Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2971

Appeal MA12-411

City of Kawartha Lakes Police Services Board

October 31, 2013

Summary: The appellant submitted a request to the City of Kawartha Lakes Police Services Board (the police) for records relating to four separate occurrences identified by the requester. Relying on section 38(b) (personal privacy) of the *Act*, the police denied access to the records that it identified as being responsive to the request. During the inquiry stage of this appeal, the appellant advised the adjudicator that he had received a copy of two of the responsive records from another source. In this order, the adjudicator finds that, given that the appellant already has a copy of two of the records at issue in this appeal, the appeal is moot with respect to those two records. The adjudicator further finds that the other records at issue contain the personal information of the appellant and other identifiable individuals, but that a portion of the withheld information relates to the appellant only. He orders that the appellant's personal information be disclosed and that it would be absurd to withhold certain other information from the appellant.

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

Orders Considered: MO-2049-F, MO-2525, MO-2571, MO-2728, MO-2954, P-1295, PO-2756 and PO-3057-I.

Cases Considered: *Borowski v. The Attorney General of Canada*, (1989) 57 D.L.R. (4th) 231 (SCC).

BACKGROUND:

[1] The City of Kawartha Lakes Police Services Board (the police) received four separate requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) for access to incident reports pertaining to four separate dates.

[2] The police identified records responsive to the request and, relying on the discretionary exemption at section 38(b) of the *Act* (personal privacy), denied access to them in full.

[3] The requester (now the appellant) appealed the decision.

[4] Mediation did not resolve the matter and it was moved to the adjudication stage of the appeal process where an adjudicator conducts an inquiry under the *Act*.

[5] I commenced the inquiry by sending a Notice of Inquiry setting out the facts and issues in the appeal to the police and three persons whose interests may be affected by disclosure of the information in the responsive records. No responding representations were provided.

[6] I then sought representations from the appellant on the facts and issues set out in a Notice of Inquiry. The appellant provided responding representations. In his representations the appellant advised that he had received from another source a copy of two of the records at issue in this appeal.

RECORDS:

[7] The records at issue in the appeal consist of certain identified responsive records in the custody and control of the police, including General Occurrence and Occurrence Summary Reports.

ISSUES:

A. Is the appeal moot with respect to the two records that the appellant received from another source?

B. Do the records contain personal information?

C. Does the discretionary exemption at section 38(b) apply to the personal information in the records?

D. Would it be absurd to withhold certain information from the appellant?

DISCUSSION:

A. Is the appeal moot with respect to the two records that the appellant received from another source?

[8] The issue of mootness arises in appeals where the record has previously been disclosed by the institution, or was disclosed to the requester in some other context. The issue before me, therefore, is whether the appeal is moot with respect to two of the records at issue because they are already in the appellant's possession. Should I nonetheless proceed to a determination of the exemptions claimed for them? For the reasons that follow, I conclude that I should not proceed with such a determination.

[9] In Order P-1295, former Assistant Commissioner Irwin Glasberg considered the question of when an appeal under the *Act* could be considered moot. He stated:

> The leading Canadian case on the subject of mootness is the Supreme Court of Canada's decision of *Borowski v. The Attorney General of Canada* [(1989), 57 D.L.R. (4th) 231]. There, the court commented on the topic of mootness as follows:
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>> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot ...
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> In the *Borowski* case, Sopinka J., speaking for the court, indicated that a two-step analysis must be applied to determine whether a case is moot. First, the court must decide whether what he referred to as "the required tangible and concrete dispute" has disappeared and the issues have become academic. Second, in the event that such a dispute has disappeared, the court must decide whether it should nonetheless exercise its discretion to hear the case.

[10] The approach taken by former Assistant Commissioner Glasberg, which was to apply the test set out in *Borowski*, has been adopted in several subsequent orders of this office. In particular, adjudicators declined to make a determination in regard to exemptions claimed for records where the requester already had obtained access to the record at issue, rendering the appeal moot. This determination is made where there is not sufficient public interest or importance to decide if the exemptions apply nonetheless.[1]

[11] Based on the test for mootness referred to in *Borowski*, I find that the first part of the test has been met as the live controversy, which might have been said to exist between the parties relating to the two records, is now at an end because the records have already been disclosed, in their entirety, to the appellant.

[12] Under the second part of the test, I have considered whether the question of access to the two records is of sufficient public interest or importance to merit reviewing them regardless of their mootness. While the appellant questions why the source obtained the two records while he was refused access to them, I find that he has not provided me with sufficiently cogent evidence that the disclosure of the information contained in the two records is in the public interest or has some other public importance. Accordingly, I have concluded that no useful purpose would be served by proceeding with my inquiry regarding the application of section 38(b) to these two records.

[13] In conclusion, I find that the appeal is moot with respect to two of the records at issue in the appeal and I will not be making a determination on the exemptions claimed by the police with respect to them. Accordingly, I will not address them further in this order.

B Do the records contain personal information?

[14] The discretionary personal privacy exemption in section 38(b) of *MFIPPA* applies to "personal information". Consequently, it is necessary to determine whether the records contain "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,
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> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

[1] See Orders MO-2049-F, MO-2525, MO-2571, MO-2728, PO-2756 and PO-3057-I.

(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;

[15] The list of examples of personal information under section 2(1) is not exhaustive. Therefore information that does not fall under paragraph (a) to (h) may still qualify as personal information.[2]

[16] Sections 2(2.1) and 2(2.2) of the *Act* also relate to the definition of personal information. These sections state:

> 2(2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

[2] Order 11.

> 2(2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[17] In addition, previous IPC orders have found that 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]

[18] However, previous orders have also found that 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]

[19] Having carefully reviewed the records at issue and the representations, I conclude that they contain the appellant's personal information within the meaning of the definition of personal information at section 2(1) of the *Act*, including his name, and the views of other individuals about him. Some of the records also contain the personal information of other identifiable individuals which was collected in the course of a criminal investigation.

[20] That said, I find that some information in the records pertains only to the appellant and qualifies as his personal information only. I have highlighted this information in green on a copy of the records that I have provided to the police along with a copy of this order.

C. Does the discretionary exemption at section 38(b) apply to the personal information in the records?

[21] Section 38(b) states:

> A head may refuse to disclose to the individual to whom the information relates personal information,
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>> if the disclosure would constitute an unjustified invasion of another individual's personal privacy.

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[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.

[22] 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.[5]

[23] 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 requester.

[24] As certain information contained in the records pertains only to the appellant and qualifies as his personal information only, disclosing this information to him would not constitute an "unjustified invasion" of another individual's personal privacy. Accordingly, I will order that this information, which I have highlighted in green on a copy of the records provided to the police along with this order, be disclosed to the appellant. I will now address the balance of the withheld information sought by the appellant.

[25] In determining whether the exemption in section 38(b) applies,[6] 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 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).

[26] In their decision letter the police relied on the discretionary exemption at section 38(b) of the *Act*, with particular emphasis on the factor at section 14(2)(f) to deny access to the requested information. The materials provided by the appellant when he appealed the police's decision to this office seem to raise the possible application of the factor in favour of disclosure found at section 14(2)(a) of the *Act*. At mediation, the police advised that they had intended to raise 14(3)(b) in their decision letter. In my view the presumption at section 14(3)(b) is also a relevant consideration.

[27] Sections 14(2)(a) and (f) 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,

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[5] Order M-352.

[6] See in this regard the extensive analysis conducted by Adjudicator Laurel Cropley in Order MO-2954.

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

(f) the personal information is highly sensitive.

[28] Section 14(3)(b) 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.

[29] 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.[7] The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.[8]

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

[31] 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). Accordingly, the disclosure of the personal information is presumed to constitute an unjustified invasion of personal privacy of other identifiable individuals.

Section 14(2)(a)

[32] The objective of section 14(2)(a) of the *Act* is to ensure an appropriate degree of scrutiny of government and its agencies by the public. After reviewing the materials provided by the appellant and the records, in my view disclosing the subject matter of the personal information in the records would not result in greater scrutiny of the police. The appellant's assertions pertaining to the motivation of the police are not sufficient to displace my determination in this regard. Additionally, in my view, the subject matter of the records sought does not suggest a public scrutiny interest.[9]

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[7] Orders P-242 and MO-2235.
[8] Orders MO-2213 and PO-1849.
[9] See Order PO-2905 where Assistant Commissioner Brian Beamish found that the subject matter of a record need not have been publicly called into question as a condition precedent for the factor in section

[33] Accordingly, in the circumstances, I find that the factor at section 14(2)(a) is not a relevant consideration.

Section 14(2)(f)

[34] In order for personal information to be considered highly sensitive, it must be found that disclosure of the information could reasonably be expected to cause the subject individual significant personal distress.[10]

[35] In my view, the disclosure of certain personal information of other identifiable individuals in the records would, in the circumstances of this appeal, cause those individuals significant personal distress. In my view, the factor at section 21(2)(f) applies in this case and weighs heavily in favour of non-disclosure.

Conclusion

[36] Given the application of the presumption in section 14(3)(b), the factor in section 14(2)(f) weighing heavily in favour of non-disclosure and no factors that favour disclosure being established, I am satisfied that the disclosure of the remaining personal information in the records would constitute an unjustified invasion of another individual's personal privacy. Accordingly, I find that this information is exempt from disclosure under section 38(b) of the *Act*.

D. Would it be absurd to withhold certain information from the appellant?

[37] Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 38(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption.[11]

[38] The absurd result principle has been applied where, for example:

- the requester sought access to his or her own written witness statement[12]
- the requester was present when the information was provided to the institution[13]

21(2)(a) of *FIPPA* to apply, but rather that this fact would be one of several considerations leading to its application.

[10] PO-2518, PO-2617, MO-2262 and MO-2344.

[11] Orders M-444, M-451, M-613, MO-1323, PO-2498 and PO-2622.

[12] Order M-444.

[13] Orders M-444, P-1414 and MO-2266.

- the information is clearly within the requester's knowledge[14]

[39] If disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.[15]

[40] I have carefully reviewed the withheld information and find that it would be absurd to withhold certain information contained in the records which I have found to be exempt under section 38(b) because it was provided by the appellant, or which is clearly within his knowledge. I have highlighted this information in yellow on a copy of the pages of the records that I have provided to the police along with a copy of this order and will order that it be disclosed.

ORDER:

1. I order the police to disclose to the appellant the portions of the records that I have highlighted on a copy of the pages of the records that I have enclosed with this order by sending it to him by **December 9, 2013** but not before **December 4, 2013**.

2. In all other respects I uphold the decision of the police.

3. In order to verify compliance with this order, I reserve the right to require the police to provide me with a copy of the pages of the records as disclosed to the appellant.

Original signed by: October 31, 2013
Steven Faughnan
Adjudicator

[14] Orders MO-1196, PO-1679, MO-1755 and MO-2257-I.
[15] Orders MO-1323, PO-2622 and PO-2642.