

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2704

Appeal MA11-322

Toronto Police Services Board

March 22, 2012

Summary: The appellant filed an access request to obtain records relating to a complaint filed against her with the Toronto Police Services Board. The police granted the appellant partial access to the responsive records withholding the remaining information pursuant to the personal privacy and law enforcement provisions of the *Act*. The information at issue is found to be exempt under sections 38(a) and (b) and the police's decision is upheld.

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

Orders and Investigation Reports Considered: MO-2446.

OVERVIEW:

[1] The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Toronto Police Services Board (the police) for access to information relating to an incident involving the appellant.

[2] The police granted the appellant partial access to the responsive records. The police claim that disclosure of the withheld portions of the records would constitute an unjustified invasion of personal privacy under section 38(b)(disclosure of one's own information) taking into consideration the presumption at section 14(3)(b). The police also claim that portions of the records qualify for exemption under section

38(a)(disclosure of one's own information) in conjunction with section 8(1)(l)(facilitate the commission of an unlawful act or hamper the control of crime).

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

[4] During mediation the mediator attempted to contact three affected parties. Two of the affected parties contacted advised the mediator that they do not consent to the disclosure of any information contained in the records which relate to them. The mediator was unable to make contact with the other affected party.

[5] At the end of mediation, the appellant confirmed that she continues to seek access to all of the withheld information contained in the records.

[6] The issues remaining in dispute at the end of mediation were transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. I sought and received representations from the police, two affected parties and the appellant. The affected parties provided confidential representations objecting to the release of any information which relates to them.

[7] In this order, I uphold the police's decision and I find that:

- the records contain the personal information of the appellant and three affected parties;
- disclosure of the personal information of the affected parties to the appellant would constitute an unjustified invasion of personal privacy under section 38(b) of the *Act*;
- the law enforcement exemption at section 38(a) applies to the operational codes and police code information contained in the records; and
- the police properly exercised its discretion.

RECORDS:

[8] The records at issue include withheld portions of an occurrence report and a police officer's hand-written notes (8 pages).

[9] I have carefully reviewed the records and note that the police identified portions of the records as not responsive to the request. These portions are contained in officer's handwritten notes (pages 6 and 8) and relate to the officer's notes on an unrelated police matter. Having regard to the content of these entries, I am satisfied that they are not responsive to the request and have removed the entries from the scope of the appeal.

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1)?
- B. Does the discretionary exemption at section 38(b) in conjunction with section 14(1) apply to the records?
- C. Does the discretionary exemption at section 38(a) in conjunction with section 8(1)(l) apply to the records?
- D. Did the police properly exercise its discretion?

DISCUSSION:

A. DO THE RECORDS CONTAIN "PERSONAL INFORMATION" AS DEFINED IN SECTION 2(1)?

[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. The police claim that the portions of the records which only contain the personal information of the appellant has been disclosed to her. The police claim that the remaining personal information at issue is comprised of the personal information of both the appellant and other identifiable individuals, which cannot be reasonably severed from one another.

[11] The appellant's representations did not address this issue.

[12] I have carefully reviewed the records and find that they contain the personal information of the appellant, the complainant and two other individuals (the affected parties). In particular, the records contain address and telephone number information of the complainant and two other individuals [paragraph (d) of the definition of "personal information"]. In addition, the individuals' names appears with other personal information relating to them [paragraph (h)], including their personal views and opinions about the appellant and circumstances relating to the incident reported to the police [paragraph (e)]. I also find that the withheld portions of the records contain the personal information of the appellant, namely the complainants' views and opinions about the appellant [paragraph (g)]. In addition, I agree with the police and find that the personal information of the appellant cannot be reasonably severed from the personal information of the affected parties.

[13] As I have found that the records contain the personal information of the appellant and the affected parties, I will determine whether the records qualify for exemption under section 38(a) and (b) of the *Act*.

B. DOES THE DISCRETIONARY EXEMPTION AT SECTION 38(b) IN CONJUNCTION WITH SECTION 14(1) APPLY TO THE RECORDS?

[14] I have found that the withheld information contains the personal information of the appellant and the affected parties. 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. Section 38(b) introduces a balancing principle that must be applied by institutions where a record contains the 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 her own personal information against the affected party's right to the protection of their privacy. If the police determines that the release of the information would constitute an unjustified invasion of an identifiable individual's personal privacy, then section 38(b) gives the police the discretion to deny access to the appellant's personal information.

[15] 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 the affected person'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 14(1), disclosure is not an unjustified invasion of personal privacy under section 38(b).

Section 14(1)(a)

[16] Section 14(1)(a) states:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except, upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access

[17] In this case, the mediator contacted the three affected parties in an attempt to obtain consent to release their personal information. Two of the affected parties advised the mediator that they did not consent to the release of their information. These individuals also submitted representations objecting to the release of their information.

[18] Under the circumstances, I find that section 14(1)(a) does not apply to the personal information at issue as the affected parties whose information is at issue did not consent to the disclosure of the information relating to them.

Section 38(b)

[19] Section 38(b) states:

A head may refuse to disclose to the individual to whom the information relates personal information if the disclosure would constitute an unjustified invasion of another individual's personal privacy.

[20] The police claim that section 38(b), taking into consideration the presumption at section 14(3)(b) applies to the personal information at issue. The appellant claims that the factor favouring disclosure at section 14(2)(d) applies in the circumstance of this appeal.

[21] Section 14(2)(d) states:

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 the personal information is relevant to a fair determination of rights affecting the person who made the request.

[22] The appellant submits that she requires the personal information at issue to defend her position in a family court case. The appellant also submits that she requires the information so that she can seek relief from the courts. In support of her position, the appellant attached documents relating to a legal dispute involving a mortgage.

[23] For section 14(2)(d) to apply, the appellant must establish that:

- (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and
- (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
- (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

[Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and*

Privacy Commissioner) (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.)).

[24] I have carefully considered the appellant's evidence and find that she has failed to adduce sufficient evidence to establish that the personal information at issue is required to prepare for a specific proceeding. In addition, the appellant has failed to establish that the personal information at issue has some bearing to the determination of the right in question or is required to ensure an impartial hearing. Accordingly, I find that the factor at section 14(2)(d) has no application to the present appeal.

Section 14(3)(b)

[25] Section 14(3)(b) 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.

[26] In support of its position that the presumption at section 14(3)(b) applies to the personal information at issue, the police's representations refer to the *Criminal Code of Canada* and state:

The responsive records found in both the memorandum book notes and the report, were created by an officer, after the complainant attended 54 Division. Once the circumstances were investigated, a determination was made that it was a dispute only and police were not required. Whether charges are laid does not negate the applicability of subsection 14(3)(b) as it only requires that there be an investigation into a possible violation of the law.

[27] The appellant's representations do not specifically address the issue of whether the presumption at section 14(3)(b) applies. However, she comments that based on her review of the portions of the records which have been released to her, it appears that the withheld information contains "accusatory and damaging" information about her.

[28] The personal information at issue is comprised of the complainant and other individual's names, address and statements made to the police. I have carefully reviewed this information along with the representations of the parties and find that the presumption at section 14(3)(b) applies to the withheld personal information. I am satisfied that the personal information in the records was compiled by the police during their investigation of a matter involving the appellant. Accordingly, I am satisfied that

the personal information at issue was compiled and is identifiable as part of the police investigation into a possible violation of law.

[29] As I have found that only the presumption at section 14(3)(b) applies to the circumstances of this appeal, I find that disclosure of the affected party's personal information to the appellant would constitute an unjustified invasion of personal privacy under section 38(b), subject to my review of the police's exercise of discretion.

C. DOES THE DISCRETIONARY EXEMPTION AT SECTION 38(a) IN CONJUNCTION WITH SECTION 8(1)(I) APPLY TO THE RECORDS?

[30] Section 38(a) states:

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.

[31] 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].

[32] 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. The police claim that the operational codes and police code information withheld from the records is exempt under section 38(a) taking into consideration section 8(1)(I). Section 8(1)(I) states:

A head may refuse to disclose a record if the disclosure could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime.

[33] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.¹

[34] In the case of section 8(1)(I), where section 8 uses the words "could reasonably be expected to", the institution must provide "detailed and convincing" evidence to

¹ *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

establish a “reasonable expectation of harm”. Evidence amounting to speculation of possible harm is not sufficient.²

[35] In support of its position that the operational codes and other police code information is exempt under section 38(a), the police refers to Order MO-2446. In that order, Adjudicator Diane Smith states:

I note that this office has applied section 8(1) to exempt police operational codes. This office has consistently found that section 8(1)(l) applies to these codes (for example, see Orders M-93, M- 757, MO-1715, MO-2414 and PO-1665). These orders adopted the reasoning stated in Order PO-1665 by Adjudicator Laurel Cropley:

In my view, disclosure of the “ten-codes” would leave OPP [Ontario Provincial Police] officers more vulnerable and compromise their ability to provide effective policing services as it would be easier for individuals engaged in illegal activities to carry them out and would jeopardize the safety of OPP officers who communicate with each other on publicly accessible radio transmission space.

I agree with Adjudicator Cropley’s reasoning and find that it is relevant in the circumstances of this appeal.

I am satisfied that disclosure of the police operational codes could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. Accordingly, I find that this information that has been withheld from the appellant qualifies for exemption under section 8(1)(l) of the Act.

[36] The reasoning in Orders MO-2446 and PO-1665 has been applied in recent orders from this office.³ I also adopt the reasoning in the above-referenced appeals and find that disclosure of the operational codes and other police code information found on pages 1 and 4 could reasonably be expected to cause the harms contemplated in section 8(1)(l). Accordingly, I find that this information qualifies for exemption under section 38(a), subject to my review of the police’s exercise of discretion.

² Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

³ See for instance Orders PO-3023, PO-3020, PO-3013, PO-2970 and MO-2620.

D. DID THE POLICE PROPERLY EXERCISE ITS DISCRETION?

[37] The sections 38(a) and (b) exemptions are 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. 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.

[38] 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)].

[39] The appellant did not make representations specifically addressing this issue. The police submit that it exercised its discretion properly by taking into consideration the nature of the information and the extent to which it is significant and/or sensitive to the police and the affected parties. The police also state that it weighed the appellant's right of access to the information with the privacy protection of the affected parties and found that the affected parties' personal privacy outweighed the appellant's right of access.

[40] As previously stated, the personal information at issue is comprised of information which relates to both the appellant and the affected parties. In addition, I found that the personal information of the appellant cannot be reasonably severed from the personal information of the affected parties. The personal information which relates solely to the appellant has already been disclosed to her.

[41] Having regard to the representations of the parties, I am satisfied that the police properly exercised its discretion and in doing so took into account relevant considerations such as the sensitive nature of the withheld information and the significance and sensitivity attached to it. I am also satisfied that the police did not exercise its discretion in bad faith or for an improper purpose, nor is there any evidence that it took into account irrelevant considerations.

[42] In making my decision, I note that the police considered that one of the purposes of the *Act* includes the principle that requesters should have a right to access their own information. However, in my view, the nature of the personal information at issue that relates to the affected parties and the sensitivity of it outweigh this principle,

taking into consideration that the police have applied the exemptions in a manner which resulted in most of the responsive information relating to the appellant being disclosed to her.

[43] Having regard to above, I am satisfied that the police properly exercised its discretion to withhold the personal and law enforcement information I found exempt under section 38(a) and (b).

ORDER:

I uphold the police's decision and dismiss the appeal.

Original Signed by: _____
Jennifer James
Adjudicator

_____ March 22, 2012