure of the records would be inconsistent with the purpose of the section 14(1) and 38(b) exemptions.

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?

[43] 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.

[44] 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.

[45] 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.[15]

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[14] Orders M-757, MO-1323 and MO-1378.
[15] Order M-352.

[46] 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.

[47] In this case, the institution relies on section 38(a) in conjunction with section 8(1)(l).

[48] Sections 8(1)(l) states:

> (1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> . . .
>
> (l) facilitate the commission of an unlawful act or hamper the control of crime.

[49] 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)

[50] The term "law enforcement" has been found to apply in a police investigation into a possible violation of the *Criminal Code*.[16]

[51] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[17]

[52] 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"

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[16] Orders M-202, PO-2085.
[17] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[18]

[53] 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.[19]

[54] The police submit that the discretionary exemption in section 38(a), in conjunction with section 8(1)(l), applies to the police codes in the duty book notes of six police officers, and that this office has consistently found that section 8(1)(l) applies to exempt police "ten codes" from disclosure.

[55] The appellant did not provide representations on this issue.

[56] The IPC has issued many orders regarding the release of police codes and has consistently found that section 8(1)(l) applies to "ten" codes.[20] These orders adopted the reasoning in Order PO-1665, where Adjudicator Laurel Cropley found:

> In my view, disclosure of the "ten-codes" would leave OPP officers more vulnerable and compromise their ability to provide effective policing services as it would be easier for individuals engaged in illegal activities to carry them out and would jeopardize the safety of OPP officers who communicate with each other on publicly accessible radio transmission space.

[57] Similarly, Adjudicator Cropley found that the rationale and conclusions in that order continued to be applicable in Order PO-2563, where she stated:

> Moreover, given the difficulty of predicting future events in the law enforcement context and the nature of the information at issue, I find that the ministry provided "detailed and convincing" evidence to establish a "reasonable expectation of harm" with respect to the ten-codes, alerts, location and zone codes.

[58] I adopt Adjudicator Cropley's reasoning for purposes of this appeal with respect to the "ten" code information contained in the records. I conclude that the police have provided "detailed and convincing" evidence to establish a reasonable expectation of harm with respect to disclosure of the "ten" codes. Therefore, I find that the "ten"

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[18] 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.).
[19] Order PO-2040; *Ontario (Attorney General) v. Fineberg*.
[20] See Orders M-93, M-757, MO-1715 and PO-1665.

codes contained in the records qualify for exemption under section 38(a), in conjunction with section 8(1)(l) of the *Act*.

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?

[59] The sections 38(a) and 38(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.

[60] 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.

[61] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[21] This office may not, however, substitute its own discretion for that of the institution.[22]

[62] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[23]

- 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.

[21] Order MO-1573.
[22] Section 43(2).
[23] Orders P-344, MO-1573.

- 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
- the historic practice of the institution with respect to similar information.

[63] The police state that they exercised their discretion properly. With respect to the police "ten codes," they state that this information is not the appellant's personal information and was withheld for law enforcement reasons that outweigh the appellant's right or need to receive this type of information.

[64] With respect to personal information contained in the records, the police submit that they considered the very sensitive nature of the information. In addition, the police state that they attempted to provide the appellant with access to as much of his own personal information as possible, while simultaneously attempting to protect the privacy of other individuals.

[65] The police also submit that they were not aware of any compelling need on the part of the appellant to receive the information in the records and that the police advised the appellant's representative that she may attempt to obtain a complete copy of the records through a court order, should she require the records for the civil litigation in which the appellant is involved.

[66] The appellant submits that the police erred in exercising their discretion by failing "without any purpose or resolve" to disclose the records in their entirety. The appellant states that the information is required to ensure that the court has all relevant information to properly adjudicate the course of events regarding the home invasion that is the subject matter of the records at issue.

[67] 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 by way of three decision letters with further information disclosed each time. Only very small portions of the appellant's personal information were withheld because it was co-mingled with that of other individuals to the extent that it could not be severed. 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 information contained in the records to the appellant.

[68] Consequently, I find that the withheld portions of the records qualify for exemption under sections 38(a) and 38(b) of the *Act*.

ORDER:

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

Original signed by: May 29, 2012
Cathy Hamilton
Adjudicator