

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-2795

Appeal MA11-191

The Greater Sudbury Police Services Board

October 10, 2012

**Summary:** The appellant requested access to information relating to two incidents in which she was involved. The police granted partial access to the responsive records, relying on section 38(a), in conjunction with sections 8(1)(l) and 8(2)(c), as well as section 38(b), to withhold portions of the records. The decision of the police is upheld, in part, and the police are ordered to disclose certain withheld portions that do not qualify for exemption under either of the exemptions claimed.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1), 8(1)(l), 8(2)(a), and 38(a) and (b).

**Orders and Investigation Reports Considered:** M-1109 and MO-2533.

### OVERVIEW:

[1] The Greater Sudbury Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the "full and complete reports and information" relating to two specified incidents involving the appellant.

[2] The police located four responsive records and issued a decision granting partial access to them. The police denied access to the remaining portions of the records claiming the application of the discretionary exemptions in section 38(a) (discretion to refuse requester's own information), in conjunction with section 8(2)(a) (law enforcement), and section 38(b) (invasion of privacy) of the *Act*.

[3] The appellant appealed the decision to this office.

[4] During mediation, the appellant confirmed that she wished to pursue access to the withheld information. As mediation did not resolve the appeal, the file was moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*.

[5] During the inquiry into this appeal, this office sought and received representations from the police. These representations were shared in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*. This office sought, but did not receive, representations from the appellant. The file was subsequently transferred to me to complete the adjudication process.

[6] I sought representations from the police and the appellant on the application of the exemptions claimed to various withheld police codes in the records, which had not been addressed previously. The police provided representations on this issue, however, the appellant did not. The police relied on section 8(1)(l) (facilitate commission of unlawful act), in conjunction with section 38(a), to withhold the police codes.

[7] In this order, I find that some of the withheld information remaining at issue qualifies for exemption under sections 38(a), in conjunction with section 8(1)(l), and 38(b), but that other portions of the withheld information ought to be disclosed to the appellant on the basis that they contain her personal information alone, and do not qualify for exemption.

[8] The records that remain at issue in this appeal are the undisclosed portions of the following:

- Record 1 - Occurrence Summary (first incident)
- Record 2 - General Occurrence Report (first incident)
- Record 3 - Occurrence Summary (second incident)
- Record 4 - Arrest Report (second incident)

## **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(a), in conjunction with sections 8(1)(l) and 8(2)(a), apply to the information at issue?

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

D. Did the institution exercise its discretion under sections 38(a) and (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?**

[9] 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 where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[10] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.<sup>1</sup> To qualify as personal information, the information must be about the individual in a personal capacity, and it must be reasonable to expect that an individual may be identified if the information is disclosed.<sup>2</sup>

[11] The police submit that records 3 and 4 contain the personal information of involved individuals and witnesses, including their names, addresses, telephone numbers and dates of birth. The police argue that these individuals, who were not acting in any professional capacity, would be readily identifiable if other personal information pertaining to them was released.

[12] The police provide no representations on record 2, however, record 2 is referred to in the police index as being subject to the same exemptions claimed to apply to records 3 and 4.

### **Analysis and Findings**

[13] All of the records relate to incidents involving the appellant and were prepared by the police after they received complaints about the appellant's conduct. On my review of the records, I find that all of them contain the appellant's personal information as that term is defined in section 2(1), including one or more of, her address and telephone number [paragraph (d)], the views or opinions of another individual about her [paragraph (g)] and her name along with other personal information relating to her [paragraph (h)].

[14] I also find that records 1 and 2 contain the personal information of the appellant alone. The police have withheld the second last paragraph of record 2, which contains an unidentified individual's opinion about the appellant and a partial physical description of the individual. This paragraph does not contain the personal information of this unnamed individual, who is not identifiable should the withheld information be disclosed. Accordingly, I find that section 38(b) cannot apply to record 2.

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<sup>1</sup> Order 11.

<sup>2</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[15] I further find that records 3 and 4 contain the personal information of an individual who complained to the police about the appellant. This information qualifies as personal information because it includes the address and telephone number of the individual, and the individual's name along with other personal information relating to the individual, engaging paragraphs (d) and (h) of section 2(1).

[16] However, I find that two of the four withheld portions in the last paragraph of record 3 contain the appellant's personal information alone. These two portions can be severed in accordance with section 4(2) of the *Act*, without disclosing the personal information of the complainant. The first portion contains a description of another individual's opinion of the appellant during the second incident, when the individual complained to the police about the appellant. The individual is identified as the complainant in this paragraph and is not identifiable. The second portion similarly does not contain the personal information of anyone other than the appellant.

[17] The withheld second last paragraph of the first page of record 4 contains the personal information of the appellant, including her name, date of birth, address, and the opinion of the complainant about the appellant. This undisclosed portion of record 4 also contains the personal information of the complainant engaging section 38(b). However, I find, as above, that the appellant's personal information can be severed in accordance with section 4(2), without disclosing the complainant's personal information.

[18] I will determine below whether section 38(b) applies to the portions of records 3 and 4 that contain the complainant's personal information. The police claim that section 38(a) applies to the remaining withheld portions of the records and I will begin with this discussion.

**B. Does the discretionary exemption at section 38(a) in conjunction with sections 8(1)(l) and 8(2)(a) apply to the information at issue?**

[19] 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.

[20] 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.

[21] 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.<sup>3</sup>

[22] 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.

[23] Sections 8(1)(l) and (2)(a) state:

(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.

(2) A head may refuse to disclose a record,

(a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law.

[24] 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).

[25] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.<sup>4</sup>

[26] In order for a record to qualify for exemption under section 8(2)(a) of the *Act*, the institution must satisfy each part of the following three part test:

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<sup>3</sup> Order M-352.

<sup>4</sup> *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

1. the record must be a report; and
2. the report must have been prepared in the course of law enforcement, inspections or investigations; and
3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.<sup>5</sup>

[27] The police rely on section 38(a), in conjunction with section 8(1)(l), to withhold the police codes in records 1, 3 and 4, from the appellant. The police submit that the withheld police codes identify specific police zones and beats within the municipality, as well as emergency service zones used by the provincial police. The police explain that these codes are assigned to all addresses in the same geographical area of the city by the computer aided dispatch software system that generates and dispatches police calls. The police claim that these codes are exempt from disclosure under section 8(1)(l). The appellant provides no representations on the exemption of the police codes in this appeal.

[28] The police also rely on section 38(a), in conjunction with section 8(2)(a), arguing that all of the records comprise a police report for the purposes of that section. The police submit that while there are specific comments about the appellant in the records, these comments were provided to the police in the course of an investigation and form part of the police report. The police submit that these comments may or may not be accurate and are, for the most part, opinions.

[29] With respect to the three part test under section 8(2)(a), the police submit that all of the records qualify as a report as they are two occurrence summary reports. The police further state that the reporting officers on duty were dispatched to a police investigation and, therefore, the four records qualify as reports prepared in the course of law enforcement investigations. Finally, the police submit that they are a law enforcement agency that has the function of enforcing and regulating compliance with the law as contemplated by the third part of the test under section 8(2)(a).

### **Analysis and Findings**

[30] The police claim that section 38(a), in conjunction with section 8(1)(l), applies to exempt the various police codes in the records from disclosure, while the appellant makes no representations on this issue. I note that this office has previously dealt with claims for exempting police codes from disclosure under section 8(1)(l). This office has issued many orders that have established that the disclosure of police patrol zone information could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime, engaging the application of section 8(1)(l).<sup>6</sup> I adopt

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<sup>5</sup> Orders 200 and P-324.

<sup>6</sup> Orders M-757, M-781, MO-2065 and MO-2175.

the approach taken by previous orders of this office and I find that the various withheld police codes in records 1, 3 and 4, are properly exempt under section 38(a), in conjunction with section 8(1)(l).

[31] With respect to the application of section 8(2)(a), there is no dispute in this appeal that the police qualify as an agency charged with enforcing and regulating compliance with the law, and that the records were prepared in the course of law enforcement. Accordingly, the sole determination in evaluating the application of section 8(2)(a) in the circumstances of this appeal is whether all of the records are reports, as contemplated by the provision.

[32] The word "report" means "a formal statement or account of the results of the collation and consideration of information." Generally, results would not include mere observations or recordings of fact.<sup>7</sup>

[33] The title of a document is not determinative of whether it is a report, although it may be relevant to the issue.<sup>8</sup> In Order M-1109, former Assistant Commissioner Tom Mitchinson made the following comments about police occurrence reports:

An occurrence report is a form document routinely completed by police officers as part of the criminal investigation process. This particular Occurrence Report consists primarily of descriptive information provided by the appellant to a police officer about the alleged assault, and does not constitute a "report".

[34] In Order MO-2533, Assistant Commissioner Brian Beamish, considered the application of section 8(2)(a) to occurrence reports in another appeal involving the same police service as in this appeal. The Assistant Commissioner made the following comments about police occurrence reports:

Generally, and despite the appearance of the word "report" in document names, occurrence reports and similar records of other police agencies have been found not to meet the definition of "report" under the *Act* (set out in detail above), in that they are more in the nature of recordings of fact than formal, evaluative accounts of investigations: see, for example, Orders PO-1796, P-1618, MO-2361, MO-2290, M-1120 and M-1141.

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Having reviewed the occurrence reports, sudden death reports and the witness statements at issue in this appeal, I am satisfied that they do not meet the definition of a "report" under the *Act*, in that they consist of

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<sup>7</sup> Orders P-200, MO-1238 and MO-1337-I.

<sup>8</sup> Order MO-1337-I.



observations and recordings of fact rather than formal, evaluative accounts. It is significant that the content of these records is descriptive and not evaluative in nature. In other words, the records are not "formal statements or accounts of the results of the collation and consideration of information."

[35] I agree with the approach of the Assistant Commissioner and adopt it here. Having reviewed the four records, they do not consist of a "formal statement or account of the results of a collation and consideration of information."<sup>9</sup> The records contain information provided by witnesses in relation to two incidents, as well as the observations of the police officers who responded to the incidents. I find that these constitute mere observations or recordings of fact, and do not qualify as reports for the purposes of section 8(2)(a). I am, therefore, not satisfied that the records meet the definition of a "report" under the *Act*.

[36] I find that section 8(2)(a) does not apply, and consequently, the records are not exempt under section 38(a), in conjunction with section 8(2)(a).

[37] As I have found above that only records 3 and 4 contain the personal information of another individual in addition to that of the appellant, I will now consider whether the personal information relating to this individual qualifies for exemption under section 38(b).

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

[38] As noted above, 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.

[39] 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.

[40] 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 the requester's own personal information against the other individual's right to protection of his or her privacy.

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<sup>9</sup> Order P-200.

[41] Sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met.

[42] If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 38(b). In *Grant v. Copley*,<sup>10</sup> the Divisional Court said the Commissioner could:

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

[43] Even if no criminal proceedings were commenced against any individuals, the presumption in section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.<sup>11</sup> The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.<sup>12</sup>

[44] The police submit that they are permitted to refuse disclosure of the withheld portions of the records under section 38(b), as disclosure would constitute an unjustified invasion of another individual's personal privacy. The police rely on the presumption at section 14(3)(b), which states that disclosure of the personal information is presumed to constitute an unjustified invasion of personal privacy where the records were compiled and are identifiable as part of an investigation into a possible violation of law. Finally, the police submit that the consideration in section 14(2)(f) is also applicable as the personal information is highly sensitive and some of the comments made in the records about the appellant may be disturbing to her.

## **Analysis and Findings**

[45] If I find that the presumption in section 14(3)(b) applies to the severed information in records 3 and 4, as the police submit, then disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 38(b). This presumption may be overcome if the personal information at issue falls under section 14(4), which it does not in this appeal.

[46] It is clear that the undisclosed portions of records 3 and 4 which contain the personal information of an identifiable individual other than the appellant, were compiled by the police and are identifiable as part of an investigation of a possible violation of the law. Accordingly, I find that this personal information falls within the ambit of the presumption in section 14(3)(b).

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<sup>10</sup> [2001] O.J. 749.

<sup>11</sup> Orders P-242 and MO-2235.

<sup>12</sup> Orders MO-2213, PO-1849 and PO-2608.

[47] Regarding the consideration in section 14(2)(f), I do not accept the representation of the police that the personal information of the appellant should be withheld because it may be disturbing to her. The appellant has specifically requested the “full and complete” information about the two incidents in question. The opinion of the police about how the appellant may perceive the information is not a relevant factor in determining whether the appellant is entitled to the information in question. The appellant did not provide any representations on this or any other issue.

[48] I conclude that the portions of records 3 and 4 which contain the personal information of another identifiable individual are exempt under section 38(b), as the presumption against disclosure in section 14(3)(b) applies, and no considerations favouring disclosure are present.

**D. Did the institution exercise its discretion under sections 38(a) and (b)? If so, should this office uphold the exercise of discretion?**

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

[50] 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.

[51] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>13</sup> This office may not, however, substitute its own discretion for that of the institution.<sup>14</sup>

[52] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant<sup>15</sup>:

- the purposes of the *Act*, including the principles that
  - information should be available to the public

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<sup>13</sup> Order MO-1573.

<sup>14</sup> Section 43(2) of the *Act*.

<sup>15</sup> Orders P-344 and MO-1573.

- 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.

[53] The police state that in exercising their discretion they acknowledge that the appellant has a right to her personal information and that they take the *Act* "extremely seriously." The police submit that they provided the appellant as much of the records as they felt they could in good faith. The police contend that they did not exercise their discretion in bad faith and that they treated the appellant respectfully and in the same way that they would treat any other requester seeking his or her own personal information. The police further submit that they took into account all relevant factors and did not take any irrelevant factors into consideration in exercising their discretion.

[54] I have upheld the police's decision to withhold the various police codes in records 1, 3 and 4, in accordance with the discretionary law enforcement exemption in section 38(a), in conjunction with section 8(1)(l). I have also upheld the decision of the police to withhold those portions of records 3 and 4 that contain the personal information of an individual other than the appellant in accordance with section 38(b). The withheld

personal information is subject to a presumption against disclosure, and there is a significant basis for this.

[55] Having regard to the above, I am satisfied that the police exercised their discretion to withhold those portions of the records that qualify for exemption under section 38(a), in conjunction with section 8(1)(l) and section 38(b), and that their discretion was exercised appropriately. Accordingly, I uphold the police's exercise of discretion in this appeal.

**ORDER:**

1. I order the police to disclose page 2 of record 2 in its entirety, and the severances in records 3 and 4 noted above by **November 13, 2012**. For greater certainty, I have highlighted the severances that the police are to disclose on the copies of records 3 and 4 that I have sent to the police along with this order.
2. I uphold the decision of the police to withhold the remaining severed portions of records 1, 3 and 4 in accordance with section 38(a), in conjunction with 8(1)(l), and section 38(b).
3. To verify compliance with provision 1 of this order, I reserve the right to require a copy of the record disclosed to the appellant to be provided to me.

Original Signed By: \_\_\_\_\_ October 10, 2012  
Stella Ball  
Adjudicator