

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2832

Appeal MA12-116

Toronto Police Services Board

January 18, 2013

Summary: The appellant submitted a request to the Toronto Police Services Board for dispatch records relating to her address, and memobook notes from officers that attended at her residence. The police granted partial access to the records, withholding some portions pursuant to section 38(b) (personal privacy), with reference to the presumption in section 14(3)(b). A number of other issues were raised in the police decision and appeal, but were resolved as the appeal proceeded through the mediation and adjudication processes. In this order, the adjudicator finds that the records at issue contain the personal information of the appellant and other identified and/or identifiable individuals. She also finds that the records are exempt under section 38(b) after weighing the presumption at section 14(3)(b) (information compiled and identifiable as part of a law enforcement investigation), which favours privacy protection, and the factor at section 14(2)(d) (fair determination of rights), which weighs in favour of disclosure.

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), 14(2)(d), 14(3)(b), 38(b).

OVERVIEW:

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

- Dispatch information for my address, with dates
- Memobook notes of officers who attended my address

[2] The police located responsive records and granted partial access to them, with severances pursuant to the discretionary exemptions at section 38(a) (discretion to refuse requester's own information), in conjunction with section 8(1)(l) (law enforcement), and section 38(b) (personal privacy), with specific reliance on the presumption at section 14(3)(b) of the *Act*. In the decision, the police indicated that some of the information was removed from the records as it was not responsive to the request.

[3] The appellant appealed the police's decision, and indicated that the notes of two identified police officers were missing.

[4] During the course of mediation, the appellant confirmed that she sought access to the withheld portions of the records. The appellant further clarified that she is not seeking access to the portions of the records that were identified as non-responsive nor any of the police codes contained within the records. Accordingly, sections 8(1)(l) and 38(a) of the *Act* are not at issue in this appeal; nor are records identified as non-responsive.

[5] Finally, the appellant indicated that, although the police did not locate any records for the year 2010, she believes that dispatch records for that year should exist. Accordingly, the issue of reasonableness of search was also raised as an issue in this appeal.

[6] I sought, and received, representations from the police and the appellant. The representations were shared in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[7] In their representations, the police indicate that further records for the year 2010 were located during the adjudication stage, and disclosed to the appellant. The police provided a copy of these records, which consist of "I/CAD Event Details Reports," to this office. I note that they were disclosed to the appellant with severances made pursuant to sections 38(a) and 8(1)(l). The severances made on the newly located records are consistent with those made on similar records previously identified. As I noted above, the appellant has indicated that she is not seeking access to these withheld portions on the records previously located. Accordingly, similar portions of the newly located records and sections 38(a) and 8(1)(l) are not at issue in this appeal.

[8] In addition, the police issued a revised decision letter on August 27, 2012 in which it disclosed additional information pertaining to an incident in 2011. The appellant was not satisfied with the additional disclosure and continues to appeal the section 38(b) exemptions claimed by the police.

[9] At the end of the mediation stage, whether the police conducted a reasonable search for responsive records was at issue in this appeal. As I indicated above, however, following the conclusion of mediation, the police subsequently located records pertaining to 2010 and disclosed them to the appellant. In her representations, the appellant notes that the information she was seeking had been located. She does not indicate that she believes further records should exist. In my view, the appellant appears to be satisfied with the search conducted by the police for records that she believed should exist. Accordingly, I will not address the issue of the reasonableness of the search further in this order.

[10] In this decision, I find that the records contain the personal information of the appellant and other identified and/or identifiable individuals. I also find that the records at issue are exempt under section 38(b) of the *Act*.

RECORDS:

[11] The records at issue in this appeal consist of some of the withheld information contained within police officers' hand-written notes and "I/CAD Event Details 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?

DISCUSSION:

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

[12] 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;

[13] 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

[14] Sections 2(2), (2.1) and (2.2) also relate to the definition of personal information. These sections state:

(2) Personal information does not include information about an individual who has been dead for more than thirty years.

(2.1) 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.

¹ Order 11.

(2.2) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[15] 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

[16] 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

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

[18] The police state that the records at issue were "created in connection with a police investigation into a complaint... [in which the] investigating officer interviewed individuals and recorded these interactions within his memorandum book." The police submit that the records contain the personal information of individuals other than the appellant, including the names, addresses and other identifying information about them.

[19] The appellant does not address this issue directly in her representations. Rather, the appellant describes certain events pertaining to her and other individuals living and/or working in the apartment building in which she lives, including a matter currently before the Landlord and Tenant Board. The appellant describes the contacts she has had with the police in attempting to obtain the information she seeks in this appeal and states, "I only seek a disclosure of the portions of what was shared with the [police] by the third party to use in court, not necessarily personal information."

[20] Having reviewed the records, I find that they all pertain to the appellant, directly or indirectly. In addition, the records contain information about other identified or identifiable individuals. I note that in their initial decision, the police withheld certain information about an individual in their professional capacity. However, the police disclosed this information in their revised access decision. I find that the remaining information in the records is about other individuals in their personal capacity and qualifies as their "personal information."

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

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.).

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

General principles

[21] 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.

[22] 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.

[23] 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.

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

[25] 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). Moreover, 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).

[26] Having reviewed the records and submissions, I find that none of these sections apply in the circumstances of this appeal.

[27] 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.

[28] The police claim that the presumption at paragraph (b) applies in the circumstances of this appeal because the records were all “created and compiled for the

purpose of an investigation into various complaints (ie. Break and Enter, Noise Complaint, Threatening)...” In particular, the police note that the records “were created by the investigating officers, after police responded to 911 calls generated by the appellant and a third party.” The police indicate that charges were not laid in any of these matters as they determined that the disputes should be resolved by the Landlord and Tenant Board, and point out that section 14(3)(b) only requires that there be an investigation into a possible violation of the law.

[29] Having reviewed the records, I am satisfied that they were all created by the police in response to calls for assistance and that the personal information contained in them was compiled and is identifiable as part of an investigation into a possible violation of law.

[30] As the police correctly note, 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.⁵

[31] Accordingly, I find that the presumption at section 14(3)(b) applies to the personal information contained in the records. I give this presumption significant weight in determining whether section 38(b) applies due to the nature of the incidents at issue and the involvement of the police in them.

[32] I have also considered whether any of the factors in section 14(2) apply in the circumstances of this appeal.

[33] 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).⁶

[34] The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2).⁷

[35] The appellant implicitly raises the factor in section 14(2)(d). This section 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;

⁵ Orders P-242 and MO-2235.

⁶ Order P-239.

⁷ Order P-99.

[36] 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.⁸

[37] As I indicated above, the appellant describes the various incidents in which she has been involved and the matter she is involved in before the Landlord and Tenant Board. The appellant provides copies of the Hearing Notices pertaining to her application before the Landlord and Tenant Board. The Notices indicate that the matter has been adjourned numerous times pending completion of the appellant's application. The documents include a Landlord and Tenant Board document entitled "Summons to a Witness" of a named police officer to give evidence at the Hearing in May, 2012. The summons requires the officer to bring with him documents pertaining to an incident that occurred on a specific date in May, 2011.

[38] The appellant also attached to her representations two "Subpoena to a Witness" documents directed at the police and duly commissioned. However, it is not clear to which matter they relate, or under what specific authority they were prepared. In her representations, the appellant indicates that the police refused to comply on the basis that these subpoenas were not valid.

[39] Also in her representations, the appellant states that this matter remains on-going. She indicates that she made her access request to the police "to aid my case against my Landlords." She describes her efforts to obtain the requested information, including her belief that additional records existed. However, she notes that the police subsequently provided her with copies of the missing records, but have not provided what she refers to as "the third party notes," which comprise the withheld portions of the records at issue. She states further:

⁸ 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.).

I understand that the [police] is governed by law to protect individuals personal information; however, I am not seeking the third party address information, or phone numbers, I would even consider the information without the individuals names or full names, for example tenant 1 or even Alex said so and so. The actions I have taken are not against the third party nor do I wish to pursue any legal action against any third party, my legal issue is only with the landlord. The Landlord will be using some of these third party individuals in our next hearing and it would be helpful for my case if I can counteract their involvement based on the information they provided to the [police.]

[40] Based on the appellant's submissions and the documents she has provided to support her claim, I accept that the appellant seeks the information in question to pursue a legal right related to a Landlord and Tenant Board proceeding. I also accept that this information may be of some value to the appellant in the determination of her rights and that this information is required in order to prepare for the hearing.

[41] In assessing the weight to be given to this factor I have taken into consideration section 51(1) of the *Act*, which provides:

This *Act* does not impose any limitation on the information otherwise available by law to a party to litigation.

[42] This section of the *Act* has been considered in a number of previous orders.⁹ In Order MO-1109, former Assistant Commissioner Tom Mitchinson commented on this section as follows:

Accordingly, the rights of the parties to information available under the rules for litigation are not affected by any exemptions from disclosure to be found under the *Act*. Section 51(1) does not confer a right of access to information under the *Act* (Order M-852), nor does it operate as an exemption from disclosure under the *Act* (Order P-609).

Former Commissioner Sidney B. Linden held in Order 48 that the *Act* operates independently of the rules for court disclosure:

This section [section 64(1) of the provincial *Freedom of Information and Protection of Privacy Act*, which is identical in wording to section 51(1) of the *Act*] makes no reference to the rules of court and, in my view, the existence of codified rules which govern the production of documents in other contexts does not necessarily imply that a different

⁹ See, for example: Orders P-609, M-852, MO-1109, MO-1192 and MO-1449.

method of obtaining documents under the *Freedom of Information and Protection of Privacy Act, 1987* is unfair.

[43] With respect to the obligations of an institution under the *Act*, the former Assistant Commissioner stated:

The obligations of an institution in responding to a request under the *Act* operate independently of any disclosure obligations in the context of litigation. When an institution receives a request under the *Act* for access to records which are in its custody or control, it must respond in accordance with its statutory obligations. The fact that an institution or a requester may be involved in litigation does not remove or reduce these obligations.

The Police are an institution under the *Act*, and have both custody and control of records such as occurrence reports. Therefore, they are required to process requests and determine whether access should be granted, bearing in mind the stated principle that exemptions from the general right of access should be limited and specific. The fact that there may exist other means for the production of the same documents has no bearing on these statutory obligations.

[44] I agree with the above comments. In my view, the two schemes work independently. The fact that information may be obtainable through discovery or disclosure under a separate proceeding is not determinative of whether access should be granted under the *Act*. However, it is relevant in considering the weight to be given to the factor favouring disclosure in section 14(2)(d).

[45] As the appellant's documents indicate, the Landlord and Tenant Board has the power to require disclosure in the context of a Hearing before that board. In my view, the comments made above apply similarly in the context of Hearings before this administrative tribunal. Accordingly, I find that the information the appellant seeks is available through other means. As a result, although I find that section 14(2)(d) is a relevant consideration favouring the disclosure of the personal information at issue, I attach moderate weight to it.

[46] Based on the representations made by the appellant, I find that none of the other factors in section 14(2) are relevant in the circumstances. Nor do I find any other circumstances to be relevant.

[47] After considering all of the circumstances of this appeal, I find that the privacy interests of the affected parties outweigh any interest the appellant has in obtaining the information remaining at issue. In arriving at this decision, I am mindful that the records reflect incidents in which the police were called to address and/or intervene in

matters between the appellant and other individuals. I also note that the appellant has received a large amount of the information contained in the records; for the most part, the portions that have been withheld pertain directly to other individuals. Accordingly, I find that the records at issue qualify for exemption under section 38(b) of the *Act*.

Exercise of Discretion

[48] 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.

[49] 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.

[50] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁰ This office may not, however, substitute its own discretion for that of the institution.¹¹

[51] In exercising its discretion “in favour of protecting the privacy of those persons who may inadvertently be affected,” the police state that they took into account the following:

- the records contain some indirectly collected personal information which is an authorized activity in law enforcement matters;
- the records are law enforcement records which, in itself, carries a heightened privacy value;
- the appellant was provided with a significant amount of her own personal information.

[52] Based on the submissions made by the police and my review of the records, 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. In making this decision, I note that the appellant has been given the vast majority of the information contained in the records. The remaining information relates directly to other identified or identifiable individuals or is inextricably intertwined with her

¹⁰ Order MO-1573.

¹¹ Section 43(2).

information. I am satisfied that in approaching this request, the police have taken into consideration the appellant's need for access to information about the incidents and have balanced that need with the privacy interests of other parties.

[53] Accordingly, I find that the withheld portions of the records at issue are exempt under section 38(b) of the *Act*.

ORDER:

I uphold the decision of the police.

Original Signed by: _____
Laurel Cropley
Adjudicator

_____ January 18, 2013