

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2903

Appeal MA12-173

Hamilton Police Services Board

June 21, 2013

Summary: The requester sought access to police occurrence reports containing information about himself. The police denied access in part, citing the personal privacy exemption in section 38(b). This order upholds the police's decision. This order also upholds the police's search for responsive records.

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), 38(b), 14(3)(b), 14(2)(f), 17.

OVERVIEW:

[1] The Hamilton Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for:

Access to all records from [date] to present of the request with [the requester's] name in them. All occurrences, complaints and investigations.

[and] incident [date] where ...complaint withdrawn...

[and] all complaints by [two named] agents of Hamilton Police.

[and date] ...court family ... identify all agent reports.

[2] The police located a number of responsive records and provided access to them in part. Access to portions of these records was denied in accordance with section 38(a), in conjunction with sections 8(1)(e) and (l) (law enforcement), and section 38(b) (personal privacy) of the *Act*.

[3] The requester, now the appellant, appealed that decision.

[4] During mediation, the appellant advised the mediator that he believes additional records exist, in particular, police records about an incident in 2006 and two incidents in 2009. The police reviewed the search they conducted and confirmed that no additional records could be found.

[5] The appellant advised that he is not satisfied with the access decision by the police and he asked that the file proceed to an inquiry. In addition, the appellant advised that he wished to appeal the police's search for responsive records pursuant to section 17 of the *Act*. As a result, reasonable search was included in the issues on appeal.

[6] Accordingly, the file was referred to the adjudication stage of the appeals process where an adjudicator conducts an inquiry. I had the Adjudication Review Officer assigned to this appeal file contact the appellant to seek confirmation as to what information remains outstanding in the records. The appellant advised that he was only interested in receiving information from seven specific occurrence reports:

[7] The appellant also advised that he only wants access to the information about the persons who informed the police about the appellant's involvement in the alleged crime set out in each of these occurrence reports. He also confirmed that he is no longer seeking access to the police codes in the records, therefore, section 38(a), read in conjunction with sections 8(1)(e) and (l), is no longer at issue.

[8] During adjudication, representations on the issues that remained outstanding were sought from the parties in accordance with section 7 of this office's *Code of Procedure* and *Practice Direction 7*. The appellant was provided with a copy of the police's representations and provided representations in response. The appellant's representations were not shared with the police due to confidentiality concerns.

[9] In this order, I uphold the police's decision to deny access to the personal information in the records on the basis of section 38(b). I also uphold the police's search for responsive records.

RECORDS:

[10] The police have claimed the application of section 38(b) (personal privacy) to the records, which consist of seven occurrence reports. The appellant wants access to any

information about the individuals who informed the police about the appellant's alleged involvement in the incidents described in the records.

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 institution exercise its discretion under sections 38(b)? If so, should this office uphold the exercise of discretion?
- D. Did the institution conduct a reasonable search for records relating to an incident in 2006 and two incidents in 2009?

DISCUSSION:

A. Do the records 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. 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

[14] 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

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

[16] The police submit that the occurrence reports contain both the personal information of the appellant and the other identifiable individuals, including their names, addresses, dates of birth, sex, phone numbers and statements that they provided to the investigating police officers.

¹ Order 11.

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.).

Analysis/Findings

[17] Based on my review of the records at issue and the parties' representations, I find that the records contain the personal information of the appellant and other identifiable individuals in their personal capacity in accordance with paragraphs (a), (d), (e) and (h) of the definition of personal information in section 2(1) of the *Act*. This information includes their home addresses and telephone numbers, dates of birth, sex, as well as their names which appear with other personal information relating to them.

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

[18] 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.

[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.

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

[21] Sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met under section 38(b).

[22] The police submit that sections 14(1) and 14(4) do not apply. They state that the presumption in section 14(3)(b) applies to the records due to the fact that in each case, an investigation was begun with information being compiled that was identifiable as part of an investigation into a possible violation of law, specifically the *Criminal Code*. The fact that no criminal proceedings were subsequently undertaken has no bearing on this issue as section 14(3)(b) only requires that there be an investigation. They also state that section 14(2)(f) was relied upon due to the fact that all personal information is regarded as highly sensitive.

Analysis/Findings

[23] If the information fits within sections 14(1)(a) to (e) or 14(4), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). In this appeal, the information does not fit within these sections.

[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. 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.

[25] As noted above, the police rely on the presumption in section 14(3)(b), which reads:

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] The records are all police occurrence reports concerning investigations about alleged *Criminal Code* violations. In this appeal, I find that all of the records were compiled and are identifiable as part of various investigations into possible violations of law. Accordingly, I find that the presumption in section 14(3)(b) applies to all of the personal information at issue in the records.

[27] 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 The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.⁶

[28] 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.⁷

[29] The police rely on the factor in section 14(2)(f), which 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,

⁵ Orders P-242 and MO-2235.

⁶ Orders MO-2213, PO-1849 and PO-2608.

⁷ Order P-239.

the personal information is highly sensitive;

[30] The police state that this section was relied upon due to the fact that all personal information is regarded as highly sensitive and they seek to protect the right of privacy for all individuals to whom it relates.

[31] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.⁸ On my review of the information contained in the records, I am satisfied that the factor favouring privacy protection in section 14(2)(f) applies to much of that information. I find that there is a reasonable expectation that the disclosure of much of the information relating to the other identifiable individuals in the records would result in significant personal distress to them, based on the nature of the information contained in the records.

[32] I have carefully considered the appellant's confidential representations and the police's representations. I find that disclosure of the records remaining at issue is presumed to constitute an unjustified invasion of the personal privacy of identifiable individuals other than the appellant under section 14(3)(b), and that no factors favouring disclosure apply. I find that the disclosure of the information contained in the records would constitute an unjustified invasion of the personal privacy of the identifiable individuals in the records under section 38(b) of the *Act*, subject to my discussion of the exercise of discretion, below.

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

[33] The sections 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.

[34] 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.

⁸ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

[35] 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

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

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - 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
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

[36] The police state that they exercised their discretion after careful consideration and a review of all relevant factors, with each set of circumstances being considered

⁹ Order MO-1573.

¹⁰ Section 43(2).

¹¹ Orders P-344, MO-1573.

separately. In this case, the police contend that their decision was arrived at after careful consideration and without prejudice. They submit that any information that was disclosed to police officers about the appellant by the other identifiable individuals in the records should remain protected as these parties have a right of privacy. They state that oftentimes officers act as mediators in situations like this, and they document both sides of the story and all parties are given the right to freely express their views and opinions without fear of reprisal.

[37] Based on my review of the particular information at issue in the records, and after considering both the police's and the appellant's representations, I find that the police exercised their discretion in a proper manner, taking into account relevant factors and not taking into account irrelevant factors. Disclosure of the information at issue is presumed to constitute an unjustified invasion of privacy of other identifiable individuals, as the information was compiled in the course of law enforcement investigations.

[38] In the circumstances of this appeal, I find that the police disclosed as much of the appellant's personal information in the records to him as they could. I conclude that the appellant's right of access to his own information does not outweigh the privacy rights of the other identifiable individuals that appear in the information withheld from the records.

[39] Accordingly, I uphold the police's exercise of discretion and find that the remaining information at issue in the records is exempt by reason of the personal privacy exemption in section 38(b).

D. Did the institution conduct a reasonable search for records relating to an incident in 2006 and two incidents in 2009?

[40] During mediation, the appellant advised that he believes that additional records exist relating to an incident in 2006 and two incidents in 2009.

[41] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.¹² If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[42] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence

¹² Orders P-85, P-221 and PO-1954-I.

to show that it has made a reasonable effort to identify and locate responsive records.¹³ To be responsive, a record must be "reasonably related" to the request.¹⁴

[43] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.¹⁵

[44] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.¹⁶

[45] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.¹⁷

[46] A requester's lack of diligence in pursuing a request by not responding to requests from the institution for clarification may result in a finding that all steps taken by the institution to respond to the request were reasonable.¹⁸

[47] The police were asked to provide a written summary of all steps taken in response to the request. In particular, they were asked:

1. Did the institution contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.
2. If the institution did not contact the requester to clarify the request, did it:
 - (a) choose to respond literally to the request?
 - (b) choose to define the scope of the request unilaterally? If so, did the institution outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did the institution inform the requester of this decision? Did the institution explain

¹³ Orders P-624 and PO-2559.

¹⁴ Order PO-2554.

¹⁵ Orders M-909, PO-2469 and PO-2592.

¹⁶ Order MO-2185.

¹⁷ Order MO-2246.

¹⁸ Order MO-2213.

to the requester why it was narrowing the scope of the request?

3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.
4. Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

[48] The police submit that the search was conducted by an experienced and knowledgeable employee following a set procedure for search and retrieval of information for Freedom of Information Access requests. They state that this search was conducted by accessing their two Records Management systems by performing a query on the appellant's name and checks were performed using the criteria he provided. They further state that the appellant was given access to the incident reports that were requested and no further records were located meeting this criteria.

[49] In response to the appellant's request, the police located a number of responsive occurrence reports. Seven of these occurrence reports are at issue in this appeal, as set out above.

[50] During the mediation stage of this appeal, the appellant advised the mediator that he believes additional occurrence reports should exist concerning an incident in 2006 and two incidents in 2009. The appellant also refers in his representations to two incidents in 2007, which he believes should have resulted in the creation of additional police occurrence reports.

[51] In his representations, the appellant refers to an incident in 2006, where he spoke to the police. The appellant has not provided me with sufficient evidence that the incident in 2006 resulted in the police creating a report on that incident. There is also no evidence that the appellant had any contact with the police regarding the first incident in 2007 and the first incident in 2009 listed in his representations. The appellant did not have any contact with the police concerning the second incident in 2007. The second incident in 2009 had nothing to do with the appellant.

[52] After considering both the police's and the appellant's representations, and after reviewing the records located by the police in response to the appellant's request, I find that the police conducted a reasonable search for responsive occurrence reports.

[53] I find that the appellant has not provided a reasonable basis for concluding that additional records exist. Accordingly, I uphold the police's search for responsive records.

ORDER:

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

Original Signed By: _____
Diane Smith
Adjudicator

_____ June 21, 2013