

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2830

Appeal MA12-121

Peel Regional Police Services Board

January 17, 2013

Summary: The appellant submitted an access request to the Peel Regional Police Services Board for a "report" relating to an incident involving her and her family. The police located occurrence reports relating to this incident and denied access to parts of these records under the discretionary personal privacy exemption in section 38(b) of the *Municipal Freedom of Information and Protection of Privacy Act*. In this order, the adjudicator finds that the withheld personal information in the occurrence reports qualifies for exemption under section 38(b), because its disclosure to the appellant would be an unjustified invasion of other individuals' personal privacy.

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"), 2(2.1), 4(2), 14(2)(h), 14(3)(b) and 38(b).

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

OVERVIEW:

[1] The appellant submitted a request to the Peel Regional Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for the "report" relating to an incident involving herself and her family.

[2] By way of background, the appellant went to a house occupied by her sister and other family members to resolve a monetary dispute relating to ownership of the house. She ended up in a fight with one of her sisters. Their mother was injured during the fight and sent to hospital. The police later arrested the appellant but concluded, after further investigation, that there were insufficient grounds to support any charges against her.

[3] The police located several occurrence reports that are responsive to the appellant's request and issued a decision letter that provided her with partial access to these records. They denied access to some information in the occurrence reports under the discretionary exemption in section 38(b) (personal privacy), read in conjunction with the presumption in section 14(3)(b) (investigation into violation of law) of the *Act*.

[4] The appellant appealed the police's decision to the Information and Privacy Commissioner of Ontario (IPC). This appeal was not resolved during mediation and was moved to adjudication for an inquiry. Early in the inquiry, the police issued a supplementary decision letter to the appellant and provided her with access to additional information in the occurrence reports.

[5] An adjudicator then sought and received representations from both the police and the appellant and shared the parties' representations in accordance with section 7.07 of the IPC's *Code of Procedure* and *Practice Direction Number 7*. For the most part, the appellant's representations do not address the legal issues in this appeal but instead provide her perspective on the incident that occurred.

[6] This appeal was transferred to me to complete the inquiry. For the reasons that follow, I find that the withheld personal information in the occurrence reports qualifies for exemption under section 38(b), because its disclosure to the appellant would be an unjustified invasion of other individuals' personal privacy.

RECORDS:

[7] The records at issue in this appeal are seven pages of police occurrence reports.

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 the IPC uphold their exercise of discretion?

DISCUSSION:

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

[8] The discretionary personal privacy exemption in section 38(b) of the *Act* applies to "personal information." Consequently, it is necessary to determine whether the records contain "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;

[9] 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

[10] Section 2(2.1) excludes certain information from the definition of personal information. It states:

Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

[11] The police state that the records contain the personal information of various "affected parties," including statements that these individuals gave to the police when the appellant was not present. It submits that the information in their statements qualifies as "personal information" because it contains their views and opinions of what transpired.

[12] The seven pages of occurrence reports contain information relating to various individuals, including the appellant, her sisters, her brother, her father, her mother and a social worker who is employed at the hospital where the appellant's mother was taken after she was injured.

[13] The information relating to the appellant and her family includes their names, ages, addresses, home telephone numbers and other information. I find that this information qualifies as their personal information, because it falls within paragraphs (a), (d), and (h) of the definition of this term in section 2(1).

[14] In addition, the occurrence reports include information about the medical condition of the appellant's mother and the treatment she received, which qualifies as her mother's personal information under paragraph (b) of the definition.

[15] The occurrence reports also include statements that the appellant and her family gave to the police about the incident that took place. In accordance with paragraph (g) of the definition, the opinions or views of another individual about the individual constitute the latter individual's personal information. For example, I find that those portions of a family member's statement to the police that contains that individual's views or opinions about the appellant constitutes the appellant's personal information.

¹ Order 11.

[16] The information relating to the social worker includes her name, business telephone number and employer. I find that this information is excluded from the definition of personal information under section 2(2.1) and it therefore constitutes her professional information.

[17] The police have disclosed substantial parts of the occurrence reports to the appellant that contain her personal information, her family members' personal information, and the social worker's professional information. However, they have withheld some parts of the occurrence reports that contain both her personal information and her family members' personal information.

[18] The withheld parts include statements that the appellant's sister, brother and mother made to the police. In addition, the police have withheld those parts that describe her mother's medical condition and treatment.

[19] I will now determine whether the withheld personal information in the occurrence reports qualifies for exemption under section 38(b) of the *Act*.

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

[20] The police submit that the withheld parts of the occurrence reports containing the personal information of the appellant and her family members qualifies for exemption under section 38(b).

[21] 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.

[22] Because of the wording of section 38(b), the correct interpretation of "personal information" in the preamble is that it includes the personal information of other individuals found in records which also contain the requester's personal information.²

[23] In other words, 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 under section 38(b).

² Order M-352.

[24] In the circumstances of this appeal, it must be determined whether disclosing the personal information of the appellant and other individuals would constitute an unjustified invasion of these other individuals' personal privacy under section 38(b).

[25] Sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold under section 38(b) 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);
- section 14(2) lists "relevant circumstances" or factors that must be considered;
- section 14(3) lists circumstances in which the disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy; and
- section 14(4) lists circumstances in which the disclosure of personal information does not constitute an unjustified invasion of personal privacy, despite section 14(3).

Section 14(1)

[26] The police submit that none of the circumstances in paragraphs (a) to (e) of section 14(1) apply to the withheld personal information of the appellant and her family members. I agree with the police's assessment and find that these provisions are not applicable to the withheld personal information in the occurrence reports.

Section 14(2)

[27] The factors in paragraphs (a), (b), (c) and (d) of section 14(2) generally weigh in favour of disclosure, while those in paragraphs (e), (f), (g), (h) and (i) weigh in favour of privacy protection.³

[28] The police submit that the factor in section 14(2)(h) is relevant is determining whether disclosing the withheld personal information in the occurrence reports to the appellant would constitute an unjustified invasion of other individuals' personal privacy. This provision states:

³ Order PO-2265.

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 has been supplied by the individual to whom the information relates in confidence;

[29] The police submit that the section 14(2)(h) factor weighs in favour of privacy because the withheld personal information in the occurrence reports was “implicitly” provided to the police in confidence.

[30] The section 14(2)(h) factor applies if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Thus, section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.⁴

[31] In my view, whether an individual supplied his or her personal information to the police in confidence during an investigation is contingent on the particular facts, and such a determination must be made on a case-by-case basis.

[32] In the particular circumstances of this appeal, the withheld parts of the occurrence reports include statements that the appellant’s sister, brother and mother made to the police. I am satisfied that these individuals and the police expected that some of these individuals’ personal information would be treated confidentially. Given the adversarial relationship that appears to exist between the appellant and some of her family members and the nature of the incident that took place, I also find that this expectation of confidentiality was reasonable in the circumstances.

[33] In short, I find that in the particular circumstances of this appeal, the section 14(2)(h) factor weighs in favour of withholding some personal information of the appellant’s family members, particularly in the statements that they provided to the police about the incident.

Section 14(3)

[34] With respect to records claimed to be exempt under section 38(b), in *Grant v. Copley*,⁵ the Divisional Court said the IPC 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)

⁴ Order PO-1670.

⁵ [2001] O.J. 749.

[which is equivalent to section 38(b)], whether disclosure . . . would constitute an unjustified invasion of [a third party's] personal privacy.

[35] The police claim that the section 14(3)(b) presumption applies to the withheld personal information in the occurrence reports. This provision 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;

[36] 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 The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.⁷

[37] The police state that the personal information of various individuals was compiled by its officers as part of an investigation into an offence under the *Criminal Code*.

[38] Based on my review of the records, I am satisfied that the withheld personal information in the occurrence reports was compiled and is identifiable as part of an investigation into a possible violation of the *Criminal Code* by the appellant. Although the police concluded that there were insufficient grounds to proceed with criminal charges, this does not negate the application of the presumption.

[39] Consequently, I find that the withheld personal information in the occurrence reports clearly falls within the section 14(3)(b) presumption and its disclosure to the appellant is presumed to be an unjustified invasion of the personal privacy of other individuals in her family.

[40] In my view, the section 14(3)(a) presumption also applies to some of the withheld personal information in the occurrence reports. This provision states:

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

relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

⁶ Orders P-242 and MO-2235.

⁷ Orders MO-2213, PO-1849 and PO-2608.

[41] The police have withheld parts of the occurrence reports that contain information about the mother's medical condition and treatment, which constitutes her personal information. I find that this personal information fits squarely within section 14(3)(a) and disclosing it to the appellant is presumed to constitute an unjustified invasion of her mother's personal privacy.

Section 14(4)

[42] If any of paragraphs (a) to (d) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy, despite section 14(3), and the personal information is not exempt under section 38(b). In my view, none of the circumstances listed in paragraphs (a) to (d) of section 14(4) apply to the personal information in the occurrence reports.

Absurd Result

[43] 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.⁸

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

- the requester sought access to his or her own witness statement;⁹
- the requester was present when the information was provided to the institution;¹⁰ and
- the information is clearly within the requester's knowledge.¹¹

[45] 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.¹²

[46] The police states that the absurd result principle does not apply to the personal information in the withheld parts of the occurrence reports. They submit that although the appellant clearly has some personal knowledge of the incident, there is insufficient

⁸ Orders M-444, M-451, M-613, MO-1323, PO-2498 and PO-2622.

⁹ Orders M-444 and M-451.

¹⁰ Orders M-444, P-1414 and MO-2266.

¹¹ Orders MO-1196, PO-1676, PO-1679, MO-1755 and MO-2257-I.

¹² Orders M-757, MO-1323, MO-1378, PO-2622, PO-2627 and PO-2642.

evidence to show that the withheld information in these records is clearly within her knowledge.

[47] I agree with the police. I have reviewed the appellant's representations, which contain her account of the incident that took place. I am satisfied that she was not present when several family members provided their statements to the police. In addition, she has not presented evidence to demonstrate that the specific information relating to her mother's medical condition and treatment is clearly within her knowledge. In short, I find that the absurd result principle does not apply to the personal information in the withheld parts of the occurrence reports.

Severances

[48] Section 4(2) of the *Act* obliges the police to disclose as much of the records as can reasonably be severed without disclosing the information that is exempt.

[49] The withheld parts of the occurrence reports include statements that the appellant's sister, brother and mother made to the police, which contain both the appellant's personal information and the personal information of other family members.

[50] I have considered whether these specific parts of the occurrence reports can be severed in a manner that provides the appellant with her own personal information without disclosing the personal information of other individuals that is exempt under section 38(b). However, the personal information of the appellant and other individuals is closely intertwined in these statements, and I find that it cannot be reasonably severed.

Conclusion

[51] In assessing whether the personal information in the occurrence reports qualifies for exemption under section 38(b), I have found that:

- none of the circumstances in paragraphs (a) to (e) of section 14(1) apply to the withheld personal information;
- the section 14(2)(h) factor weighs in favour of withholding some personal information of individuals other than the appellant;
- disclosing the withheld personal information of the appellant's mother, which relates to her medical condition and treatment, is presumed to constitute an unjustified invasion of her mother's personal privacy under section 14(3)(a);

- disclosing the withheld personal information of various individuals in the occurrence reports, which was compiled and is identifiable as part of an investigation into a possible violation of the *Criminal Code*, is presumed constitute an unjustified invasion of the personal privacy of individuals other than the appellant under section 14(3)(b);
- none of the circumstances listed in paragraphs (a) to (d) of section 14(4) apply to the withheld personal information;
- the absurd result principle does not apply to the withheld personal information; and
- the appellant's personal information is closely intertwined with that of other individuals in some of the withheld parts of the occurrence reports and cannot be reasonably severed under section 4(2).

[52] Consequently, subject to my assessment under Issue C below as to whether the police exercised their discretion appropriately, I find that the withheld personal information in the occurrence reports qualifies for exemption under section 38(b), because its disclosure to the appellant would be an unjustified invasion of other individuals' personal privacy.

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

[53] The section 38(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. This involves a weighing of the requester's right of access to her own personal information against the other individuals' right to protection of their privacy.

[54] An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[55] In addition, the IPC 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; or
- it fails to take into account relevant considerations.

[56] In either case the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.¹³ The IPC may not, however, substitute its own discretion for that of the institution.¹⁴

[57] In its initial decision letter, the police disclosed limited parts of the occurrence reports to the appellant. However, at the outset of adjudication, it re-exercised its discretion under section 38(b) and disclosed substantial parts of these records to the appellant that contain her own personal information, her family members' personal information and the social worker's professional information.

[58] I am satisfied that the police weighed the interests in disclosure and non-disclosure and exercised their discretion to withhold the remaining personal information in these records, which is found in the statements that the appellant's sister, brother and mother made to the police about the incident, and in those parts that describe her mother's medical condition and treatment. The police clearly decided that these individuals' right to privacy trumps the appellant's interest in disclosure.

[59] I am not persuaded that the police failed to take relevant factors into account or that they considered irrelevant factors in withholding those parts of the occurrence reports. I find, therefore, that they exercised their discretion under section 38(b) and did so in a proper manner.

ORDER:

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

Original signed by: _____
Colin Bhattacharjee
Adjudicator

_____ January 17, 2013

¹³ Order MO-1573.

¹⁴ Section 43(2).