

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2974

Appeal MA12-261-2

Belleville Police Services Board

November 8, 2013

Summary: The police received a request under the *Act* for access to all reports, notes and materials relating to a specified incident. The police identified two records responsive to the request: an occurrence report and a police officer's notes. The police granted the requester partial access to the records, claiming that it withheld portions of them under section 38(a), in conjunction with sections 8(1)(c) (investigation techniques and procedures) and 8(2)(a) (law enforcement report), and section 38(b) (personal privacy). The requester appealed the police's decision. In this order, the adjudicator upholds the police's decision to withhold portions of the records under section 38(b) and finds that the police did not err in their exercise of discretion.

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

OVERVIEW:

[1] The Belleville Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all reports, notes and materials relating to a specified incident.

[2] The police identified five pages of records responsive to the request: an occurrence report and a police officer's notes. The police issued an access decision to the requester, granting partial access to the records. The police advised the requester

that it withheld portions of them under the discretionary exemptions in section 38(a), read with sections 8(1)(c) (investigation techniques and procedures) and 8(2)(a) (law enforcement report), and section 38(b) (unjustified invasion of personal privacy) of the *Act*. In support of their section 38(b) exemption claim, the police raised the application of the presumptions in sections 14(3)(a) (medical history) and 14(3)(b) (investigation into violation of law) of the *Act*.

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

[4] During mediation, the appellant confirmed that she continues to seek access to all the withheld information.

[5] The parties were unable to resolve the appeal through mediation and the file was transferred to the adjudication stage for a written inquiry.

[6] The adjudicator originally assigned to conduct the inquiry invited the police to submit representations in response to a Notice of Inquiry, and they did so. The appellant was then invited to make submissions in response to those of the police and she also submitted representations on the issues in this appeal.

[7] Following the completion of the inquiry, this appeal was transferred to me to complete the order. In the discussion that follows, I uphold the police's decision to withhold certain portions of the records at issue. I find that the information at issue contains "personal information" within the meaning of section 2(1) of the *Act* and that the information is exempt under section 38(b). Further, I find that the police exercised their discretion under section 38(b) properly and uphold their decision to deny access to the undisclosed portions of the records.

RECORDS:

[8] The undisclosed portions of four pages of records remain at issue. They consist of an occurrence report (2 pages) and a police officer's notes (2 pages).

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1) and if so, to whom does it relate?
- B. Does the discretionary exemption at section 38(b) apply to the information at issue?
- C. Did the police exercise their discretion under section 38(b)? If so, should I uphold the exercise of discretion?

DISCUSSION:

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

[9] Under the *Act*, different exemptions may apply depending on whether a record at issue does or does not contain the personal information of the requester.¹ Where a record contains the requester's own information, access is addressed under Part II of the *Act* and the exemptions at section 38 may apply. Where a record contains the personal information of individuals other than the appellant, access is addressed under Part I of the *Act* and the exemptions found at sections 6 to 15 may apply.

[10] In order to determine which sections of the *Act* may apply, it is necessary to first determine whether the occurrence report 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

¹ Order M-352.

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;

[11] 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.²

[12] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.³

[13] The police submit that the information at issue contains personal information that relates solely to an individual other than the appellant (the affected party). The police submit that the information severed from the records relates to the identity and actions of the affected party, who was acting in a personal capacity at the time the records were created.

[14] The police submit further that the information included in the occurrence report and in the officer's notes contains personal information, including the affected party's name and home town, as well as his personal views and opinions.

[15] The police acknowledge that the appellant is aware of the identity of the affected party. In any case, the police submit that the personal information of the affected party, particularly his personal views and opinions, must be protected from disclosure.

[16] In her representations, the appellant submits that the records contain personal information relating to her, the affected party and her son.

[17] Based on my review of the records at issue, I find that the withheld portions of the records contain "personal information", as that term is defined in section 2(1) of the *Act*.

[18] Specifically, I find that both records contain the appellant's personal information, including her date of birth (paragraph (a)), her address and telephone number

² Order 11.

³ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

(paragraph (d)), her personal opinions or views (paragraph (e)), the opinions or views of individuals as they relate to her (paragraph (g)) and her name, along with other personal information about her (paragraph (h)). As the occurrence report and police officer's notes relate to an incident that the appellant was involved in, I find that it can be considered to contain her personal information, within the meaning of that term in section 2(1) of the *Act*.

[19] In addition, I find that the records contain the personal information of other identifiable individuals involved in the incident. These identifiable individuals are the appellant's husband, her son and the affected party. The personal information consists of their dates of birth (paragraph (a)), their addresses and telephone numbers (paragraph (d)), their personal opinions or views (paragraph (e)), the opinions or views of individuals as they relate to these individuals (paragraph (g)) and their names, along with other personal information about them (paragraph (h)).

[20] I have reviewed the withheld portions of the records and find that they contain the personal information of the appellant and another individual (the affected party). The personal information consists of the affected party's personal opinions or views (paragraph (e)) and his name, along with other personal information about him (paragraph (h)).

[21] As I have found that the severed portions of the records contain the personal information of the appellant and/or the affected party, I will consider whether they qualify for the personal privacy exemption under the discretionary exemption at section 38(b) in Part II of the *Act*.

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

[22] Section 38(b) of the *Act* is the discretionary personal privacy exemption under Part II of the *Act*. Section 38(b) provides:

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.

[23] Because of the wording of section 38(b), the correct interpretation of "personal information" in the preamble is that it includes the personal information of other individuals found in the records which also contain the requester's personal information.⁴

⁴ Order M-352.

[24] In other words, where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an “unjustified invasion” of the other individual’s personal privacy, the institution may refuse to disclose that information to the request.

[25] In the circumstances of this appeal, it must be determined whether disclosing the personal information of the appellant and the third party would constitute an unjustified invasion of the affected party’s personal privacy under section 38(b).

[26] If the information at issue 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 personal information against the other individual’s right to protection of their privacy.

[27] Under section 14, where a record contains the personal information of an individual other than the requester, the institution must refuse to disclose that information unless disclosure would not constitute an “unjustified invasion of personal privacy”.

[28] 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 the personal information in the records would result in an unjustified invasion of another individual’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 paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy under section 38(b).

Section 14(3)

[29] The police submit that section 38(b) applies to the information at issue. The police submit that none of the exceptions in sections 14(1)(a) through (e) or section 14(4) apply to the information at issue. The police submit that the presumption listed in section 14(3)(b) of the *Act* applies to the information at issue in this appeal. Section 14(3)(b) 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.

[30] The police state that, as a law enforcement agency, it is mandated under the *Police Services Act* to investigate offences under the *Criminal Code of Canada*. The police submit that the records, a general occurrence report and the investigating officer's notes, were prepared or compiled by a member of the police in relation to an investigation into a possible violation of law, specifically the offence of Criminal Breach of Court Order in section 127 of the *Criminal Code of Canada*.

[31] The police submit that even though no criminal charges were laid, Order P-242 states that the presumption in section 14(3)(b) only requires that there be an investigation into a possible violation of law.

[32] The police submit that the personal information remaining undisclosed in the records pertains exclusively to the affected party, who was interviewed by a police officer during the investigation.

[33] In response, the appellant submits that the disclosure of the information at issue would not result in an unjustified invasion of personal privacy. The appellant alleges that the affected party has made a number of false accusations about her and submits that it is important for her to have access to the information the affected party provided to the police to determine and challenge its accuracy. The appellant submits that this is particularly necessary as it appears that the affected party's opinions and comments are the basis for the police's decisions and actions.

[34] The appellant also acknowledges that she has a history with the police and submits that they have not provided her with a thorough level of service. With regard to this particular incident, the appellant submits that the police failed to investigate her complaint and there is no mention of her complaint in the portions of the records disclosed to her. The appellant raises the application of the factor in section 14(2)(a) to the information at issue and submits that the information should be released in its entirety to subject the police to public scrutiny.

[35] Based on my review of the records and the representations of the parties, I find that the presumption in section 14(3)(b) applies to the information at issue. As the police note, this office has found that the presumption in section 14(3)(b) may apply even if no criminal proceedings were commenced against any individuals. 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

[36] I have reviewed the occurrence report and the investigating officer's notes and it is clear from the circumstances that the personal information in it was compiled and is identifiable as part of the police's investigation into a possible violation of law, namely the *Criminal Code of Canada*.

[37] Accordingly, I find that the personal information in the records was compiled and is identifiable as part of an investigation into a possible violation of law, and falls within the presumption in section 14(3)(b). Its disclosure is, accordingly, presumed to be an unjustified invasion of another's personal privacy.

Section 14(2)

[38] In situations where the records are claimed to be exempt under section 38(b), section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of privacy under section 38(b).⁷

[39] The police rely on the application of the considerations favouring non-disclosure in sections 14(2)(e), (f), (h) and (i). In her representations, the appellant raises the application of the factor favouring disclosure in section 14(2)(a). These sections state:

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,

(a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;

(e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;

(f) the information is highly sensitive;

(h) the personal information has been supplied by the individual to whom the information relates in confidence; and

(i) the disclosure may unfairly damage the reputation of any person referred to in the record.

⁵ Orders P-242 and MO-2235.

⁶ Orders MO-2213 and PO-1849.

⁷ Order P-239.

[40] In the confidential portions of their representations, the police provide information regarding the acrimonious relationship between the appellant and the affected party. The police also provide a brief history of their interactions with the appellant. Based on my review of these representations, I find that the factors listed in sections 14(2)(e), (f), (h) and (i) of the *Act* apply and weigh against the disclosure of the information at issue to the appellant. Due to the nature of the relationship between the appellant and the affected party, I find that it is reasonable to believe that the affected party would be exposed unfairly to pecuniary or other harm if the information at issue is disclosed, thereby engaging the application of the factor in section 14(2)(e). In addition, I find that section 14(2)(f) applies to the information at issue. In the unique circumstances of this appeal, there is a reasonable expectation of significant personal distress to the affected party if the information is disclosed.⁸ I am also satisfied that the affected party provided the information at issue in confidence to the police during an investigation into a complaint against him. Accordingly, I find that section 14(2)(h) applies in favour of non-disclosure. Finally, as the disclosure of the information may unfairly damage the reputation of the affected party, I find that the factor in section 14(2)(i) applies in favour of non-disclosure, but will give it minimal weight.

[41] In her representations, the appellant describes her history with the police and submit that they have not provided her with a thorough level of service in response to her earlier complaints. With regard to the incident at issue in the records, the appellant submits that her complaint was not properly investigated and that her complaint was not even mentioned in the portions of the records that were disclosed to her. In light of the circumstances surrounding the investigation of her complaint, the appellant submits that the factor favouring disclosure in section 14(2)(a) applies and that the record should be released in order to subject the police to public scrutiny.

[42] Previous orders have established that section 14(2)(a) contemplates disclosure in order to subject the activities of the government (as opposed to the views or actions of private individuals) to public scrutiny.⁹ Previous orders have also confirmed that this factor exists because the public has a right to expect that expenditures of employees of government institutions during the course of performing their employment-related responsibilities are made in accordance with established policies and procedures, carefully developed in accordance with sound and responsible administrative principles.¹⁰

[43] In the circumstances of this appeal, I am not satisfied that the factor in section 14(2)(a) applies to the information at issue. Based on my review, I am not satisfied that its disclosure would subject the police to public scrutiny. The withheld portions of

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

⁹ Order P-1134.

¹⁰ Orders P-256 and PO-2536.

the record contain the personal information of the appellant and affected party, including his personal opinions or views regarding the appellant and the incident. The information at issue does not contain details regarding the manner in which the police handled the appellant's complaint or how it conducted its investigation. Therefore, I find that the factor in section 14(2)(a) does not apply to the information at issue.

[44] I also find that none of the other factors favouring disclosure apply to the information at issue.

[45] Consequently, I find that the presumption in section 14(3)(b) applies to all of the personal information at issue, that there are no factors favouring disclosure and that the factors in sections 14(2)(e), (f), (h) and (i) favouring non-disclosure apply. Accordingly, I am satisfied that the disclosure of this information would constitute an unjustified invasion of the personal privacy of the affected party whose personal information is contained in the records and that the personal information is exempt under section 38(b). I uphold the application of the discretionary exemption at section 38(b) with respect to the personal information that remains undisclosed in the records, subject to my finding in regard to the police's exercise of discretion.

[46] The information at issue was withheld under both the section 38(b) and section 38(a), in conjunction with sections 8(1)(c) and 8(2)(a) (law enforcement), exemptions. Because I have found the information to be exempt under section 38(b), I do not need to consider whether it is also exempt under section 38(a).

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

[47] 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, I may determine whether the institution failed to do so.

[48] In addition, I 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.

[49] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹¹ This office may not, however, substitute its own discretion for that of the institution.¹²

¹¹ Order MO-1573.

¹² Section 43(2).

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

- 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 and 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; and
- the historic practice of the institution with respect to similar information.

[51] The police submit that they exercised their discretion under section 38(b) in making the decision to deny the appellant access to the information at issue. The police also submit that they relied on the presumption in section 14(3)(b) in their consideration of whether the disclosure of the personal information at issue would result in an unjustified invasion of personal privacy.

[52] The police acknowledge that the appellant has a right to access her own personal information. The police state that they endeavoured to respect the spirit of the *Act* at all times, where it involved the appellant's right to access. In the circumstances of this request, the police submit that they were aware of their

responsibility to respect the affected party's right to privacy and believe that a balance was struck between these two competing considerations.

[53] The police also submit that they exercised their discretion in good faith, for a proper purpose and took into account all relevant factors.

[54] The police state that they made every effort to provide the appellant with all of her personal information. The police submit that none of the redacted portions of the record have a bearing on the appellant's ability to make use of the advice provided to her by the police to avoid further incidents in the future.

[55] In her representations, the appellant submits that while the police did exercise their discretion, this office should not uphold that decision. The appellant did not provide any explanation as to why I should not uphold the police's exercise of discretion.

[56] I have reviewed the circumstances surrounding this appeal and the representations of both parties on the manner in which the police exercised their discretion. I note that the majority of the information in the records was disclosed to the appellant and that very little of the appellant's personal information was withheld. The majority of the information that was withheld consists of the personal information of the affected party. Based on my review of the police's representations and the records, I am satisfied that the police weighed the appellant's interest in obtaining access to information against the protection of the affected party's personal privacy. Accordingly, I am satisfied that the police did not err in the exercise of their discretion to refuse to disclose the remaining personal information contained in the records to the appellant.

[57] Therefore, I uphold the police's decision to withhold those portions of the records that qualify for exemption under section 38(b) of the *Act*.

ORDER:

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

Original signed by: _____
Justine Wai
Adjudicator

November 8, 2013