

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2949-F

Appeal MA11-122

Durham Regional Police Services Board

September 18, 2013

Summary: The appellant made a request for the police investigation file relating to her sister, who disappeared fifty years ago. The police denied access to the records, in whole, claiming the application of the discretionary exemptions in section 38(a), read with the law enforcement exemptions in sections 8(1)(a) (law enforcement matter), 8(1)(b) (law enforcement investigation), 8(1)(f) (right to a fair trial), 8(2)(a) (law enforcement report) and 8(2)(c) (exposure to civil liability), and section 38(b), read with section 14(1) (personal privacy). The adjudicator upheld the police's decision, in part. The police were also ordered to disclose some records to the appellant, to re-exercise their discretion under sections 38(a) and 38(b) and to provide the adjudicator with representations on their re-exercise of discretion. This is the final order, disposing of the remaining issue in the appeal, which is the police's re-exercise of discretion, which is upheld.

OVERVIEW:

[1] This is my final order in this appeal. It addresses the re-exercise of discretion by the Durham Regional Police Services Board (the police), disposing of the final issue raised in response to a request for all records relating to an individual who went missing fifty years ago. The requester is the sister of the missing individual.

[2] The police denied access to approximately 60 pages of responsive records, in their entirety, citing section 38(a), read with the law enforcement exemptions in sections 8(1)(a) (law enforcement matter), 8(1)(b) (law enforcement investigation),

8(1)(f) (right to a fair trial), 8(2)(a) (law enforcement report) and 8(2)(c) (exposure to civil liability), and section 38(b), read with section 14(1) (personal privacy). In support of its reliance on the section 38(b)/14(1) exemption claim, the police indicated that they were relying on the presumption in section 14(3)(b) (investigation into a possible violation of law).

[3] On June 28, 2013, I issued Order MO-2909-I, upholding the police's decision in part. I ordered them to disclose some records to the appellant. In that order, I commented as follows on the police's exercise of discretion:

Based on the police's representations, I am not satisfied that they properly exercised their discretion. In particular, I find that the police did not consider the age of the information in the records, the fact that exemptions from the right of access should be limited and specific, and the nature of the relationship between the appellant and the affected parties.

Further, given that disclosure of records is essentially disclosure to the world, I find that the police's consideration of the appellant's involvement in internet blogs was an irrelevant consideration. Accordingly, I will order the police to re-exercise their discretion.

[4] Accordingly, I included Order Provision 3, which contained the following term related to the exercise of discretion:

I order the police to re-exercise their discretion under sections 38(a) and (b) of the *Act* and to provide me with representations on their exercise of discretion by **August 6, 2013**.

[5] The police complied with the provision by providing me with representations on the results of their re-exercise of discretion.

DISCUSSION:

Did the police properly exercise their discretion under sections 38(a) and 38(b) of the *Act*?

[6] The sections 38(a) and 38(b) exemptions are discretionary. Therefore, once it is determined that a record qualifies for exemption under this section, the police must exercise their discretion in deciding whether or not to disclose it.

[7] Under section 39(a) in conjunction with section 8(1)(l), the exercise of discretion involves a weighing of the appellant's right of access against the police's ability to control crime.

[8] Under section 38(b), the exercise of discretion involves a weighing of the requester's right of access to his or her own personal information against other individuals' right to protection of their privacy.

[9] 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.

[10] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹

- 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.

¹ Orders P-344 and MO-1573.

[11] The police submit that as a result of their re-exercise of discretion, in accordance with relevant considerations, they have determined that it is necessary to continue to withhold access to the remaining records.

[12] The police advise that they re-exercised their discretion in good faith, taking into account the following considerations.

The purpose and principles of the *Act*

[13] The police acknowledge that exemptions from the right of access should be limited and specific and also that the privacy of individuals should be protected. The police submit that the vast majority of the records contain the personal information of several other individuals, including family members, friends, witnesses, persons of interest and members of the public. The police further argue that several individuals would be identifiable even with most of their personal information severed. In light of this fact, the police state, the privacy of these individuals ought to be protected.

The wording of the exemption and the interests it seeks to protect

[14] The police submit that the exemption in section 8 seeks to protect law enforcement matters, which is fundamental to the proper operation of the police service. The police rely on section 8 to maintain the integrity of sensitive and ongoing investigations by withholding certain records.

[15] The section 14 exemption, in conjunction with section 38(b), the police state, plainly seeks to protect the privacy of other individuals. The information at issue was compiled as part of an investigation into a possible violation of law and disclosure of others' personal information would constitute an unjustified invasion of their privacy. The police state that the minimal information regarding the appellant, which has already been disclosed to her, should not outweigh the other individuals' right to the protection of their privacy.

Whether the appellant seeks her own personal information

[16] The police advise that the records contain a very limited amount of the appellant's personal information and this factor was considered in the application of the balancing principle.

Whether the appellant has a sympathetic or compelling need to receive the information

[17] The police acknowledge that the appellant has a sympathetic need to receive the information, and members of their homicide unit have met with the appellant and

shared as much information as possible with her without jeopardizing the integrity of the open investigation of this tragic situation.

The relationship between the appellant and any affected parties

[18] The police submit that they took into consideration the relationship between the appellant and the affected parties. However, the police argue that despite the fact that some of the individuals involved in the investigation may be known to the appellant as a family member or friend, many others are not, as the records include other persons of interest. Consequently, the police submit, the protection of these individuals' personal information is paramount.

Whether disclosure will increase public confidence in the operation of the police and the sensitivity/significance of the information to the institution, the appellant or any affected party

[19] The police argue that disclosure of the information at issue would not increase public confidence in the police service, as disclosure may negatively affect the ongoing investigation. In particular, the police submit that personal privacy must be protected so that other members of the public would feel confident that the police would respect their privacy should they provide further information to the police regarding this matter.

[20] Further, the police submit that they are mandated to provide adequate and effective police services, including law enforcement investigations, including the requirement to preserve the integrity of records with a view to solving crimes.

[21] The police state:

. . . [A] police officer's duties pursuant to the *Police Services Act*² include preventing crimes and other offences, providing assistance and encouragement to other persons in their prevention, apprehending criminals and personal who may lawfully be taken into custody, laying charges and participating in prosecutions. Therefore, notwithstanding the age of some of the records at issue, the police are not relieved of their duties to continue to work on this case, as they have, with a view to apprehending criminals and/or preventing future similar crimes. Due to the open investigation, this remains a sensitive police matter.

[22] Consequently, the police argue, considering the nature of the information and the significance and sensitivity to the police service and other affected parties, this outweighs any additional information that may be disclosed to the appellant.

² R.S.O. 1990 c. P.15.

The age of the information and the historic practice of the police with respect to similar information

[23] The police state that although some of the records are fifty years old, there are other records with various dates throughout the years. Police officers in the homicide unit, they argue, are of the opinion that this case may still be solved and, therefore, the age of the information does not detract from the privacy expectations of individuals or the importance of the police maintaining control over all the records relating to an open investigation.

[24] The police advise that this missing persons case file was uploaded into the Ontario Major Case Management software system (MCM). The MCM combines specialized police training and investigation techniques with a computer software system and is governed by certain standards.³ The police advise that the standards address the collection, classification, prioritization and flow of investigative information in order to protect the integrity of the information while allowing sharing of information between police services with a view to solving major cases.

[25] The police state:

It is imperative to note that one of the proven and successful business practices to solving major cases is to control the information obtained during the course of the investigation.

[26] The police also advise that their historic practice with respect to similar information is to withhold records relating to ongoing investigations until the matters are closed and all appeal periods are expired. Further, they advise that in extremely limited circumstances they may, if necessary, disclose records relating to an ongoing investigation but only to another law enforcement agency to aid in the investigation.

[27] Lastly, the police advise that they did not take into account irrelevant considerations in their re-exercise of discretion. In particular, they argue, they did not take the appellant's involvement in Internet blogs into consideration in their re-exercise of discretion.

[28] I find that the police took into account relevant factors in weighing both for and against the disclosure of the information at issue and did not take into account irrelevant considerations. In my view, the police's representations reveal that they considered the appellant's position and circumstances, balanced against the privacy rights of other individuals in the context of an ongoing investigation, in exercising their discretion not to disclose the information at issue.

³ Set out in the *Ontario Major Case Management Manual*.

[29] Under all the circumstances, therefore, I am satisfied that the police have appropriately exercised their discretion under sections 38(a) and 38(b).

ORDER:

I uphold the police's exercise of discretion to apply the exemptions in sections 38(a) and 38(b) to the withheld information that I did not order disclosed in Order MO-2909-I.

Original signed by: _____
Cathy Hamilton
Adjudicator

_____ September 18, 2013