Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2798

Appeal MA12-188

Halton Regional Police Services Board

October 15, 2012

Summary: The requester sought access to a police occurrence report. The police denied access on the basis that the record was exempt as being a law enforcement report under section 8(2)(a) and on the basis of the personal privacy exemption in section 38(b). This order partially upholds the police's decision under section 38(b).

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) definition of personal information, 38(a), 8(2)(a), 38(b), 14(3(b).

OVERVIEW:

[1] The Halton Regional Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a particular police report.

[2] Prior to issuing their decision, the police notified an affected person, in accordance with section 21 of the *Act*, seeking their view regarding disclosure of the occurrence report. Upon receipt of the response, the police issued an access decision to the requester granting partial access to the occurrence report and denying access to portions of the report pursuant to sections 38(a) in conjunction with 8(1)(e), 8(1)(l), and 8(2)(a) (law enforcement), and section 38(b) (personal privacy) of the *Act*.

[3] The requester (now the appellant) appealed the police's decision.

[4] During mediation, the mediator contacted the affected person who advised that she does not consent to the disclosure of any information contained in the record that relates to her. During the course of the mediation, the appellant advised that he is not seeking access to the police 10 codes, patrol zone information and statistical codes that the police denied access to under sections 8(1)(e) and (l) of the *Act.* Accordingly, this information and these exemptions are no longer at issue.

[5] The appellant confirmed with the mediator that he is pursuing access to the remainder of the withheld information and the file was transferred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry.

[6] I sought and received representations from the police, the appellant and the affected person, which were shared in accordance with this office's *Practice Direction 7*.

[7] In this order I partially uphold the police's decision under section 38(b).

RECORD:

[8] The record is a two page occurrence report. Remaining at issue is the information severed from page 1 of the report consisting of the affected person's name, date of birth, sex, home address, and telephone numbers and the information severed from page 2 of the record about the affected person's marital status and the police's interaction with the affected person.

[9] This information is being withheld by the police under sections 38(a) in conjunction with 8(2)(a) (law enforcement report), and section 38(b) of the *Act*.

ISSUES:

A. Does the record 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 the section 8(2)(a) exemption apply to the information at issue?

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

D. Did the police exercise their discretion under section 38(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A. Does the record 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) 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;

[11] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

[12] To qualify as personal information, 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.)].

[13] The police submit that the record contains the mixed personal information of individuals, including the appellant. This information includes name, address, dates of birth, telephone number and statements contained in the police occurrence report, as defined in the legislation.

[14] Neither the affected person nor the appellant provided representations on this issue.

Analysis/Findings

[15] Based on my review of the information at issue in the record, I find that the record contains the personal information of the appellant and the affected person. This information includes their names, home addresses, dates of birth, telephone numbers, their views or opinions about each other, and these individuals' names where it appears with other personal information relating to the individual in accordance with the definition of personal information in section 2(1) set out above.

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

[16] 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.

[17] 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.

[18] 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 [Order M-352].

[19] 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.

[20] In this case, the police rely on section 38(a) in conjunction with section 8(2)(a). Section 8(2)(a) states:

> A head may refuse to disclose a record,
>
> > 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;

[21] 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)

[22] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)].

[23] It is not sufficient for an institution to take the position that the harms under section 8 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfilment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

[24] The police submit that the record comprises a two-page report and contains the facts in the case and the way the officer concluded his law enforcement investigation by concluding that no offences had been committed and no further police action was required.

[25] Neither the affected person nor the appellant provided representations on this issue.

Analysis/Findings

[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:[1]

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.

[27] 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 [Orders P-200, MO-1238 and MO-1337-I].

[28] The title of a document is not determinative of whether it is a report, although it may be relevant to the issue [Order MO-1337-I].

[29] An overly broad interpretation of the word "report" could create an absurdity. If "report" means "a statement made by a person" or "something that gives information", all information prepared by a law enforcement agency would be exempt, rendering sections 8(1) and 8(2)(b) through (d) superfluous [Order MO-1238].

[30] The record consists of an occurrence report. Generally, occurrence reports and similar records of other police agencies have been found not to meet the definition of "report" under the *Act*, in that they are more in the nature of recordings of fact than formal, evaluative accounts of investigations.[2]

[31] 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".

[1] Orders 200 and P-324.
[2] See, for instance, Orders PO-2967, PO-1959, PO-1796, P-1618, M-1341, M-1141 and M-1120.

[32] I agree with this approach of former Assistant Commissioner Mitchinson. On my review of the record, I find that it does not consist of a formal statement of the results of the collation and consideration of information. The small amount of analysis in this record does not meet the definition of a "report" under section 8(2)(a) of the *Act*. The record primarily contains observations, recordings of fact and collection of information rather than formal evaluative accounts of investigations.[3] Accordingly, I find that section 8(2)(a) of the *Act* does not apply to the record in this appeal.

[33] I will now consider whether the personal privacy exemption in section 38(b) applies to the information at issue in this appeal.

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

[34] 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.

[35] 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.

[36] 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.

[37] 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). Neither sections 14(1) or 14(4) apply in this appeal.

[3] Order PO-1959.

[38] 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. Cropley* [2001] O.J. 749, 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.

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

[40] The police provided both confidential and non-confidential submissions on this issue. In their non-confidential submissions, the police state that they were called to an alleged domestic incident, thereby quite possibly a violation of law had occurred.

[41] The police state that the undisclosed information was compiled as part of a law enforcement investigation and that disclosure would constitute an unjustified invasion of the privacy of the affected person.

[42] The police rely on Order M-1092, where Adjudicator Laurel Cropley states:

> I have reviewed the records and am satisfied that the presumed unjustified invasion of personal privacy in section 14(3)(b) applies to the personal information in the records, because this information was clearly compiled and is identifiable as a part of an investigation into a possible violation of law (the Criminal Code). Despite the fact that a determination was made that no criminal act had occurred, the investigation was conducted with a view towards determining whether or not this was the case, and this is sufficient to bring the records within the presumption.

[43] As well, the police rely on Order P-223 where former Assistant Commissioner Tom Wright determined that:

> … this subsection does not specify whether the "investigation into a possible violation of law" must be one which examines the activities of the individuals who are subject to investigation or is more properly referable to those of the individuals interviewed in the course of such investigations. It is my opinion that the subsection may be interpreted in either way.

[44] Neither the affected person nor the appellant provided representations on this issue.

Analysis/Findings

[45] 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]

[46] Section 14(3)(b) does not apply if the records were created after the completion of an investigation into a possible violation of law.[6]

[47] I agree with the police and find that the personal information in the records was compiled and is identifiable as part of an investigation into a possible violation of law. Therefore, the presumption in section 14(3)(b) applies to the information remaining at issue in this appeal.

[48] As section 14(3)(b) applies, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 38(b). However, based on the information provided in both the affected party and the appellant's representations, I will now consider whether the absurd result principle applies in this appeal.

Absurd result

[49] 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].

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[4] Orders P-242 and MO-2235.
[5] Orders MO-2213, PO-1849 and PO-2608.
[6] Orders M-734, M-841, M-1086, PO-1819 and PO-2019.

[50] 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]

[51] 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].

[52] Based on my review of the appellant's representations, I find that certain information in the record is clearly within the appellant's knowledge. In particular, the second page of the occurrence report contains information that the appellant provided to the police or information that the police provided to him, all of which is clearly within the appellant's knowledge.

[53] Accordingly, I find that the absurd result principle applies to this information and I will order it disclosed to the appellant. For the sake of clarity, I will provide a highlighted copy of this information to the police with the portions that should be disclosed to the appellant.

[54] I will now determine whether the police exercised their discretion in a proper manner under section 38(b) with respect to the information that I have found subject to section 14(3)(b) and not subject to the absurd result principle.

C. Did the police exercise their discretion under section 38(b)? If so, should this office uphold the exercise of discretion?

[55] 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.

[56] 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.

[57] 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)].

[58] 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.

[59] The police state that in exercising their discretion they took into account the appellant's right of access to the information and they have balanced that right against the privacy interests of the affected person who did not provide consent. The police further state:

> This institution considered whether or not the record could be severed in a way that would allow the disclosure of the appellant's information without disclosing another individual's personal information or breach their privacy. This was not possible in all cases as the personal information was so intertwined. This institution disclosed as much personal information as possible to the appellant; while respecting the wishes of the affected [person].

[60] Neither the affected person nor the appellant provided representations on this issue.

Analysis/Findings

[61] Based on the police's representations and my review of the information remaining at issue, which contains the personal information of the affected person that is not within the appellant's knowledge, I find that the police have exercised their discretion in a proper manner, taking into account relevant considerations and not taking into account irrelevant considerations.

[62] The information contained within the record was compiled in the course of a law enforcement investigation. The remaining information in the record is sensitive personal information of the affected person. Considering the relationship between the affected person and the appellant, I find that the appellant does not have a sympathetic or compelling need to receive this information.

[63] Accordingly, I am upholding the police's exercise of discretion with respect to the information I have found subject to section 38(b).

ORDER:

1. I order the police to disclose to the appellant the highlighted information in the copy of the record provided to the police with this order by **November 20, 2012** and not before **November 15, 2012**.

2. I uphold the police's decision to withhold the remaining information in the record.

3. In order to verify compliance with provision 1 of this order, I reserve the right to require the police to provide me with a copy of the information disclosed to the appellant.

Original signed by: October 15, 2012
Diane Smith
Adjudicator