

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2777

Appeal MA11-203

Hamilton Police Services Board

August 7, 2012

Summary: The appellant appealed the decision of the police to withhold the witness statements and portions of an Occurrence Details Report relating to the investigation of an alleged assault on him. The police relied on the discretionary personal privacy exemption in section 38(b) in refusing to disclose the information at issue. This order upholds the decision of the police. Disclosure of the information at issue is presumed to constitute an unjustified invasion of personal privacy as per section 14(3)(b). The discretionary exemption at section 38(b) was appropriately applied by the police.

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

OVERVIEW:

[1] The Hamilton Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a particular Occurrence Details Report (Report) pertaining to the alleged assault of the appellant. The police granted partial access to the Report relying on sections 38(b) (personal privacy), 8(1)(e) (endanger life or safety) and 8(1)(l) (facilitate unlawful act) to deny access to the portions they withheld.

[2] The appellant appealed the decision.

[3] During mediation the police clarified that they were relying on section 38(a) in conjunction with sections 8(1)(e) and (l) to deny access to the police "10-codes", patrol zone information and/or statistical codes contained in the Report. The appellant confirmed he was not seeking access to this information and as a result, the application of section 38(a) in conjunction with sections 8(1)(e) and (l) are not at issue in this appeal.

[4] During mediation the appellant also advised the mediator that he was seeking access to the names of the individuals who provided statements to the police about the incident in question, along with the statements themselves. The police conducted a search for these records and located a number of responsive witness statements. The police advised that they relied on sections 38(b), 14(3)(b) and 14(2)(f) and (g) to deny access to these witness statements in their entirety, and to the withheld portions of the Report.

[5] This office subsequently sought the consent of the individuals who provided witness statements to the police as their interests may be affected by disclosure of the information (the affected parties). The affected parties who were successfully notified refused to consent to the disclosure of their personal information. One affected party could not be notified as the contact information for this individual available in the records was no longer valid.

[6] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeal process where an adjudicator conducts an inquiry under the *Act*.

[7] During the inquiry into this appeal this office sought representations from the police, and from the affected parties. Only the police submitted representations in response. These representations were shared in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*. The appellant did not submit representations.

[8] This file was subsequently transferred to me to complete the adjudication process.

[9] The records remaining at issue in this appeal are the witness statements totaling nine pages, and the information severed from pages 4 and 5 of the 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 police exercise their discretion under section 38(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

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

[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) in part as follows:

“personal information” means recorded information about an identifiable individual, including,

...

- (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,

...

- (d) the address, telephone number, fingerprints or blood type of the individual,

...

- (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;

[11] 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.¹ 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

¹ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

² Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

[12] In their representations, the police state that the records include the personal information of all of the affected parties as defined in section 2(1). The police state that the addresses and telephone numbers of the affected parties should be withheld, as should the name and personal information of the unrelated individual who assisted one of the affected parties during the police interview.

[13] The police point out that one of the affected parties who provided a witness statement did so in a professional capacity; however, this individual's address and telephone number still qualify as personal information under section 2(1)(d) and should be protected. Also, the portion of this individual's statement that refers to the employment and medical history of another affected party should be withheld as this information qualifies as personal information under section 2(1)(b).

Analysis and findings

[14] Although the police raise the possibility that one affected party was involved in the investigation in a work related capacity, the records do not support this conclusion. The records reflect that the alleged assault occurred outside of work hours and outside of the appellant's workplace, specifically, in the parking lot of the appellant's workplace while he was on his way to work. The records also reflect that the appellant's employer did not consider the incident "work related" and did not, for this reason, investigate the incident internally such that this affected party was obligated to provide a witness statement in a professional capacity. Accordingly, in my view, the affected party was not involved in the police investigation in a professional capacity.

[15] Based on my review of the witness statements and the Report, I find that the records contain the personal information of both the appellant and the affected parties.

[16] In particular, I find that they contain the following types of personal information of the affected parties, as defined in section 2(1):

- information relating to the medical and employment history of the individual [paragraph (b)]
- the addresses and telephone numbers of the affected parties [paragraph (d)]
- the individual's name...with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual [paragraph (h)].

[17] I find that the witness statements also contain the appellant's personal information as follows:

- information relating to the medical and employment history of the individual [paragraph (b)]
- the views or opinions of another individual about the individual [paragraph (g)].

[18] One of the witness statements also contains the personal information, as per sections 2(1)(d) and (h), of an unrelated individual who assisted one of the affected parties during the taking of the statement. As well, the remaining witness statements contain the personal information of another identifiable individual as set out under section 2(1)(a).

[19] The witness statements of the affected parties have been paraphrased by the investigating officer and included in the Report. The Report therefore contains the personal information of the affected parties and the identifiable individuals referenced above, in addition to the personal information of the appellant.

[20] Accordingly, I find that the records contain the personal information of the appellant, the affected parties, and other identifiable individuals.

[21] I further find, based on my review of the records, that the personal information of the appellant is inextricably mixed in the records with that of the affected parties and the other identifiable individuals. I find that the personal information in the records is not severable as the disclosure of even small snippets of the appellant's personal information could identify other individuals.

[22] As I have found that the records contain the personal information of the appellant, I will balance the appellant's right to access the records with the affected parties' and the individuals' right to personal privacy in my consideration of the application of section 38(b) in conjunction with section 14 below.

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

[23] 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). 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.

[24] 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 his or her privacy.

[25] In determining whether the exemption in section 38(b) applies, sections 14(1), (2), (3) and (4) provide guidance in determining whether the unjustified invasion of

personal privacy threshold is met. 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).

[26] In their representations, the police state that the appellant has been granted partial access to the Report and full access to his own personal information. The police state that they rely on section 38(b), in conjunction with section 14(3)(b), in refusing to disclose the withheld portions of the records.

[27] Section 14(3)(b) sets out one of the presumptions against disclosure. This section states:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

...

was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

...

[28] The police also submit that the information contained in the witness statements about the appellant is mostly "rumours and gossip" and they have no way of determining the validity of the views about the appellant that were expressed by the affected parties. The police submit that sections 14(2)(f) and (g) apply to the withheld witness statements and portions of the Report, and they also rely on these sections.

[29] Sections 14(2)(f) and (g) are two criteria to be considered in determining an unjustified invasion of privacy. These sections state:

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,

...

(f) the personal information is highly sensitive;

(g) the personal information is unlikely to be accurate or reliable;

...

Analysis and findings

[30] It is evident that all of the records at issue in this appeal were compiled by the police and are identifiable as part of an investigation into a possible violation of the law, namely, assault under the Criminal Code. 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.³ Consequently, I find that the presumption in section 14(3)(b) applies to the personal information at issue in this appeal.

[31] Turning to the criteria under section 14(2), I note that the police have not provided any information to support their assertion that sections 14(2)(f) and (g) apply. On the other hand, the appellant has not provided any representations establishing that any of the criteria in section 14(2) are relevant and favour disclosure. In the circumstances, I find that the factors in section 14(2) do not support disclosure.

Absurd Result

[32] 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.⁴

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

- the requester sought access to his or her own witness statement⁵
- the requester was present when the information was provided to the institution⁶
- the information is clearly within the requester's knowledge⁷

³ Orders P-242 and MO-2235.

⁴ Orders M-444, M-451, M-613, MO-1323, PO-2498 and PO-2622.

⁵ Orders M-444 and M-451.

⁶ Orders M-444, P-1414 and MO-2266.

⁷ Orders MO-1196, PO-1679, MO-1755 and MO-2257-I.

[34] 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.⁸

[35] In their representations the police suggest that the appellant may be aware of some of the information in the records, either through personal knowledge or because he was verbally provided with information by the investigating officer, and therefore, the absurd result principle may apply in the circumstances.

[36] In my view, the absurd result principle is not applicable as the appellant is not seeking access to his own witness statement, he did not supply the requested information, and he was not present when the information was provided by the affected parties or other individuals. There is no evidence in the records that the personal information of the individuals who provided statements to the police, and the content of those statements, are clearly within the appellant's knowledge. While the Report indicates that the investigating officer spoke with the appellant "about the information that was disclosed by the investigation", it does not indicate that the appellant was advised of the identity of the individuals who provided witness statements, or that he was told what each of these individuals stated.

[37] Although it is likely that the appellant knows some information about the matter as a result of being involved, this does not in and of itself support a conclusion that the absurd result principle applies. Accordingly, I am not persuaded that withholding the records at issue would result in an absurdity.

[38] I therefore find that the presumption in section 14(3)(b) applies to all of the personal information at issue, and the factors in section 14(2) do not favour disclosure. Further, 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 from disclosure under section 38(b), subject to my review of the police's exercise of discretion below.

Issue C. Did the police exercise their 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.

⁸ Orders M-757, MO-1323, MO-1378, PO-2622, PO-2627 and PO-2642.

[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.⁹ This office may not, however, substitute its own discretion for that of the institution.¹⁰

[42] In their submissions, the police submit that they exercised their discretion in protecting privacy while disclosing portions of the records to the appellant at the time of their initial decision. The police further submit that when they discovered the existence of the witness statements, they sought the consent of the affected individuals to disclosure.

[43] Based on my review of the evidence before me including the representations of the police and the records in their entirety, and considering the portion of the records that has been disclosed by the police and the fact that the appellant has received therein the details and results of the investigation of his alleged assault, I am satisfied that the police weighed the appellant's interest in access to information against the protection of other individuals' personal privacy. The personal information that the police decided to withhold from the appellant was gathered from individuals during a law enforcement investigation, and accordingly the privacy rights of the individuals who supplied this information are significant. I am satisfied that the police properly exercised their discretion in withholding portions of the Report and the witness statements in their entirety.

[44] Accordingly, I uphold the police's exercise of discretion and find that the records are properly exempt under section 38(b).

⁹ Order MO-1573.

¹⁰ Section 54(2) of the *Act*.

ORDER:

I uphold the decision of the police to withhold portions of the Occurrence Details Report, and the nine pages of witness statements in their entirety.

Original signed by: _____
Stella Ball
Adjudicator

_____ August 7, 2012