

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2783

Appeal MA11-22

Halton Regional Police Services Board

August 24, 2012

Summary: The Halton Regional Police Services Board received a request for access to information relating to a complaint made about criminal conduct on the part of the appellant. The police granted partial access to the responsive records and denied access to others, in whole or in part, claiming the application of sections 38(a), in conjunction with section 8(2)(a) and 38(b). After making additional disclosure at the mediation stage, the police maintained their position with respect to the remaining information. In this decision, the adjudicator found that the records contain the personal information of the appellant and other identifiable individuals and upheld the police's decision to deny access to them under section 38(b).

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

Cases Considered: *Grant v. Cropley* [2001] O.J. 749

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 "any and all information" relating to a complaint that was made against the requester by a particular individual. The police identified one record (an occurrence report) as responsive to the request and issued a decision granting partial access to it. Portions of

the record were withheld pursuant to section 38(a) (discretion to refuse requester's own information), in conjunction with section 8(2)(a) (law enforcement report) and the personal privacy exemption in section 38(b). The police also stated that sections 8(1)(e) & (l) (law enforcement) were being applied to withhold the ten-codes, patrol zone information and statistical codes.

[2] The requester (now the appellant) appealed the police's decision to this office, and a mediator was appointed to explore resolution of the issues. During mediation, the appellant advised the mediator that he believed more records should exist, including officers' notebook entries and videotaped interviews.

[3] The mediator relayed this information to the police and they conducted another search for responsive records, subsequently locating a video statement and police officers' notebook entries. The police granted partial access to these additional records, denying access to portions of the newly identified records under the same exemptions as in the first decision, with the exception of section 8(2)(a). The police also stated that:

... the Hamilton Police Service took over the investigation to which you are seeking records. Copies of the records belonging to the Hamilton Police Service must be obtained directly from the Hamilton Police Service, as the Halton Regional Police Service does not have custody and/or control of the records.

[4] The appellant does not take issue with this part of the decision, nor does he seek access to the police codes, patrol zone information and statistical codes which were claimed to be exempt under sections 8(1)(e) and (l). As a result, the issues of responsiveness and the law enforcement exemptions in sections 8(1)(e) and (l) were removed from the scope of the appeal.

[5] The police later clarified that some portions of these additional records were disclosed because the information in those portions is not responsive to the request. The appellant does not dispute that these portions of the records are, in fact, non-responsive. The police also confirmed which exemptions apply to each of the records at issue in this appeal:

1. Occurrence report: section 38(a), in conjunction with section 8(2)(a), and section 38(b);
2. Officer's notebook entries: section 38(b); and
3. Video statement: section 38(b).

[6] As it was not possible to fully resolve this appeal by mediation, it was transferred to the adjudication stage of the appeals process, where an adjudicator conducts a written inquiry. The adjudicator assigned to conduct the inquiry provided a Notice of Inquiry outlining the facts and issues to the police initially, and they provided representations in response. A modified Notice of Inquiry was then provided to the appellant, seeking his submissions on the issues in this appeal. The appellant also provided representations in response to the Notice. The file was then transferred to me to complete the inquiry.

In this order, I uphold the police's decision to deny access to the remaining records, and parts of records at issue, including the videotape as they are exempt under the discretionary personal privacy exemption in section 38(b).

RECORDS:

[7] The records at issue in this appeal consist of: 1) a videotaped statement (VHS), in its entirety; 2) portions of an occurrence report, including a follow up report (17 pages); and 3) police officers' notebook entries (23 pages).

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 mandatory exemption at section 14(1) or the discretionary exemption at section 38(b) apply to the information at issue?
- C. Does the discretionary exemption at section 38(a), in conjunction with the section 8(2)(a) exemption, apply to the information at issue?
- D. Did the police exercise its discretion under section 38? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A: Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[8] 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,

- (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,
- (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,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual’s name if 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;

[9] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be “about” the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225].

[10] I have reviewed each of the records at issue, as well as the videotape and confirm the following:

- The videotape contains the personal information of the individual being interviewed including his/her address, telephone number, marital status, employment history, his/her own personal views, as well as his/her views and opinions about the appellant;
- The individual being interviewed in the videotape provides to the interviewer personal information relating to a number of other identifiable individuals, including the appellant, referring to their age, sex, family or marital status, their medical and employment history; and

- The paper records at issue contain the personal information of the appellant and a number of other identifiable individuals, including information about their address, telephone number, marital status, medical and employment history, their own personal views, as well as their views and opinions about the appellant.

[11] Based on my review of these records, I am satisfied that they contain the personal information of the appellant and other identifiable individuals within the definition of that term which is included in section 2(1).

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

[12] I have found above that all of the records at issue contain the personal information of the appellant, along with that of other identifiable individuals. 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.

[13] 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.

[14] 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.

[15] Sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met. The factors and presumptions in sections 14(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 14(1)(f).

[16] 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). With respect to records claimed to be exempt under section 38(b), in *Grant v. Cropley* [2001] O.J. 749, the Divisional Court said that the Commissioner could:

. . . consider the criteria mentioned in s.21(3)(b) [the provincial equivalent to section 14(3)(b)] in determining, under s.49(b) [the equivalent to

section 38(b)], whether disclosure . . . would constitute an unjustified invasion of personal privacy.

[17] In the circumstances, it appears that the presumptions at paragraphs (a) and (b) could apply to some or all of the personal information in the records. These sections state:

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

- (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
- (b) 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;

14(3)(a): medical history

[18] The records contain references to certain medical information pertaining to one of the affected parties to this appeal. I find that the presumption in section 14(3)(a) applies to this information and its disclosure is presumed to constitute an unjustified invasion of this individual's personal privacy.

14(3)(b): investigation into violation of law

[19] 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 [Orders P-242 and MO-2235].

[20] All of the records at issue in this appeal, including the videotape, were compiled by the police as part of their investigation into certain allegations of criminal behavior by the appellant. The records describe in detail the steps taken by the police to investigate the allegations made against him, as well as the process that led to a decision not to proceed with the laying of charges under the *Criminal Code of Canada*. As a result, I find that the presumption in section 14(3)(b) applies to the undisclosed information in all of the records at issue and its disclosure is presumed to constitute and unjustified invasion of the personal privacy of the individuals whose information is included therein.

Do any of the section 14(2) factors apply?

[21] In situations where the records are claimed to be exempt under section 38(b), section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy under section 38(b) [Order P-239].

[22] The police rely on the application of the consideration favouring non-disclosure in section 14(2)(f), which relates to personal information which is "highly sensitive". Although the appellant does not specifically refer to it, his representations make reference to the circumstances which are addressed by the factors favouring disclosure in sections 14(2)(d) and (i). 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,

...

(d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

...

(f) the personal information is highly sensitive;

...

(i) the disclosure may unfairly damage the reputation of any person referred to in the record

14(2)(d): fair determination of rights

[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] The appellant argues that false and malicious accusations were made about him and that he is entitled to know what he was accused of by the complainant in the investigation that is reflected in the records. He points out that had he been criminally charged, he would have been entitled to receive full disclosure of all of the allegations made against him as part of the criminal disclosure process.

[25] I note that the appellant does not refer to any existing or contemplated proceeding in which his legal rights have been or will be engaged. I find that the appellant has not established that the disclosure of the records is necessary in order to prepare for a hearing or to ensure that an impartial hearing takes place. Without any existing or contemplated proceeding, this factor has no application to the disclosure of the records.

14(2)(f): highly sensitive

[26] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed [Orders PO-2518, PO-2617, MO-2262 and MO-2344].

[27] The police argue that the inclusion of an individual's name in a police report, whether as a witness, complainant, victim or accused person "implies some type of police contact and, as such, by its very nature is highly sensitive."

[28] In the unique circumstances surrounding the bringing of accusations of criminal wrongdoing against the appellant by the complainant, I find that there is a much-reduced sensitivity around the personal information contained in these records. Based on understanding of the facts that gave rise to the allegations and subsequent investigation by the police, I find that there is no reasonable expectation that the disclosure of the information would result in "significant personal distress" to any of the individuals whose personal information appears in the records. As a result, I find that this factor is not relevant to a determination of whether the disclosure of the records would result in an unjustified invasion of personal privacy under section 38(b).

14(2)(i): unfair damage to reputation

[29] The applicability of this section is not dependent on whether the damage or harm envisioned by the clauses is present or foreseeable, but whether this damage or harm would be "unfair" to the individual involved [Order P-256].

[30] The appellant argues that because the allegations made against him were false, his reputation would be damaged as a result of the disclosure of the records. He goes on to suggest that no harm could come to the reputations of the other individuals identified in the records because the allegations were false.

[31] However, because he is seeking access to the records, I am assuming that he does not wish to have this consideration weigh in favour of a decision that this factor is relevant. In my view, this factor, which is used as a consideration favouring non-disclosure, has no application in the present appeal.

Conclusion

[32] In my discussion above, I have found that the presumptions in section 14(3)(a) and (b) apply to some or all, respectively, of the records at issue in this appeal. I have also found that none of the factors listed under section 14(2) have any application to this matter.

[33] As a result, I find that the disclosure of the remaining information at issue in the records, including the complete videotape, would result in an unjustified invasion of the personal privacy of the individuals whose personal information is contained therein. As a result, I find that the information that remains undisclosed is exempt under section 38(b). I note that the appellant has received a significant degree of disclosure as a result of the initial police decision and a later disclosure that took place during the mediation stage of the appeal. The personal information that was not disclosed to him which remains the information at issue in this appeal relates primarily to other identifiable individuals.

[34] Because of the manner in which I have addressed the application of section 38(b) to the records, it is not necessary for me to consider whether they are also exempt under section 38(a), taken in conjunction with section 8(2)(a).

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

[35] 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.

[36] 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.

[37] 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)].

Relevant considerations

[38] 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.

[39] The police argue that further disclosure of the records to the appellant, including the videotape, was not possible in this case because the personal information relating to him and to other individuals was so intertwined. They submit that the records could not be further severed without the possibility of disclosing the personal information of other individuals.

The police also indicate that they considered the fact that the undisclosed personal information in the records fell within the presumption in section 14(3)(b) which is intended to protect information compiled as part of an investigation into a possible violation of law.

[40] The appellant argues that his right to have access to the records is particularly compelling because he feels he was the victim of false accusations which resulted in him being investigated for a serious crime. He contends that a person who is falsely accused of a crime ought to have a higher right of access which essentially trumps the privacy rights of other individuals who made the false accusations. The appellant indicates that his reputation has been harmed as a result of these allegations, despite the fact that he was never charged. For this reason, he suggests that the police ought to exercise their discretion to disclose the remaining information in the records to him.

[41] I note that the appellant has received access to most of the information contained in the records and that what remains undisclosed is only the personal information of other identifiable individuals, including those involved in making the accusations against him. In my view, the police have granted access to those portions of the records which relate to the appellant and the accusations made against him. As a result, the appellant was able to answer the allegations and, ultimately, have the investigation not proceed on the basis of the evidence presented to the police by the complainant and the appellant.

[42] In my view, the police have properly exercised their discretion and have provided the appellant with access to those portions of the records which do not include the personal information of other identifiable individuals. As a result, I will not disturb that exercise of discretion on appeal.

ORDER:

I uphold the decision of the police and dismiss the appeal.

Original Signed by: _____
Donald Hale
Adjudicator

_____ August 24 2012