Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2785

Appeal MA11-469

London Police Services Board

August 30, 2012

Summary: The appellant sought access to records held by the police relating to an incident which involved the appellant and others. The police denied access to portions of the records based on section 38(b) (personal privacy) of the *Act*. This order finds that the records at issue contain the personal information of the appellant and others. It upholds the application of section 38(b) to portions of the records, but determines that the appellant was clearly aware of the information in other portions of the records, and that these portions should be disclosed to him on the basis of the absurd result principle.

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"), 14(2)(d), 14(3)(b), 38(b).

Orders and Investigation Reports Considered: M-444, MO-1420.

OVERVIEW:

[1] The London Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to an incident which involved the appellant and other individuals. After receiving the request, the police notified some of the individuals named in the records (the affected parties) and sought their views regarding disclosure of the responsive

information to the appellant. One of the affected parties consented to the disclosure of their information.

[2] The police then issued an access decision in which they granted partial access to the responsive records, and denied access to other portions on the basis of the exemptions in sections 14(1) and 38(b) (personal privacy), and 38(a) (discretion to refuse requester's own information), in conjunction with sections 8(1)(d) (law enforcement) and 8(1)(l) (facilitate commission of an unlawful act) of the *Act*.

[3] The appellant appealed the police's access decision.

[4] During mediation, the appellant confirmed he was not seeking access to some portions of the withheld records, including certain personal information, non-responsive information, or police codes that were denied under 8(1)(l) of the *Act*.

[5] Also during mediation, several affected parties confirmed that they did not consent to the disclosure of their information.

[6] Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process, where an adjudicator conducts an inquiry under the *Act*. I sent a Notice of Inquiry to the police and two affected parties, initially, and received representations from the police only. In their representations, the police indicated that they were not submitting representations on the possible application of the discretionary exemptions in section 38(a) or 8(1)(d). As a result, those discretionary issues are removed from the scope of this appeal.

[7] I then sent the Notice of Inquiry, along with a copy of the non-confidential portions of the representations of the police, to the appellant, who also provided representations in response. In his representations, the appellant confirms that he is not pursuing access to certain types of information, including license plate numbers, which are now no longer at issue in this appeal.

[8] In this order, I find that some of the information remaining at issue qualifies for exemption under section 38(b) of the *Act*, but that other portions of the withheld information ought to be disclosed to the appellant on the basis of the absurd result principle.

RECORDS:

[9] The pages of records remaining at issue consist of portions of pages 4, 5 and 6 (an occurrence report) and the undisclosed information on pages 8, 10 and 11 (police officer's notes).

ISSUES:

A. Do the records contain "personal information" as defined in section 2(1)?

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

DISCUSSION:

Issue A. Do the records contain "personal information" as defined in section 2(1)?

[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 where 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 if 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 [Order 11].

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

[13] 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 [Orders P-1409, R-980015, PO-2225 and MO-2344].

Representations

[14] The police state that the records at issue contain the personal information of the appellant as well as that of other individuals. They state:

> The [police] investigated a "trouble with a person" occurrence … and spoke with the appellant and [the affected parties]. Information such as addresses, telephone numbers, dates of births, gender, place of employment, licence plate number and statements were collected. Clearly, the records at issue contain the personal information of several identifiable individuals, including the appellant.

[15] The appellant agrees that the records contain the personal information of identifiable individuals as defined by the *Act*, but confirms that he is not pursuing access to information such as names, birth dates, license plate numbers and driver's license numbers. He then questions whether the withheld portions of the records contain only this type of information.

[16] The appellant also refers to section 2(1)(e) of the definition of personal information set out above, which indicates that personal views and opinions are private "except if they relate to another individual." The appellant then states:

> I feel that it was very likely that the other parties … made comments about me or my employees and yet nothing is included in the report about

> this even though these comments should not constitute "personal information."

[17] In addition, the appellant states that, in order to be considered personal information, the information must be about the individual in a "personal capacity." He refers to previous orders of this office, which set out the following test for whether information relates to an individual in a personal capacity:

> a) Is the context in which the names of the individuals appear inherently personal or is it one such as a business that is removed from the personal sphere; and
>
> b) Is there something about the particular information at issue that if disclosed would reveal something of a personal nature of the individual.[1]

[18] The appellant then states that the incident resulting in the creation of these records occurred at his place of business, and concerned a lease transaction. He states that this incident did not occur at the affected party's home or deal with a personal matter, but it was "about a commercial transaction at a place of business."

[19] The appellant also argues that, in order to qualify as "personal information," it is necessary that the individual may be identified if the information is disclosed. He therefore states that if the disclosure would not permit a third party reader to identify the person in question, the information should not be considered "personal information." He states:

> It is hard to believe that everything blacked out in the London Police Report would reveal the identity of the other parties to a reader of the report. In my opinion, the observations by the police of the parties' actions and demeanor and the conclusions they arrived at should not be viewed as protected personal information as I don't feel this disclosure would permit a third party to know who it was without additional identifying information.

[20] Lastly, the appellant refers to the possible severing of information, and states:

> I believe there is likely a lot of information contained in the Report which should not be viewed as identifiable personal information and which could have been disclosed without risk of identification by someone reading the Report. …

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[1] PO-2225.

Findings

[21] On my review of the records, I find that they contain the personal information of the appellant, as they include information in police records relating to an incident in which he was involved.

[22] I also find that the withheld portions of the records that remain at issue contain the personal information of other identifiable individuals, including information relating to the family status of the individuals [paragraph (a)], financial transactions in which the individual has been involved [paragraph (b)], the personal opinions or views of the individual [paragraph (e)], and their names along with other personal information relating to them [paragraph (h)].

[23] Although the appellant argues that he is not pursuing the names or other identifiers of the affected parties, and that therefore the remaining information would not constitute their personal information, I do not accept that position. In this appeal, the appellant clearly knows the name of at least one of the individuals involved in this matter. Although removing the names and identifiers of individuals may anonymize the information for third parties, clearly certain kinds of information without a name attached can still be the personal information of an individual.[2] Accordingly, I am satisfied that the remaining withheld portions of records at issue also contain the personal information of identifiable individuals other than the appellant.

[24] I also do not accept the appellant's position that the information is not "personal information" because the incident occurred at a business address and concerned a lease transaction. The incident resulted in the police attending and investigating the matter, and I am satisfied that the disclosure of the records would reveal something of a personal nature about the individuals involved.

[25] Accordingly, I find that the information remaining at issue constitutes the personal information of the appellant and other identifiable individuals for the purpose of the *Act*.

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

[26] 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 exceptions to this general right of access, including section 38(b). Section 38(b) introduces a balancing principle that must be applied by institutions where a record contains the 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

[2] An obvious example would be a request for a named individual's medical history. Simply removing the name from this history would not mean the information is no longer "personal information."

personal information against the affected persons' right to the protection of their privacy. If the police determine that release of the information would constitute an unjustified invasion of the affected person's personal privacy, then section 38(b) gives the police the discretion to deny access to the appellant's personal information.

[27] 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).

Section 14(1)(a)

[28] Section 14(1)(a) states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;

[29] In this case the police contacted a number of affected parties in an attempt to obtain consent to release their personal information. Some affected parties consented, and their information was disclosed to the appellant. As identified above, during mediation the mediator contacted two additional affected parties, and they did not consent to the release of their personal information.

[30] As a result, I find that section 14(1)(a) does not apply to the information remaining at issue, as the affected parties whose information is at issue did not consent to the disclosure of the information relating to them.

Section 38(b)

[31] Section 38(b) states:

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

> if the disclosure would constitute an unjustified invasion of another individual's personal privacy

[32] The police state that section 38(b) applies to the information remaining at issue. They also refer to the factor in section 14(2)(h) and the presumption in section 14(3)(b) in support of their decision. The appellant argues that these sections don't apply, and that the factor in section 14(2)(d) applies in favour of disclosure of the information.

The presumption in section 14(3)(b)

[33] Section 14(3)(b) reads:

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

[34] The police state:

> The [police] responded to a call for a "trouble with person." This type of complaint is an official law enforcement matter. These types of investigations can lead to number of different offences such as: cause a disturbance …, assault …, or [trespass to property]. The list of potential offences is not exhaustive. As a result, police attended and initiated an investigation into a possible violation of law and subsequently a report was compiled which includes the appellant's information and the affected parties' information.

[35] The police then refer to the following quotation from Order MO-2235 in support of their position that the presumption applies even though no charges were laid:

> 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 [Order P-242]. Thus, even though no charges were laid by the police in this case, the information in the record falls within the section 14(3)(b) presumption and its disclosure is presumed to be an unjustified invasion of privacy.

[36] The appellant takes the position that this presumption does not apply, and argues that the police are applying it too broadly. He also states that the term "investigation" in this section "should be related to a very real possible law violation"

and that "not every matter the police attend to should be viewed in this context." He then reviews the circumstances in this appeal, and states that "[t]he police were called to ensure that matters did not escalate out of hand. There was no allegation of any illegal violations that would be chargeable by the police at that time." In addition, he refers to the portion of the report he received which indicates what was being investigated, and argues that this is not an "investigation into a possible violation of the law" as contemplated by section 14(3)(b) of the *Act*.

Finding

[37] As set out above, the presumption in section 14(3)(b) can apply to records even if no criminal proceedings were commenced against any individuals. The presumption only requires that there be an investigation into a possible violation of law.[3]

[38] With respect to the application of the presumption in section 14(3)(b) to the records in this appeal, on my review of the records and the representations, I am satisfied that the information in the records was compiled by the police in the course of their investigation of the incident involving the appellant and others. The information at issue includes statements made to the police and is contained in an occurrence report and in police officers' notebooks, compiled by the police in the process of conducting their investigation into the incident. The police have identified the charges under the Criminal Code that may have been laid in these circumstances. In my view, the information in these records was compiled as part of an investigation conducted by the police into a possible violation of law, and fits within the presumption in section 14(3)(b). Accordingly, I find that the disclosure of the personal information contained in the records is presumed to constitute an unjustified invasion of the personal privacy of identifiable individuals under section 14(3)(b) of the *Act*.[4]

The factors in sections 14(2)(d) and (h)

[39] Sections 14(2)(d) and (h) read:

> 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,
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> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence;

[3] Orders P-242 and MO-2235.
[4] See also MO-1420.

[40] With respect to the factor in section 14(2)(d), the appellant states that he and/or his company have "pending litigation" with one of the parties over the breach of a lease agreement. He states that he believes the information will be "illuminating to a judge regarding the circumstances surrounding our repossession of the leased vehicle."

[41] For section 21(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.[5]

[42] Based on the appellant's representations, I am not satisfied that the requirements set out above have been established. Specifically, although the appellant indicates his belief that the information would be "illuminating" to a judge dealing with the pending litigation, I am not satisfied that the personal information is "required in order to prepare for the proceeding or to ensure an impartial hearing" within the meaning of section 21(2)(d). Accordingly, I find that this factor does not apply in these circumstances.

[43] With respect to section 14(2)(h), this is a factor favouring non-disclosure. Having found that the presumption in section 14(3)(b) applies and that there are no factors favouring disclosure, it is not necessary for me to review the possible application of this factor in this appeal.

[44] Because the presumption in section 14(3)(b) applies to the withheld information, and because there are no factors favouring disclosure, I am satisfied that the disclosure of this information would constitute an unjustified invasion of the personal privacy of the affected parties. Accordingly, I find that the withheld portions of the records are exempt from disclosure under section 38(b) of the *Act*, subject to my review of the absurd result principle and the police's exercise of discretion, below.

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[5] 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.).

Absurd result

[45] This office has applied the "absurd result" principle in situations where the basis for a finding that information qualifies for exemption would be absurd and inconsistent with the purpose of the exemption.

[46] Senior Adjudicator John Higgins first applied the absurd result principle in Order M-444 where, after finding that the disclosure of identified information would, according to the legislation, be a presumed unjustified invasion of privacy, he went on to state:

> However, it is an established principle of statutory interpretation that an absurd result, or one which contradicts the purposes of the statute in which it is found, is not a proper implementation of the legislature's intention. In this case, applying the presumption to deny access to information which the appellant provided to the Police in the first place is, in my view, a manifestly absurd result. Moreover, one of the primary purposes of the Act is to allow individuals to have access to records containing their own personal information, unless there is a compelling reason for non-disclosure. In my view, in the circumstances of this appeal, non-disclosure of this information would contradict this primary purpose.

[47] Numerous subsequent orders have supported this position and include similar findings. The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement;[6]
- the requester was present when the information was provided to the institution;[7] and
- the information is clearly within the requester's knowledge.[8]

[48] However, previous orders have also established that if disclosure is inconsistent with the purpose of the exemption, the absurd result principal may not apply, even if the information was supplied by the requester or is within the requester's knowledge.[9]

Representations

[49] The police take the position that the absurd result principle does not apply in these circumstances. They state:

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[6] Orders M-444, M-451, M-613.
[7] Order P-1414.
[8] Orders MO-1196, PO-1679, MO- 1755.
[9] Orders M-757, MO-1323, MO-1378.

> The information that has been withheld is in part what the affected parties stated to police as well as the observations and opinions of Police about the affected parties. Although the appellant may have been in the vicinity and made some of the same observations, or have overheard the conversations, or may recall what was said, for the Police to assume this, would be in direct violation of the privacy of the affected parties and therefore in violation of the Act.

[50] The appellant states:

> In this case, I was present and had direct dialogue with the other parties and know them from having leased vehicles to them. We called the police. I was present the whole time the police were there and observed what took place. It was outside in front of a number of observers and the other parties were loud and acting out in front of everyone. There is in reality nothing private or confidential about the other party's actions or behaviour as I observed it all first hand. The Police had to make no assumptions about what I observed as I was there the whole time. To now deny me the police officer's observations and conclusions of what took place would be an absurd result ….

Finding

[51] The information at issue in this appeal contains the personal information of the appellant and the affected parties. I have found that it qualifies for exemption under sections 38(b) *Act*. On my review of the records, I note that some portions of the withheld information contain notes of conversations between the police officers and the affected parties about the incident. Without specific information confirming that the appellant was present and heard these conversations, I accept the position of the police that withholding this information would not result in an absurdity, and I find that the absurd result does not apply to this information.

[52] However, my review of the withheld information also confirms that portions of this information (located on pages 5 and 6 of the records) contain information that the appellant is clearly aware of, as he was present and participated in certain conversations or exchanges. In addition, the incident took place in public and in the presence of the appellant, who is clearly aware of certain actions that were taken by the parties. In these circumstances, I am satisfied that withholding portions of pages 5 and 6 from the appellant, which contain information that is clearly within his knowledge as they involved him, would lead to an absurd result.

[53] In addition, in the circumstances of this appeal, I find that disclosure of this information would not be inconsistent with the purpose of the section 38(b) exemption.

[54] Accordingly, I find that those portions of pages 5 and 6 which contain information that the appellant is clearly aware of do not qualify for exemption under section 38(b) of the *Act*, on the basis that to deny the appellant access to this information would result in an absurdity. As a result, I will order that these portions of information be disclosed to the appellant.

[55] With respect to the other information contained in the records, in the circumstances of this appeal, I find that the principle of "absurd result" is not applicable, as I am not satisfied that these portions of records contain information of which the appellant is clearly aware. Consequently, I find that the absurd result principle does not apply to the remaining portions of the records.

[56] I will provide the police with a highlighted copy of page 5 and 6, identifying the additional portions that should be disclosed, as they contain information the disclosure of which would not constitute an unjustified invasion of privacy under section 38(b) of the *Act*.

[57] As I have found above that the absurd result principle applies only to certain portions of the records, I will now review whether the police properly exercised their discretion to deny access to the remaining withheld portions of the records.

Exercise of Discretion

[58] The section 38(b) exemption is discretionary and permits the police to disclose information, despite the fact that it could be withheld. On appeal, this office may review the police's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so.[10]

[59] In their representations, the police acknowledge that the records contain both the personal information of the appellant and the affected parties. The police state that they considered the law enforcement purpose for which the personal information was collected. They also state that they considered all factors and in accordance with sections 14 and 38, and determined that disclosure would be an unjustified invasion of privacy, as the affected parties' personal privacy outweighs the right of access by the appellant.

[60] The appellant argues that the police did not properly exercise their discretion, that they took the position that "virtually everything" was protected personal information, and that they did not provide specific reasoning on how their discretion

[10] Orders PO-2129-F and MO-1629.

was exercised. He also repeats his views that, because he is not asking for the names of individuals, he ought to have access to the other information. He also states that the police did not properly consider his rights to the information, and that he should have the information because he was present when the incident occurred.

[61] I have reviewed the circumstances of this appeal and the records at issue. I note that, contrary to the appellant's position, the police did provide certain portions of the records to him. I also note that additional portions of the records are to be disclosed to the appellant on the basis of the "absurd result" principle. With respect to the remaining information, I have found that disclosure of this information would constitute an unjustified invasion of the personal information of the affected parties, and that it qualifies for exemption under section 38(b). Based on the nature of the information remaining at issue, and on the police's representations, I am satisfied that the police have not erred in the exercise of their discretion not to disclose to the appellant the remaining information contained in the records.

ORDER:

1. I order the police to provide the appellant with those portions of pages 5 and 6 which are not highlighted in the copy of the records provided to the police along with this order by **October 4, 2012** but not before **September 28, 2012**. To be clear, the portions highlighted in orange are not to be disclosed to the appellant.

2. I uphold the decision of the police to deny access to the remaining information.

3. In order to verify compliance with the terms of Order Provision 1, I reserve the right to require the police to provide me with copies of the records that are disclosed to the appellant.

Original Signed By: August 30, 2012
Frank DeVries
Adjudicator