

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2920

Appeal MA12-604

Durham Regional Police Services Board

July 26, 2013

Summary: The appellant sought access to records of an allegation of assault made against him by a specified individual. The Durham Regional Police Services Board (the police) located one responsive record and denied access to it based on the discretionary personal privacy exemption in section 38(b) with reference to the presumption in section 14(3)(b). The appellant appealed the decision of the police. This order upholds the decision of the police.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1), 14(3)(b) and 38(b).

Orders and Investigation Reports Considered: PO-1731, PO-1750, PO-1767, and MO-2891.

OVERVIEW:

[1] The Durham Regional Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a report and any other documentation alleging that the requester assaulted a named individual.

[2] The police located a single record that was responsive to the request, a general occurrence report. The police notified an individual (the affected party) whose interests

could be affected by disclosure of the record. The affected party did not consent to disclosure of the record.

[3] The police subsequently issued a decision denying access to the record in its entirety. The police relied on the discretionary personal privacy exemption in section 38(b), with reference to the presumption in section 14(3)(b), to deny access to the record.

[4] The requester, now the appellant, appealed the police's decision to this office.

[5] During mediation, the appellant confirmed that he was not pursuing access to the first three pages of the general occurrence report at issue. Accordingly, the first three pages of the record are no longer at issue in this appeal.

[6] A mediated resolution of the appeal was not possible, and it was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*.

[7] I began my inquiry by inviting the representations of the police and the affected party on the issues set out below. I received representations from both the police and the affected party, which I decided to withhold in their entirety as they satisfy the confidentiality criteria set out in section 7 and *Practice Direction 7* of this office's *Code of Procedure*.

[8] I provided a non-confidential summary of the police's confidential representations to the appellant, which I have reproduced in this order due to continuing confidentiality concerns. The appellant, in turn, provided representations in response.

[9] In this order, I uphold the decision of the police and dismiss the appeal.

RECORDS:

[10] The last nine pages of the general occurrence report are at issue in this appeal.

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. Did the institution exercise its discretion under section 38(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

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

[11] 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;

[12] 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

[13] To qualify as personal information, the information must be about the individual in a personal capacity and it must be reasonable to expect that an individual may be identified if the information is disclosed.²

[14] In their representations, the police state that the record contains the personal information of the appellant and other identifiable individuals, including the affected party.

[15] The appellant does not directly address this issue in his representations.

[16] I have reviewed the record at issue and I agree with the police's representations. I find that the record contains the personal information of a number of individuals, including the appellant and the affected party, as that term is defined in paragraphs (a) and (h) of section 2(1). I further find that disclosure of the information contained in the record would identify the affected party and other individuals.

[17] Accordingly, I will now determine whether disclosure of the record would constitute an unjustified invasion of the privacy of individuals other than the appellant.

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

[18] Section 38 of the *Act* provides a number of exemptions from the general right of individuals under section 36(1), to access their own personal information held by an institution.

[19] 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.

¹ Order 11.

² Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[20] 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 own personal information against the other individual's right to protection of his or her privacy.

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

[22] 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).

[23] 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 section 38(b).

[24] 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. Copley*,³ 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.

[25] In this appeal, the police rely on section 38(b), with reference to the presumption in section 14(3)(b) which 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] 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.⁴

³ [2001] O.J. 749.

⁴ Orders P-242 and MO-2235.

[27] 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).⁵

[28] 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).⁶

Representations

[29] In their representations, the police assert that disclosure of the record is presumed to be an unjustified invasion of privacy under section 38(b), with reference to section 14(3)(b), because the personal information at issue was collected and is identifiable as part of its investigation of a possible violation of law. The police point out that the affected party has not consented to disclosure of the record, and that none of the personal information in the record falls under section 14(4). Finally, the police state that it is not possible to sever the record and disclose only the appellant's personal information without revealing the personal information of other individuals that is exempt under the *Act*.

[30] In his representations, the appellant states that the affected party filed a report with the police that contemplated assault charges against him, however, to date, the police have not contacted him about this matter. He asserts that the police conducted some type of follow up after the report was filed. The appellant states that as a result of his professional background, he understands how police reports are filed and investigated. He explains that he is retired and looking into part-time work and community volunteer opportunities, prerequisites of which, are a police background check and a vulnerable sector check. The appellant continues as follows:

When such checks are done, a report of assault with me listed as the suspect will surface. This will have an impact on my future. As I have no idea what the allegation is, nor what the police have done, I have no ability to deal with the situation. It will simply show me as an assault suspect. This is totally unfair to me and affects my future, through both employment and volunteer opportunities.

Analysis and Findings

[31] Based on my review of the record and of the representations of the appellant, the police and the affected party, it is clear that the personal information contained in the general occurrence report at issue was compiled and is identifiable as part of an investigation into a possible violation of law. Due to the confidentiality concerns in this

⁵ Order P-239.

⁶ Order P-99.

appeal, I am not able to provide greater detail on this issue, however, I agree with the representations of the police which I summarized above, and I find that the presumption in section 14(3)(b) applies to the record.

[32] The appellant's representations do not address the application of the presumption, but they raise the possible application of the factor in section 14(2)(e), which 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 individual to whom the information relates will be exposed unfairly to pecuniary or other harm;

[33] The appellant's representations also allude to an unlisted factor, specifically, the issue of "inherent fairness" which has been recognized by previous orders of this office.⁷

[34] For section 14(2)(e) to apply, the appellant must satisfy me that the damage or harm envisioned by the clause is present or foreseeable, and that this damage or harm would be "unfair" to him. The appellant has not satisfied me that he is currently suffering unfair harm as a result of the record being withheld, or that such unfair harm is foreseeable. The appellant simply refers to an issue that he may experience should he decide to come out of retirement and apply in the future for part-time employment or for a volunteer position. His comments are based on a number of assumptions, including an assumption that the record contains certain information about him and that any background or vulnerable sector check that may be required for a position to which he may apply, would include a notation about the record and about what he assumes is contained therein. The harm to the appellant's potential future employment and volunteer opportunities as described in his representations is mere speculation. I therefore find that the factor in section 14(2)(e) does not apply in this appeal in respect of the appellant.

[35] Regarding the unlisted factor of "inherent fairness", the appellant has not satisfied me that a significant fairness issue exists in this appeal. As I noted above, the appellant's representations are based on a number of assumptions about what could hypothetically happen with information that he believes is contained in the record. Having reviewed the record and the representations of the parties, I have no basis for accepting the appellant's assumptions as accurate. Previous orders of this office have recognized an inherent fairness issue where one individual provides personal information about another individual to an institution in the context of an ongoing

⁷ Orders PO-1731, PO-1750, PO-1767 and MO-2891.

administrative or legal process.⁸ That is not the case in this appeal. Accordingly, I find that the inherent fairness factor is not relevant in this appeal.

[36] As I have found above that the presumption in section 14(3)(b) applies to all of the personal information at issue, and there are no applicable factors favouring disclosure, I find that disclosure of the record would constitute an unjustified invasion of the personal privacy of the affected party under section 38(b). I further find that the information at issue is exempt from disclosure under section 38(b), subject to my review of the police's exercise of discretion below.

B. Did the institution exercise its discretion under section 38(b)? If so, should this office uphold the exercise of discretion?

[37] 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.

[38] 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.

[39] 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

[40] 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

⁸ See orders listed in footnote 7 above.

⁹ Order MO-1573.

¹⁰ Section 43(2) of the *Act*.

¹¹ Orders P-344 and MO-1573.

- 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
- the relationship between the requester and any affected persons
- 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 historic practice of the institution with respect to similar information.

[41] The police's representations indicate that they exercised their discretion after weighing the appellant's right to have access to his personal information against the affected party's expectation of privacy. The police further state that they concluded that the affected party's expectation of privacy far outweighed the appellant's right of access. Finally, the police submit that they did not exercise their discretion in bad faith or for an improper purpose, but only to protect the privacy of the affected party.

[42] The appellant does not address this issue in his representations.

[43] Having reviewed the representations of the police on this issue, I am satisfied that the police properly exercised their discretion to withhold the record. I uphold the police's exercise of discretion under section 38(b) of the *Act*.

ORDER:

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

Original Signed By: _____
Stella Ball
Adjudicator

July 26, 2013