

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2850

Appeal MA12-341

Hamilton Police Services Board

February 25, 2013

Summary: The appellant sought access to records relating to an incident involving her that was investigated by the police. During mediation, the police granted access to most of the responsive record. They denied access to portions of the record, including the personal information of others and police code information, on the basis of the exemptions in sections 38(b) (personal privacy) and 38(a) (discretion to deny access to requester's own information) in conjunction with section 8(1)(l) (law enforcement) of the *Act*. In this order, the police's decision to deny access to the withheld portions of the record 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(3)(b), 38(a) 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 access to records relating to a specified incident that allegedly took place in September of 2011. The police located a 2-page responsive record, which is a document titled "Occurrence Details" and denied access to it on the basis of the exemptions in sections 14(1) and 38(b) (personal privacy), as well as section 38(a) (discretion to deny access to requester's own information) in conjunction with sections 8(1)(e) and (l) (law enforcement) of the *Act*.

[2] The appellant appealed the decision.

[3] During mediation, one of the parties whose information is contained in the record consented to the release of their personal information. The police then issued a revised decision, granting access to large portions of the record, and denying access to other parts of it on the basis of the exemptions relied on earlier.

[4] Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process, where an adjudicator conducts an inquiry under the *Act*. I sent a Notice of Inquiry identifying the facts and issues in this appeal to the police, initially, and received representations in response. I then sent the Notice of Inquiry, along with a severed copy of the representations of the police, to the appellant, who did not provide representations to me.

[5] For the reasons that follow, I uphold the police's decision and dismiss the appeal.

RECORD:

[6] The record remaining at issue is the withheld portions of the 2-page document titled "Occurrence Details".

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(b) apply to the information at issue?
- C: Does the discretionary exemption at section 38(a), in conjunction with sections 8(1)(l) and/or 8(1)(e), apply to the information at issue?
- D: Did the institution exercise its discretion under sections 38(a) and 38(b)? 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?

[7] In order to determine whether sections 14(1) or 38 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;

[8] 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.¹

[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.²

¹ Order 11.

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

[10] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.³

[11] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁴

[12] The police take the position that the record contains the personal information of the appellant, and that the withheld portions of the record contain the personal information of other identifiable individuals (the affected parties) including their name, address, date of birth and telephone numbers.

[13] I have examined the record at issue, which relates to an incident involving the appellant and others. The record contains the name, address and telephone number of the appellant, as well as other information about the appellant, including information about the appellant's actions. In my view, the record contains the personal information of the appellant in accordance with paragraphs (d) and (h) of the definition of the term "personal information" in section 2(1) of the *Act*.⁵

[14] In addition, most of the brief portions of the record which have been withheld contain the personal information of other identifiable individuals, including their name, address, telephone number and/or other information about them or which would identify them. Accordingly, I find that most of the withheld portions of the record contain the personal information of other identifiable individuals in accordance with paragraphs (d) and (h) of the definition of the term "personal information" in section 2(1) of the *Act*.

[15] A few small withheld portions of the record do not contain the personal information of identifiable individuals other than the appellant. The police have claimed that the discretionary exemption in section 38(a), in conjunction with sections 8(1)(e) and (l), applies to those portions of the record, and I will review the possible application of those sections to these portions of the record, below.

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

[16] 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.

³ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁴ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

⁵ Orders MO-1245, MO-1795.

[17] Under section 38(b), where a record contains the 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.

[18] 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.

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

[20] The police submit that disclosure of the withheld portions of the record would constitute an unjustified invasion of privacy and that, in the circumstances, section 38(b) applies to this information. In addition, the police submit that the presumption in section 14(3)(b) applies to this withheld information because the record was compiled as part of a police investigation into a possible violation of the law. 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;

[21] 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.⁶ However, section 14(3)(b) does not apply if the record was created after the completion of an investigation into a possible violation of law.⁷

[22] On my review of the record at issue, I am satisfied that it was compiled by the police in the course of their investigation of the circumstances surrounding the incident involving the appellant and others. I find that all of the information at issue in this appeal was compiled and is identifiable as part of the police investigation into a possible violation of law under section 14(3)(b).

[23] The appellant did not provide representations, and I find that none of the factors in section 14(2) apply to the withheld portions of the record.

⁶ Orders P-242 and MO-2235.

⁷ Orders M-734, M-841, M-1086, PO-1819 and PO-2019.

[24] Accordingly, I find that the disclosure of the personal information of the affected parties contained in the withheld portions of the record at issue is presumed to constitute an unjustified invasion of the personal privacy of those individuals under section 14(3)(b) of the *Act*. In addition, I find that the exception set out in section 14(4) does not apply, and the appellant has not raised the application of the “public interest override” in section 16. As a result, I find that the undisclosed portions of the record which contain the personal information of other individuals are exempt from disclosure under section 38(b) of the *Act*, subject to my review of the police’s exercise of discretion, below.

Issue C: Does the discretionary exemption at section 38(a), in conjunction with sections 8(1)(l) and/or 8(1)(e), apply to the information at issue?

[25] As set out above, 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. That section 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.

[26] The police have relied on section 38(a) to deny access to certain undisclosed portions of the record (the severed patrol zone information, and police 10-codes and statistical codes found in the record). The police claim that section 8(1)(l) applies to this information. Section 8(1)(l) 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.

[27] Previous orders have established that the disclosure of police codes and police patrol zone information could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime.⁸ Based on the representations of the police and in keeping with the findings made in those previous orders, I find that the police code and patrol zone information which was severed from the record, is properly exempt under section 38(a), in conjunction with section 8(1)(l).

⁸ See, for example, Orders M-781, PO-1665 and MO-2065.

[28] Having found that these portions of the record qualify for exemption under section 38(a) and 8(1)(l), it is not necessary for me to review the possible application of section 8(1)(e) to these portions of the record.

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

[29] The section 38(a) and 38(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.

[30] 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.

[31] 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

[32] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹¹

- 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; and
- the privacy of individuals should be protected.

⁹ Order MO-1573.

¹⁰ Section 43(2).

¹¹ Orders P-344, MO-1573.

- 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

[33] The police state that they properly exercised their discretion to deny access to the withheld portions of the record. They also refer to the fact that the information remaining at issue that relates to the affected parties was provided by those parties to the police. The police confirm that, during mediation, much of the responsive record was disclosed to the appellant, and that only portions of the record were withheld.

[34] I have reviewed the circumstances surrounding this appeal and the police's representations on the manner in which they exercised their discretion. I note that much of the information in the records was disclosed to the appellant. Only very small portions of the record were withheld, and this information consists of either the names, addresses, telephone numbers or identifiers of the affected parties, or police code and patrol zone information. The appellant was provided with much of the responsive record, including information relating to the specifics of the incident involving her.

[35] In the circumstances, I am satisfied that the police have not erred in exercising their discretion not to disclose the remaining information contained in the records. Consequently, I find that the withheld portions of the records qualify for exemption under sections 38(a) and 38(b) of the *Act*.

ORDER:

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

Original Signed By: _____ February 25, 2013
Frank DeVries
Adjudicator