Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2757

Appeal MA11-329

Kingston Police Services Board

June 27, 2012

Summary: The appellant sought access to records relating to various incidents in which he was involved with the police. The police granted access to most of the information contained in the records, but denied access to other portions, claiming the application of the exemption in section 38(b), in conjunction with section 14(1) (personal privacy). During the mediation of the appeal, the appellant raised the issue of reasonable search. In this order, the adjudicator upholds the police's decision to deny access to the records under section 38(b) and finds that the police properly exercised their discretion not to disclose the records. In addition, the adjudicator upholds the police's search as being reasonable and dismisses the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2 (definition of personal information), 14(1), 14(3)(b), 17 and 38(b).

OVERVIEW:

[1] This order disposes of the issues raised in an appeal of an access decision made by the Kingston Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) following a request for access to all personal information contained in any records relating to the requester.

[2] In response to the request, the police located responsive records and issued a decision letter, granting access to them, in part. The police denied access to the remaining portions of the records, claiming that it contained third party personal information.

[3] The requester, now the appellant, appealed the police's decision to this office.

[4] During the mediation of the appeal, the police confirmed that they are relying on section 38(b), in conjunction with section 14(1) (personal privacy) of the *Act* to deny access to the remaining portions of the records.

[5] The appellant confirmed with the mediator that he seeks information compiled since 2003 and that he is not interested in any personal information that relates solely to any other identifiable individuals, unless the personal information about another individual also relates to him.

[6] Also during mediation, one of the individuals identified in the records provided their consent to the mediator to disclose their information to the appellant. The mediator provided the signed consent form to the police who subsequently issued a supplementary decision letter, disclosing the information relating to that individual to the appellant.

[7] However, the other individuals either could not be reached or did not provide their consent to the release of the remaining portions of the records to the appellant.

[8] The appellant also raised the issue of reasonable search, as he was of the view that more occurrence reports should exist. Accordingly, the adequacy of the search undertaken by the police was added as an issue in this appeal, in addition to the application of the exemption claimed.

[9] The appeal then moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. I initially provided the police and three of the individuals identified in the records (the affected parties) with a Notice of Inquiry, soliciting their representations on the issues identified in the appeal. I received representations from the police, but not the affected parties. The police advised that they located an additional responsive record and issued a supplementary decision letter to the appellant, disclosing the record, in part, to him. The police again denied access to portions of the record, claiming the exemption in section 38(b), in conjunction with section 14(1). I also received representations from the appellant. The representations of both parties were shared in accordance with this office's *Practice Direction 7*.

[10] For the reasons that follow, I uphold the police's search as being reasonable and I uphold the police's decision to deny access to the undisclosed portions of the records. Accordingly, the appeal is dismissed.

RECORDS:

[11] The records remaining at issue consist of the withheld portions of various occurrence reports, witness statements and officers' notes for the period 2004 through 2010.

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), in conjunction with section 14(1) 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?

D: Did the institution conduct a reasonable search for records?

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 which sections of the *Act* may apply, it is necessary to decide whether the records contain "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]

[15] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[3]

[16] The police submit that the withheld portions of the records contain either the personal information of the affected parties, such as their name, address, telephone number, or the mixed personal information of the appellant and the affected parties.

---

[1] Order 11.
[2] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[3] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[17] The appellant agrees that the records contain his personal information, mixed with the personal information of other individuals.

[18] I have reviewed the records and, in my view, they contain personal information about the appellant and about other identifiable individuals.

[19] In particular, most of the records contain the following personal information about other identifiable individuals:

- information relating to the race, national origin, colour, age, sex, marital or family status, which falls within the ambit of paragraph (a) of the definition of that term in section 2(1);
- information relating to the psychiatric, psychological or criminal history, which falls within the ambit of paragraph (b) of the definition;
- the address and telephone number, which falls within the ambit of paragraph (d) of the definition;
- the personal opinions or views of the individual except where they relate to another individual, which falls within the ambit of paragraph (e) of the definition; and
- the individual's name where it appears with other personal information relating to the individual, which falls within the ambit of paragraph (h) of the definition.

[20] In addition, some of the records contain the appellant's personal information, consisting of the views or opinions of another individual about him, which falls within the ambit of paragraph (g) of the definition in section 2(1). This personal information is inextricably intertwined with that of another identifiable individual, in my view.

Issue B: Does the discretionary exemption at section 38(b), in conjunction with section 14(1) apply to the information at issue?

[21] 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, including section 38(b). Section 38(b) introduces a balancing principle that must be applied by institutions where a record contains 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 personal information against the other individuals' right to the protection of their privacy. If the police determine that release of the information would constitute an unjustified invasion of the other individuals' personal privacy, then section 38(b) gives the police the discretion to deny access to the appellant's personal information.

[22] 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 another individual'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 21(1), disclosure is not an unjustified invasion of personal privacy under section 38(b).

[23] In their representations, the police rely on the presumption in section 14(3)(b) of the *Act* to deny access to the personal information contained in the records. 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, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.[4] The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.[5]

[25] The police submit that they are an accredited police agency responsible for providing police services to the City of Kingston, including investigating possible violations of the law. All of the records at issue, the police state, were prepared by police officers while conducting investigations into possible violations of the *Criminal Code of Canada* and/or the *Highway Traffic Act*.

[26] The police also submit that all of the identifiable personal information in the records was collected as part of various investigations into possible violations of the law and, accordingly, its release would constitute an unjustified invasion of personal privacy.

---

[4] Orders P-242 and MO-2235.
[5] Orders MO-2213, PO-1849 and PO-2608.

[27] In their representations, the police also refer to the factors in sections 14(2)(a), (f) and (h) which weigh in favour of privacy protection. In particular, the police submit that none of the factors favouring disclosure in section 14(2) apply to the records at issue and that two of the factors that do not favour disclosure apply.

[28] Section 14(2) states, in part:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;
>
> . . .
>
> (f) the personal information is highly sensitive;
>
> . . .
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence;

[29] With respect to the application of the factor favouring disclosure in section 14(2)(a), the police state:

> There is no overriding public interest in these reports in that they mainly document private disputes Similarly, the release of the third party personal information is unlikely to assist in subjecting the activities of the institution to public scrutiny.

[30] The police also argue that the factors in sections 14(2)(f) and 14(2)(h), which do not favour disclosure, are applicable in this appeal. The police state:

> The information contained in these reports is highly sensitive in that they document the views and opinions of individuals involved in a police investigation. There is no doubt that witnesses and victims providing information to the police have some expectation of confidentiality. The disclosure of witness personal information could negatively impact on the effectiveness of police investigations particularly if witnesses cannot have some expectation of confidentiality. Witnesses/victims are less likely to be forthcoming with information without some expectation of confidentiality.

[31] Lastly, the police submit that the "absurd result" principle does not apply, as all records that were supplied by the appellant, such as emails he sent to the police, were disclosed to him, in full.

[32] The appellant's representations generally consist of detailed descriptions of each of his interactions with the police that form the subject matter of the records. The appellant states that much of the personal information in the records is "derogatory and defamatory." Consequently, the appellant argues, the manner in which the occurrences were documented gives rise to a compelling public interest. In addition, the appellant submits that the application of the exemption creates an absurd result, as he provided the information to the police in the first place.

[33] The appellant also provided signed consents from two individuals who consented to the disclosure of their personal information. In the case of one individual, the consent was limited to a particular incident. The forms were sent to the police with the appellant's representations.

[34] In reply, the police state that once they received the consents, they contacted one of the individuals, who clarified that she provided consent to disclose her personal information in relation to an incident in which she was the alleged victim of an assault that did not involve the appellant. The police advise that they conducted a search, but no responsive records exist related to the alleged assault. In addition, the police submit that if there was a record related to the incident, it would be outside the scope of the original request, which was for the appellant's own personal information.

[35] Further, with respect to the consent of the second individual, the police submit that the record[6] in which this individual is referred to does not contain this individual's personal information. As a result, the consent is moot.

[36] In sur-reply, the appellant submits that the point of providing the consents was to facilitate the disclosure of "mixed information," with no portions withheld, and that the record contains the personal information of the second individual referred to above.

[37] I have carefully reviewed the portions of the records that were withheld from the appellant. I note that the vast majority of the appellant's personal information has been disclosed to him by the police and that the majority of the personal information that has been withheld consists of the personal information of other individuals, as identified above.

[38] In my view, all of the records at issue in this appeal were compiled by the police and are identifiable as part of various investigations into a possible violation of the law arising from a number of incidents in which the police were contacted. I am, therefore,

[6] This record has been disclosed, in part, to the appellant.

satisfied that the personal information remaining at issue falls within the ambit of the presumption in section 14(3)(b). The appellant submits that there is a public interest in the disclosure of the withheld information, because the records contain "derogatory and defamatory" material.

[39] Although the appellant did not specifically raise the application of the factor favouring disclosure in section 14(2)(a) of the *Act*, he has by inference argued that it may apply to the records at issue. Section 14(2)(a) contemplates disclosure in order to subject the activities of the government (as opposed to the views or actions of private individuals) to public scrutiny.[7]

[40] Based on the appellant's representations, I am not satisfied that disclosure of the personal information contained in the records would subject the activities of the police to public scrutiny. The records reflect private disputes between the appellant and other individuals. Therefore, I find that the factor at section 14(2)(a), which favours disclosure, does not apply to the records at issue.

[41] In addition, I am satisfied that the two factors raised by the police, sections 14(2)(f) and (h) favouring non-disclosure, are applicable to the circumstances of this appeal. Having reviewed the records, I find that some of the information in the records is highly sensitive and was provided by individuals with a reasonable expectation of confidentiality.

[42] Consequently, I find that the presumption in section 14(3)(b) applies to all of the personal information at issue, that there are no factors favouring disclosure and that the factors in sections 14(2)(f) and (h) favouring non-disclosure apply. Accordingly, 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 and that the personal information is exempt under section 38(b).

[43] Therefore, I uphold the application of the discretionary exemption at section 38(b) with respect to the personal information that remains undisclosed in the records, subject to my finding in regard to the police's exercise of discretion.

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

[44] 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

[7] Order P-1134.

exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[45] 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.

[46] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[8] This office may not, however, substitute its own discretion for that of the institution.[9]

[47] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[10]

- 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;
- 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;

[8] Order MO-1573.
[9] Section 43(2).
[10] Orders P-344, MO-1573.

- 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; and

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

[48] The police submit that they properly exercised their discretion and that as much information as possible was disclosed to the appellant, without adversely affecting the privacy rights of the affected parties. In doing so, the police state that they balanced the right of the appellant to access his own information against the privacy rights of the affected parties, bearing in mind the strong privacy protection principle set out in the presumption in section 14(3)(b) of the *Act*.

[49] The police also state that they considered whether the appellant had a sympathetic and compelling need for the withheld information and concluded that he has not, given that the appellant had a number of conversations with the police concerning the access request, and did not make any arguments to that effect.

[50] Further, the police advise that they attempted to contact the affected parties, who either refused to provide consent to release their personal information or did not respond.

[51] The appellant's representations do not address the issue of whether the police properly exercised their discretion.

[52] 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 on three occasions since the request was made, and that very little of the appellant's personal information was withheld from him. The majority of the information that was withheld consists of the personal information of other individuals. I am satisfied that the 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 personal information contained in the records to the appellant.

[53] Consequently, I find that the withheld portions of personal information in the records qualify for exemption under section 38(b) of the *Act*.

Issue D: Did the institution conduct a reasonable search for records?

[54] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a

reasonable search for records as required by section 17.[11] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[55] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[12]

[56] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[13]

[57] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[14]

[58] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[15]

[59] The police submit that they conducted a reasonable search. The search was conducted, the police state, by an experienced and knowledgeable employee who had direct contact with the appellant on several occasions during the processing of his request. The police submit that the appellant clearly stated that he was seeking access to police records containing his personal information.

[60] It is the police's practice, they state, to create file entries for all police reports in their electronic records management database. The database was queried using the appellant's name and date of birth as search terms, resulting in 13 reports being identified. Twelve of the reports were disclosed to the appellant, with portions withheld under the *Act*. The final report relates to an event which falls outside the scope of the *Act* by virtue of certain provisions of the *Criminal Code*.

[61] The police also submit that they conducted further "wildcard" searches of the database in an effort to identify any further responsive records. One record was located as a result of these searches, and was disclosed to the appellant during the inquiry of this appeal. The police argue that they believe they have identified and located all of the police reports in their custody involving the appellant.

---

[11] Orders P-85, P-221 and PO-1954-I.
[12] Orders P-624 and PO-2559.
[13] Orders M-909, PO-2469, PO-2592.
[14] Order MO-2185.
[15] Order MO-2246.

[62] The appellant submits that the onus of reasonable search has not been fulfilled by the police and that the police's failure to conduct a reasonable search is a willful obstruction of justice.

[63] Although the appellant provided representations in this appeal, he does not provide a reasonable basis for concluding that further records exist. During the inquiry of this appeal, the police conducted a further search and provided details of the nature and extent of both the original and the second search in their representations.

[64] Based on the information provided by the police and the absence of a reasonable basis for his belief that additional records exist, I am satisfied that the police conducted a reasonable search.

ORDER:

I uphold the police's search as being reasonable and I uphold the police's decision. Accordingly, the appeal is dismissed.

Original signed by: June 27, 2012
Cathy Hamilton
Adjudicator