

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-2752

Appeal MA11-375

Toronto Police Services Board

June 19, 2012

**Summary:** The police received a request for reports relating to a specific incident involving the appellant. The police denied access to portions of the records under the discretionary personal privacy exemption in section 38(b). This order partly upholds the police's decision.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 38(b), 14(3)(b).

**Cases Considered:** *London Property Management Association v. City of London*, 2011 ONSC 4710.

### OVERVIEW:

[1] The appellant made a request to the Toronto Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) relating to a specific incident. The police located the responsive records and issued a decision providing partial access to the records, severing some information citing section 38(b) (personal privacy).

[2] The parties were unable to resolve the appeal through the process of mediation and this file was transferred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry under the *Act*. Representations were received from the

police and the appellant and shared in accordance with section 7 of the *IPC's Code of Procedure and Practice Direction Number 7*.

[3] In this order, I partly uphold the police's application of section 38(b) to the information at issue in the records.

## **RECORDS:**

[4] The records consist of an Intergraph Computer Aided Dispatch (ICAD) Events Detail Report and an occurrence report.

## **ISSUES:**

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

## **DISCUSSION:**

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

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

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

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name 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.

[6] 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].

[7] Sections 2(2), (2.1) and (2.2) also relate to the definition of personal information. These sections state:

(2) Personal information does not include information about an individual who has been dead for more than thirty years.

(2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(2.2) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[8] 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].

[9] 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].

[10] 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.)].

[11] The police state that the records relate to a landlord and tenant incident and contain the personal information of the appellant and the affected persons. The police state that they released all of the information in the responsive records with the exception of minimal personal information of the affected persons. The police rely on paragraphs (c) and (d) of the definition of personal information in particular.

[12] Neither the appellant nor the affected persons addressed this issue in their representations.

### ***Analysis/Findings***

[13] The records are police reports about a landlord and tenant dispute. I agree with the police that some of the information remaining at issue includes the personal information of the appellant and the affected persons. This information includes their ages, dates of birth, personal cellphone numbers, and their personal opinions and views in accordance with paragraphs (a), (d), (e) and (g) of the definition of personal information in section 2(1) of the *Act*. I will consider below whether the personal privacy exemption in section 38(b) applies to this information.

[14] The records contain contact information of the landlords involved in the landlord and tenant dispute. The Divisional Court in *London Property Management Association v. City of London*,<sup>1</sup> determined that landlords who lease Rental Units are engaged in business whether or not the landlord is an individual leasing a Rental Unit in his own home or a corporate landlord leasing units in a large apartment building. In that case, at issue was whether the names, addresses and telephone numbers of landlords collected by the city under a licensing by-law qualified as “personal information” under the definition in sections 2(1) and 2(2.1) of the *Act*.

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<sup>1</sup> 2011 ONSC 4710.

[15] In *London Property Management Association v. City of London*, the court was satisfied that the licensing by-law did not conflict with the provisions of the *Act* which protect personal information because the names, addresses and telephone numbers of landlords is contact information that identifies the landlords in a business capacity and comes within the section 2(2.1) of the *Act*.

[16] In addition to the names and addresses of the landlords in the records, I find that other information at issue is also not personal information but information associated with individuals in their business capacity that does not reveal something of a personal nature about them. As this information, as well as the information that I have found to be subject to section 2(2.1), is not personal information, and as no other exemptions have been claimed for this information and no mandatory exemptions apply, I will order it disclosed.

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

[17] 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.

[18] 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.

[19] 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.

[20] 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 section 38(b). If any of paragraphs (a) to (c) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under sections 38(b). The information at issue in the records does not fit within paragraphs (a) to (e) of section 14(1) nor do paragraphs (a) to (c) of section 14(4) apply.

[21] 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).

[22] In the circumstances, it appears that the presumption at section 14(3)(b) could apply. This section 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;

[23] The police submit that the appellant was provided with the relevant reports related to the landlord and tenant dispute as it pertained to himself. He also received his verbatim transcript of the 911 call he placed to the police. The police state that as the appellant is aware of the other involved parties, any release of information without these individuals' consent would constitute an unjustified invasion of their personal privacy.

[24] The police state that the occurrence report was created by an officer, after police responded to a 911 call generated by the appellant. Once the circumstances were investigated, a determination was made that this dispute should be resolved by the Landlord and Tenant Tribunal.

[25] The affected persons state that they do not wish to have any personal or other information relating to them or their company or organization disclosed.

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

### ***Analysis/Findings***

[27] Based upon my review of the records, I find that the personal information in the records was compiled and is identifiable as part of an investigation into a possible violation of law. In this case, the police were investigating possible violations of the law by both the affected persons and the appellant.

[28] 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 [Orders P-242 and MO-2235]. The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn [Orders MO-2213, PO-1849 and PO-2608].

[29] As section 14(3)(b) applies, disclosure of the personal information in the records 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 [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. In this appeal, section 14(4) does not apply and the appellant did not raise the application of section 16 to the records.

[30] Therefore, the personal information remaining at issue in the records is exempt by reason of section 38(b), subject to my consideration of the absurd result principle and the police's exercise of discretion.

### **Absurd result**

[31] Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 38(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Orders M-444 and MO-1323].

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

- the requester sought access to his or her own witness statement [Orders M-444 and M-451]
- the requester was present when the information was provided to the institution [Orders M-444 and P-1414]
- the information is clearly within the requester's knowledge [Orders MO-1196, PO-1679 and MO-1755]

[33] 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 [Orders M-757, MO-1323 and MO-1378].

[34] The police and the affected persons did not provide representations on this issue.

[35] The appellant's representations indicate that he is aware of certain information that is contained in the records.

### ***Analysis/Findings***

[36] Based upon my review of the records and the parties' representations, I find that the absurd result principle applies to the information in the records that was originally supplied by the appellant, or that the appellant is otherwise aware. The appellant was a party to the incident in the records. The appellant supplied some of the information remaining at issue to the police or was present when the information was provided to the police or the information is information that is clearly within his knowledge.

[37] Accordingly, I find that the information for which the absurd principle applies is not exempt under section 38(b) and I will order it disclosed.

[38] I will now consider whether the police exercised their discretion in a proper manner with respect to the information that I have found subject to section 38(b).

#### **C. Did the institution exercise its discretion under section 38(b)? If so, should this office uphold the exercise of discretion?**

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

[40] 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.

[41] 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)].

[42] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- 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
- the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

[43] The police submit that in exercising their discretion they considered the balance between the right of access and the protection of privacy must be given in favour of protecting the privacy of the affected persons.

[44] The police also considered the nature of the institution, which entails gathering and recording information relating to unlawful activities, crime prevention activities, or activities involving members of the public who require assistance and intervention by the police. They state that a law enforcement institution's records are not simple business transaction records in which disclosure of another individual's personal information may not, on balance, be offensive.

[45] The police state that they considered that the information collected was supplied to the investigating officers as a result of a law enforcement activity. The police state that the appellant was in receipt of all his personal information, but not that of any other parties. The police submit that the section 38(b) exemption has been applied

appropriately to the withheld portions of the records and that any additional disclosure of information would constitute an unjustified invasion of personal privacy.

[46] The affected persons and the appellant did not provide representations on this issue.

***Analysis/Findings***

[47] The information that I have found to be subject to personal privacy exemption in section 38(b) and not subject to the absurd result principle contains the personal information of the affected persons and is not information that is within the appellant's knowledge. Based upon my review of the information that I have found subject to section 38(b), which is personal information that is not subject to the absurd result principle, I find that the police exercised their discretion in a proper manner, taking into account relevant considerations in the exercise of their discretion.

[48] Accordingly, I am upholding the police's exercise of discretion concerning the application of section 38(b) to the personal information in the records that is not subject to the absurd result principle and find that this information is exempt under section 38(b).

**ORDER:**

1. I order the police to disclose to the appellant the information in the records that I have found not to be personal information or to not be exempt under section 38(b) by reason of the absurd result principle by **July 25, 2012** but not before **July 20, 2012**. For ease of reference I have highlighted the information to be disclosed in the copy of the records sent to the police with this order.
2. I uphold the police's decision to withhold the remaining personal information in the records.
3. In order to verify compliance with the terms of this order, I reserve the right to require the police to provide me with a copy of the information disclosed to the appellant pursuant to order provision 1.

Original Signed by: \_\_\_\_\_  
Diane Smith  
Adjudicator

\_\_\_\_\_ June 19, 2012