

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-2882

Appeal MA12-391

Chatham-Kent Police Services Board

May 14, 2013

**Summary:** The appellant sought access to records relating to a fraud investigation. The police granted access to portions of the responsive records, and denied access to other portions on the basis of the exemptions in sections 38(a) (discretion to deny access to requester's own information), 8(2)(a) (law enforcement), and 38(b) (personal privacy). This order determines that, with one exception, the withheld information includes the personal information of the affected parties, and the police decision to deny access to the withheld portions of the records is upheld. This order also finds that the exemption in section 38(a), in conjunction with section 8(2)(a), does not apply.

**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(2)(a), 14(2)(d), 14(3)(b), 38(a) and 38(b).

**Orders and Investigation Reports Considered:** PO-1959.

### OVERVIEW:

[1] The Chatham-Kent Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to a fraud investigation conducted by a named constable.

[2] In response to the request, the police located 38 pages of responsive records, comprised of a General Occurrence report and various Supplementary Occurrence Reports. The police issued a decision advising that access was granted to portions of the records, and that access to other portions was denied on the basis of the exemptions in sections 8(2)(a) (law enforcement) and 14(1) (personal privacy). The decision letter also referred to sections 54(a) and (b) of the *Act*, which relate to the representation of the rights of a deceased individual and others.

[3] The appellant appealed the police's decision.

[4] During mediation, the parties confirmed the specific records at issue in this appeal, and also disclosed additional portions of the records to the appellant. In addition, as the records at issue appeared to contain the personal information of the appellant and other individuals, the possible application of the exemptions in sections 38(a) and (b) of the *Act* (discretion to deny requester's own information) was raised.

[5] 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 sought and received representations from the police and the appellant which were shared in accordance with section 7 of this office's *Code of Procedure and Practice Direction Number 7*.

[6] In this order, with the exception of one small portion of the records, I uphold the decision of the police that the withheld records qualify for exemption under section 38(b) of the *Act*. I also find that the exemption in section 38(a), in conjunction with section 8(2)(a), does not apply to the records.

### **Preliminary matters**

[7] As a preliminary matter, I note that the records contain a number of brief references to the daily schedule of the investigating police officer, as well as a few administrative matters. These references were severed from the records and, in their representations, the police state their position that information such as the officer's "daily hours of work time schedule" is not relevant to the request nor of interest to the appellant. The appellant's representations and the focus of his appeal clearly relate to the substantive matters contained in the records, and not these brief references to schedules and administrative matters. In the circumstances, I will remove this information from the scope of the appeal.

[8] As an additional preliminary matter, I note that the records at issue involve the estate of a deceased individual. In their decision letter, the police referred to sections 54(a) and (b) of the *Act*, which relate to the representation of the rights of a deceased individual and others. These sections state:

Any right or power conferred on an individual by this Act may be exercised,

(a) if the individual is deceased, by the individual's personal representative if exercise of the right or power relates to the administration of the individual's estate;

(b) by the individual's attorney under a continuing power of attorney, the individual's attorney under a power of attorney for personal care, the individual's guardian of the person, or the individual's guardian of property;

[9] The police state that the appellant is not the personal representative of the deceased. In the material received from the appellant, he indicates his interest in the records and his involvement with the estate of the deceased; however, there is no evidence that the appellant is either the personal representative of the deceased for the purpose of section 54(a), nor that section 54(b) applies in any way. Accordingly, in this appeal, I will not consider the application of sections 54(a) or 54(b).

## **RECORDS:**

[10] The records remaining at issue consist of the withheld portions of the General Occurrence Report and four Supplementary Occurrence Reports. They consist of the bottom paragraph of page 13, all or substantially all of pages 14-19, the top of page 20, select paragraphs on pages 22 and 23, the bottom paragraph on page 28, all or substantially all of pages 29 to 30, the top paragraph on page 31, one paragraph on page 33 and one paragraph on page 35.

## **ISSUES:**

- A. Do the records contain "personal information" as defined in section 2(1)?
- B. Does the discretionary exemption at section 38(a), in conjunction with section 8(2)(a) of the *Act*, apply to the records?
- C. Does the discretionary exemption at section 38(b) apply to the information?

## **DISCUSSION:**

### **Issue A. Do the records contain "personal information" as defined in section 2(1)?**

[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 where 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 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;

[12] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.<sup>1</sup>

[13] The records at issue relate to the allegations of fraud made by the appellant against several named individuals in connection with the estate of the appellant’s deceased brother. The police take the position that the records contain information about identifiable individuals other than the appellant, including family members of the

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<sup>1</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

appellant. By raising section 38, the police also acknowledge that the records contain the personal information of the appellant.

[14] The appellant does not directly address this issue.

[15] On my review of the records, I note that they relate to allegations of fraud made by the appellant, and that they contain the appellant's name, along with other personal information about him. In these circumstances, I find that the records contain the appellant's personal information, consisting of his name along with other personal information relating to him (paragraph (h) of the definition).

[16] I also find that, with one exception, the withheld portions of the records also contain the personal information of a number of other identifiable individuals.

[17] The withheld portions of the records relate to the investigating officer's actions in contacting named individuals in the context of conducting her investigation. Most of these portions include the statements made by these individuals, an identification of materials received from them, or other information recorded by the officer about these named individuals. On my review of this withheld information, I find that it includes the named individuals' marital or family status [paragraph (a)], their telephone number [paragraph (d)], their personal opinions or views [paragraph (e)], the views or opinions of another individual about them [paragraph (g)] and their names, along with other personal information relating to them [paragraph (h)].

[18] I also note that some of the withheld information relates to the investigating officer's actions in pursuing the investigation, and includes references to corporate entities or businesses (specifically, certain paragraphs on pages 18-20, 29 and 30). In the context of this appeal, given the nature of the investigation, the nature of the information previously disclosed to the appellant, and his knowledge of the individuals involved, I am satisfied that disclosing these portions of the records would reveal personal information about identifiable individuals [paragraph (h)].

[19] However, there is one, discreet sentence on page 22 of the records that contains only the personal information of the appellant, including his name and a description of certain actions taken by him. Although this sentence also refers to a category of individuals, I find that it does not contain the personal information of any identifiable individual other than the appellant for the purpose of section 2(1). As a result, and because no other exemptions would relate to this information, I will order that it be disclosed to the appellant.

[20] I find that the remaining portions of the records at issue contain the personal information of the appellant, as well as that of other identifiable individuals.

**Issue B. Does the discretionary exemption at section 38(a), in conjunction with section 8(2)(a) of the *Act*, apply to the records?**

[21] Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Sections 38(a) and (b) of the *Act* provide a number of exemptions to this general right of access. Section 38(a) states:

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 [emphasis added];

[22] Section 8(2)(a) states:

A head may refuse to disclose a record,

that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

[23] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.<sup>2</sup>

[24] In order for a record to fall within section 8(2)(a) of the *Act*, the police must satisfy each part of the following three-part test:

1. the record must be a report; and
2. the report must have been prepared in the course of law enforcement, inspections or investigations; and
3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

[25] The word "report" means "a formal statement or account of the results of the collation and consideration of information". Generally, results would not include mere observations or recordings of fact.<sup>3</sup>

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<sup>2</sup> *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

<sup>3</sup> Orders P-200, MO-1238, MO-1337-I.

[26] The title of a document is not determinative of whether it is a report, although it may be relevant to the issue.<sup>4</sup>

[27] Section 8(2)(a) exempts “a report prepared in the course of law enforcement *by an agency which has the function of enforcing and regulating compliance with a law*” (emphasis added), rather than simply exempting a “law enforcement report.” This wording is not seen elsewhere in the *Act* and supports a strict reading of the exemption.<sup>5</sup>

[28] An overly broad interpretation of the word “report” could create an absurdity. If “report” means “a statement made by a person” or “something that gives information,” all information prepared by a law enforcement agency would be exempt, rendering sections 8(1) and 8(2)(b) through (d) superfluous.<sup>6</sup>

[29] The police submit that the records qualify for exemption under section 8(2)(a). They state that the appellant “asked that the police investigate a criminal matter involving his allegation of conspiracy to commit fraud” by certain individuals. They also indicate that an investigation was undertaken and that, after a lengthy investigation, it was determined that no conspiracy to commit fraud had occurred. It also states that the investigation was then formally closed, and that the report was “clearly prepared in the course of law enforcement by an agency that has the function of enforcing and regulating compliance with a law.”

### ***Analysis and findings***

[30] Generally, occurrence reports and supplementary reports and similar records of various police agencies have been found not to meet the definition of “report” under the *Act*, because they have been found to be more in the nature of recordings of fact than formal, evaluative accounts of investigations.<sup>7</sup>

[31] In Order PO-1959, Senior Adjudicator Sherry Liang considered whether certain records constituted “reports” for the purpose of this section.<sup>8</sup> In addressing this issue, she wrote:

[The identified records] consist of either Sarnia Police Service incident reports, supplementary reports, or excerpts from police officers’ notebooks. Generally, occurrence reports and similar records of other police agencies have been found not to meet the definition of “report”

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<sup>4</sup> Orders MO-1238, MO-1337-I.

<sup>5</sup> Order PO-2751.

<sup>6</sup> Order MO-1238.

<sup>7</sup> See Orders M-1109, MO-2065 and PO-1845.

<sup>8</sup> The section at issue in that order was section 14(2)(a) of the *Freedom of Information and Protection of Privacy Act*, which is the provincial equivalent of section 8(2)(a) at issue in this appeal.

under [the *Act*], in that they are more in the nature of recordings of fact than formal, evaluative accounts of investigations: see, for instance, Orders PO-1796, P-1618, M-1341, M-1141 and M-1120.

[32] I agree with the approach taken in the previous orders issued by this office, and adopt it in this appeal. On my review of the records at issue, I am satisfied that they do not meet the definition of a "report" under section 8(2)(a) of the *Act*, in that they primarily consist of observations, recordings of fact and collection of information rather than formal, evaluative accounts of investigations.<sup>9</sup> Accordingly, I find that section 8(2)(a) of the *Act* does not apply, and the records do not qualify for exemption under section 38(a).

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

[33] 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 exceptions to this general right of access, including section 38(b). Section 38(b) introduces a balancing principle that must be applied by institutions where a record contains the personal information of both the requester and another individual. In this case, the police must look at the information and weigh the appellant's right of access to his own personal information against the affected persons' right to the protection of their privacy. If the police determine that release of the information would constitute an unjustified invasion of the affected person's personal privacy, then section 38(b) gives the police the discretion to deny access to the appellant's personal information. 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

[34] In determining whether the exemption in section 38(b) applies, sections 14(1), (2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the affected person's personal privacy. Section 14(2) provides some criteria for the police to consider in making this determination; section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. In addition, if the information fits within any of

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<sup>9</sup> See Orders M-1109, MO-2065 and PO-1845.



paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy under section 38(b).

***The presumption in section 14(3)(b)***

[35] In this appeal, the police rely on the "presumed unjustified invasion of personal privacy" in section 14(3)(b) of the *Act*, 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;

[36] The police refer to the fact that the records in this appeal were created as a result of the fraud allegations the appellant made against certain named individuals. The police indicate that, because of these allegations, they conducted the investigation and that the allegations were "thoroughly investigated and found to be completely unfounded."

[37] The appellant does not address the possible application of the presumption in section 14(3)(b).

[38] Section 14(3)(b) applies to personal information that was compiled and is identifiable as part of an investigation into a possible violation of law. An investigation of a conspiracy to commit fraud is clearly an investigation into a possible violation of law. In addition, previous orders have consistently held that section 14(3)(b) may still apply even if no proceedings are commenced against any individuals, and that the presumption only requires that there be an investigation into a possible violation of law.<sup>10</sup> Although the presumption does not apply to information compiled after the completion of an investigation into a possible violation of law,<sup>11</sup> it does apply to information compiled as part of the investigation.

[39] In the circumstances of this appeal, I am satisfied that the personal information contained in the withheld portions of the records was compiled and is identifiable as part of an investigation into a possible violation of law, and that it fits within the presumption in section 14(3)(b).

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<sup>10</sup> See Orders P-242 and MO-2235.

<sup>11</sup> Orders M-734, M-841, M-1086, PO-1819 and PO-2019.

***The factor in section 14(2)(d)***

[40] In the course of this appeal, the appellant has referred to the factor in 14(2)(d) in support of his position that the records ought to be disclosed to him. That section reads:

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;

[41] For section 14(2)(d) to apply, previous orders have stated 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.<sup>12</sup>

[42] In his representations, the appellant refers to his status as a creditor and beneficiary of the estate. He also refers to certain rights and entitlements that follow the death of a relative, including certain entitlements under a pension plan and the *Pension Benefits Act*. He also argues that the police should investigate additional matters relating to the actions of the named individuals.

[43] The appellant provides copies of materials relating to a civil action in which he is involved that relates to entitlement to certain amounts under a pension plan held by the deceased person. These materials include affidavits and court documents which have been filed, and correspondence and other documents relating to this claim. In addition, one of the attachments to the appellant's representations is a letter from a pension

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<sup>12</sup> 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.).

fund advising the appellant that, in the absence of consent from the estate trustee, access to information relating to the estate of the deceased is denied.

[44] Based on the evidence provided by the appellant, I accept that he is in the process of pursuing a legal right that relates to an existing proceeding. However, with respect to the last two requirements for section 14(2)(d) to apply, I am not satisfied that the personal information sought by the appellant has some bearing on or is significant to the determination of the right in question, nor am I satisfied that the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing. The material provided by the appellant relates to the civil action he has commenced, and which appears to be proceeding. In the absence of specific information connecting the personal information at issue in this appeal (which relates to a criminal investigation) with the civil action being pursued by the appellant, I find that the third and fourth requirements for section 14(2)(d) to apply have not been met. I also find that, in the absence of additional information or representations, the letter from the pension fund denying access to certain information is insufficient to satisfy me that the factor in section 14(2)(d) applies to the personal information at issue in this appeal.

### ***Summary***

[45] I have found that the presumption in section 14(3)(b) applies to the information at issue. I have also found that the factor favouring disclosure in section 14(2)(d) does not apply. Based on these findings, I am satisfied that the disclosure of the information at issue would constitute an unjustified invasion of the personal privacy of the identifiable individuals named in the records. Accordingly, I find that the withheld portions of the records are exempt from disclosure under section 38(b) of the *Act*, subject to my review of the police's exercise of discretion.

### ***Exercise of Discretion***

[46] The section 38(b) exemption is discretionary and permits the police to disclose information, despite the fact that it could be withheld. On appeal, this office may review the police's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so.<sup>13</sup>

[47] In support of its decision to exercise its discretion not to disclose the withheld portions of the record to the appellant, the police refer to a number of factors which they considered including the nature of the investigation resulting in the creation of the records, the results of the investigation, that there are no compelling or sympathetic reasons to disclose the remaining information, and the privacy interests of the named individuals.

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<sup>13</sup> Orders PO-2129-F and MO-1629.

[48] The appellant does not provide specific representations on this issue. He does, however, refer to his concerns about the actions of the named individuals, and the allegations made (by him) against them. He also refers to his concerns that his rights should be protected.

[49] I have reviewed the circumstances of this appeal and the records at issue. The police provided the appellant with significant portions of the records. These portions include the information relating to the appellant's allegations, the materials provided by the appellant, and the specific results of the investigation. I also note that one additional portion of the records (a portion of page 22) is to be disclosed to the appellant as a result of this order. With respect to the remaining information, I have found that disclosure of this information would constitute an unjustified invasion of the personal information of the named individuals, and that it qualifies for exemption under section 38(b). Based on the nature of the information remaining at issue, and on the police's representations, I am satisfied that the police have not erred in exercising their discretion not to disclose to the appellant the remaining information contained in the records.

**ORDER:**

1. I find that the records do not qualify for exemption under section 38(a) in conjunction with section 8(2)(a).
2. I order the police to disclose to the appellant by **June 19, 2013** an additional sentence on page 22 of the records, as it only contains the personal information of the appellant. For greater certainty, I have highlighted the portion of page 22 which the police are to disclose on the copy of that page sent to the police along with this order.
3. I uphold the decision by the police to withhold the remaining severed portions of the records on the basis of the exemption in section 38(b) of the *Act*.

Original signed by: \_\_\_\_\_  
Frank DeVries  
Adjudicator

\_\_\_\_\_ May 14, 2013