

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3008

Appeal MA13-29

Ottawa Police Services Board

February 7, 2014

Summary: The Ottawa Police Services Board received a request under the *Municipal Freedom of Information and Protection of Privacy Act* for access to information relating to a specific motor vehicle accident. The police granted partial access to the responsive records, denying access to portions of a general occurrence report pursuant to the exemptions at section 8(1) (law enforcement) and section 38(b) (personal privacy), read in conjunction with the presumption in section 14(3)(b) (compiled as part of an investigation into a possible violation of law) of the *Act*. The requester appealed the police's decision. During mediation, the appellant identified certain portions of the information that he was not interested in pursuing access to. Also during mediation, the police advised that they were no longer claiming section 8(1) to deny access to portions of the record. In this order, the adjudicator finds that the records at issue contain the personal information of the appellant, as well as that of other identifiable individuals and that the discretionary exemption at section 38(b) applies to all of the information at issue. The adjudicator also finds that the police's exercise of discretion to deny access to portions of the record was reasonable. As a result, the adjudicator upholds the police's decision and dismisses the appeal.

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

OVERVIEW:

[1] The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ottawa Police Services Board (the police) for access to information relating to a specific motor vehicle accident.

[2] The police located the responsive records and notified two affected parties of the request, seeking their representations on the disclosure of the information that relates to them. One of the affected parties responded, providing detailed submissions on why they did not consent the disclosure of their information to the appellant. The other affected party did not respond to the notice. The police then issued an access decision granting partial access to the requested records, denying access to portions of them pursuant to the exemptions at section 8(1) (law enforcement), and section 38(b) (personal privacy), read in conjunction with the presumption in section 14(3)(b) (compiled as part of an investigation into a possible violation of law) of the *Act*.

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

[4] During mediation, the appellant advised that he is not seeking access to two witness statements that he himself provided to the police. As a result, this information is not at issue in this appeal. Additionally, the appellant confirmed that he is not seeking access to the contact information of other individuals that appears in the first four pages of the general occurrence report. Accordingly, pages 1 to 4 are also not at issue.

[5] The mediator contacted the affected party who was advised of the request by the police, but did not provide submissions on the disclosure of their personal information. The affected party advised that they did not provide their consent to disclose their personal information to the appellant.

[6] Also during mediation the police advised that they had claimed section 8(1) in error and issued a revised decision letter to the appellant. As a result, section 8(1) is not at issue in this appeal.

[7] As mediation could not resolve this appeal, it was transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry. I began my inquiry into this appeal by sending a Notice of Inquiry, setting out the facts and issues on appeal, to the police, who provided representations in response. Subsequently, I also provided the appellant with a copy of the Notice of Inquiry together with a complete copy of the police's representations and I received submissions in return.

[8] In this order, I uphold the police's decision to deny access to portions of the responsive records. In the discussion that follows, I reach the following conclusions:

- the records at issue contain the “personal information” of both the appellant and other identifiable individuals within the meaning of the definition of that term at section 2(1) of the *Act*,
- the discretionary exemption at section 38(b) of the *Act* applies to the information at issue; and
- the police’s exercise of discretion to deny access to portions of the records under section 38(b) was reasonable.

RECORD:

[9] The information that remains at issue consists of portions of four pages of a general occurrence report regarding a motor vehicle accident.

ISSUES:

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

DISCUSSION:

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

[10] Under the *Act*, different exemptions may apply depending on whether a record at issue contains or does not contain the personal information of the requester.¹ Where the records contain the requester’s own information, access to the records is addressed under Part II of the *Act* and the discretionary exemptions at section 38 may apply. Where the records contain the personal information of individuals other than the appellant but do not contain the personal information of the appellant, access to the records is addressed under Part I of the *Act* and the mandatory exemption at section 14(1) may apply.

¹ Order M-352.

[11] Accordingly, in order to determine which sections of the *Act* 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 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] 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

[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.³

[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.⁴

[15] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁵

[16] The police submit that the information at issue contains the personal information of the appellant, as well as the personal information of individuals other than the appellant. In particular, they submit that the record contains the personal opinions or views of individuals other than the appellant, as contemplated in paragraph (e) of the definition of "personal information" in section 2(1) of the *Act*. The police submit that consent to release the personal information of the individuals other than the appellant was not obtained and, as a result, their information was not disclosed.

[17] The appellant does not specifically address whether the information at issue includes his personal information or that of other individuals. However, in his appeal letter that was attached to his representations and originally sent to this office when initiating the appeal, he states that he does not want the "personal and private information" of the other individuals identified in the report but he does "want all the interviews and all the reports and police reports and all the [information from the] witnesses" involved in this matter.

[18] Having reviewed the responsive information, which consists of portions of an occurrence report, I find that the record contains the personal information of the appellant, as well as that of other identifiable individuals who were involved or interviewed in the course of the police's investigation of the accident identified in the request. Specifically, the information includes telephone numbers [paragraph (d)], personal opinions or views of individuals [paragraph (e)], the views or opinions of other

² Order 11.

³ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁴ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁵ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

individuals about the individual [paragraph (g)], and the names of individuals together with other personal information about them [paragraph (h)].

[19] Accordingly, I find that the records at issue contain the “personal information” of both the appellant and other identifiable individuals, within the meaning of the definition of that term at section 2(1) of the *Act*.

[20] As described above, in circumstances where the appellant’s personal information is mixed with that of other identifiable individuals, Part II of the *Act* applies and I must consider whether the information is properly exempt pursuant to the discretionary exemptions at section 38.

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

[21] 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.

[22] 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.

[23] Sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met. The information at issue in this appeal does not fit within any of paragraphs (a) to (e) of section 14(1).

[24] The factors and presumptions in section 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 14(1)(f). That section reads:

A head shall refuse to disclose personal information to any person other than the individual to whom it relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

[25] If any of paragraphs (a) to (c) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). In this case, paragraphs (a) to (c) of section 14(4) do not apply.

Sections 14(2) and (3)

[26] 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.

[27] For records claimed to be exempt under section 14(1) (i.e., records that do not contain the requester's personal information), a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if a section 14(4) exception or the "public interest override" at section 16 applies.⁶

[28] If the records are not covered by a presumption in section 14(3), section 14(2) lists various factors that may be relevant in determining whether disclosure of the personal information would be an unjustified invasion of personal privacy, and the information will be exempt unless the circumstances favour disclosure.⁷

[29] For records claimed to be exempt under section 38(b) (i.e., records that contain the requester's personal information), this office will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties in determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy.⁸

[30] The police claim that the presumption at section 14(3)(b) applies in the circumstances of this appeal and that the factors at sections 14(2)(e) and (h) are also relevant.

Section 14(3) - presumptions

14(3)(b) – investigation into a violation of law

[31] 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.⁹ The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.¹⁰

[32] The police submit generally that the information at issue was compiled and is identifiable as part of an investigation into a possible violation of law as contemplated by section 14(3)(b).

⁶ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.

⁷ Order P-239.

⁸ Order MO-2954.

⁹ Orders P-242 and MO-2235.

¹⁰ Orders MO-2213, PO-1849 and PO-2608.

[33] From my review of the record at issue, it is clearly a record that was compiled by the police in the course of their investigation into a motor vehicle accident involving the appellant and other identifiable individuals. The information at issue consists of information contained in an occurrence report describing the accident and the results of the police investigation into that accident. Accordingly, I find that all of the information that remains at issue in the record falls under the ambit of the presumption in section 14(3)(b) of the *Act*.

Section 14(2) – factors

[34] Section 14(2) provides some factors for the police to consider in making a determination on whether the disclosure of personal information would result in an unjustified invasion of the affected parties' personal privacy. The list of factors under section 14(2) is not exhaustive. The police must also consider any circumstances that are relevant, even if they are not listed under section 14(2).¹¹ Some of these criteria weigh in favour of disclosure, while others weigh in favour of privacy protection.

[35] In the circumstances of this appeal, the police raised the possible application of the factors at sections 14(2)(e) and (h). However, on my review of the information at issue, the criteria listed at sections 14(2)(f) and (d) may also be relevant. Those sections read:

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 information is relevant to a fair determination of rights affecting the person who made the request;
- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
- (f) the personal information is highly sensitive;

...

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

Section 14(2)(d)

¹¹ Order P-99.

[36] For section 14(2)(d) to apply, 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.¹²

[37] Previous orders have established that an appellant must provide sufficient evidence to establish that there is a proceeding that exists or is contemplated in some definite fashion and that is relevant to a fair determination of a right.¹³

[38] Additionally, it has previously been held that for the purpose of civil litigation, it may be that the discovery mechanisms available to the requester in that litigation will be sufficient to ensure a fair hearing with the result that section 14(3)(d) does not apply.¹⁴

[39] Although the appellant has alluded to a pending legal proceeding related to the accident which forms the subject matter of the police occurrence report at issue, he has not made submissions on this issue. As a result, I find that I have not been provided with sufficient evidence to establish with any certainty that a proceeding exists or is contemplated. Additionally, I do not have sufficient evidence before me to establish that any of the other three elements of the test outlined above have been met. Accordingly, I find that the criteria at section 14(2)(d) is not a relevant consideration in the circumstances of this appeal.

¹² 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.).

¹³ Order P-443.

¹⁴ Order PO-1833.

Section 14(2)(e)

[40] In order for this section to apply, the evidence must demonstrate that the damage or harm envisioned by the disclosure is present or foreseeable, and that this damage or harm would be "unfair" to the individual involved.

[41] The police state that the factor at section 14(2)(e) is a relevant factor to consider however, they have not made any detailed representations on this issue. Although given that the information relates to an accident involving two vehicles and the appellant has indicated that there is a legal proceeding pending, it is possible that this factor could have some relevance, I have not been provided with sufficient evidence to support a conclusion that the disclosure of the information would expose one of the identified individuals to pecuniary or other harm, that the harm envisioned by the disclosure is present or foreseeable, or that the harm would be "unfair."

[42] Accordingly, I find that the criteria at section 14(2)(e) is not a relevant consideration in the circumstances of this appeal.

Section 14(2)(f)

[43] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.¹⁵ Given the nature of the information that is at issue, I accept that the personal information that has been withheld can be considered to be highly sensitive and that its disclosure could reasonably be expected to result in significant personal distress to the individuals about whom it relates. Accordingly, I find that the factor at section 14(2)(f), which weighs against disclosure, is relevant in the circumstances of this appeal.

Section 14(2)(h)

[44] The factor at section 14(2)(h) weighs in favour of privacy protection. For it to apply, both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Thus, section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.¹⁶

[45] In my view, the context and surrounding circumstances of this matter are such that a reasonable person would expect that the information supplied by them to the police would be subject to a degree of confidentiality. Accordingly, in this appeal, I find that the factor at section 14(2)(h) is a relevant consideration that weighs in favour of protecting the privacy of the other identified individuals whose personal information is found in the information at issue.

¹⁵ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

¹⁶ Order PO-1670.

Summary

[46] In conclusion, I have found that the presumption at section 14(3)(b) applies to the personal information at issue because it consists of information that was compiled as part of an investigation into a possible violation of law. Accordingly, I find that disclosure of the information at issue is presumed to result in an unjustified invasion of the personal privacy of individuals other than the appellant.

[47] Even if the presumption did not apply, there is no evidence to support a conclusion that any of the criteria in section 14(2) which favour disclosure apply in the circumstances. On the contrary, I have found that the factors weighing in favour of privacy protection and against disclosure at sections 14(2)(f) and (h) are relevant considerations as the information is highly sensitive and was supplied to the police by the individuals to whom it relates in confidence.

[48] As a result, I find that the disclosure of the information remaining at issue, would constitute an unjustified invasion of personal privacy and the discretionary exemption at section 38(b) applies to it. Accordingly, subject to my discussion below on the exercise of discretion, I will uphold the police's decision not to disclose it.

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

[49] The exemption at section 38(b) 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.

[50] 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.

[51] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁷ This office may not, however, substitute its own discretion for that of the institution.¹⁸

¹⁷ Order MO-1573.

¹⁸ Section 43(2).

Relevant considerations

[52] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹⁹

- 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.

[53] The police submit that in exercising their discretion to deny access to portions of the information they took into account all relevant facts and did not take into account

¹⁹ Orders P-344 and MO-1573.

irrelevant ones. Specifically, the police submit that in deciding to deny access to the information under section 38(b) they considered the following factors:

- that no consent to disclose was obtained from the identifiable individuals to whom the personal information relates;
- the privacy rights of the identifiable individuals who supplied the information and whose personal information is in the responsive records;
- the exemption at section 14(1) and the presumption at section 14(3)(b) that serve to protect the privacy rights of the identifiable individuals; and
- the right of access of the appellant to this information.

[54] The police also submit:

Although the appellant may have the right to information that has been supplied by other individuals and is about him, the individuals who supplied the information have the right of privacy. Information collected by the police, from individuals, must be safe-guarded in order to protect processes. If the information collected by the police is released without the consent of the individuals who supplied it then these same individuals may be hesitant to assist police in the future, as there would be no guarantee that the information would not be released.

After fully reviewing the information, [the police] determined that the privacy rights of the individuals who supplied information and those mentioned in the report overrides the appellant's right to this information. [The police] therefore exercised their discretion to deny access to the information.

[55] Based on my review of the information at issue and the representations submitted by the police, I accept that the police exercised their discretion in a proper manner, taking into account relevant factors and not taking into account irrelevant factors.

[56] Accordingly, I uphold the police's exercise of discretion as reasonable and find that the information which is subject to section 38(b) is properly exempt under that discretionary exemption.

ORDER:

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

Original signed by: _____
Catherine Corban
Adjudicator

_____ February 7, 2014