

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3024

Appeal MA13-300

Waterloo Regional Police Services Board

March 19, 2014

Summary: The appellant sought access to occurrence reports relating to an incident involving him when he was the victim of an assault as a young child in the early 1970's. After receiving the consent of two affected parties, the police granted access to large portions of the responsive records, and denied access to some remaining portions on the basis of the exemption in section 38(b) (personal privacy). This order finds that if the names and other personal identifiers are severed, some portions of the remaining records can be disclosed as they do not contain the personal information of identifiable individuals. The few remaining discrete portions of the records relate primarily to other affected parties and do not relate to the assault itself, and the decision of the police that these portions qualify for exemption under section 38(b) is upheld.

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

OVERVIEW:

[1] The Waterloo Regional Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for occurrence reports relating to an incident involving the requester when he was the victim of an assault as a young child in the early 1970's.

[2] In response to the request, the police identified responsive records and granted partial access to them. Access to portions of the records was denied on the basis of the exemptions in sections 14(1) and 38(b) (personal privacy) of the *Act*.

[3] The appellant appealed the decision of the police.

[4] During mediation, the police conducted additional searches for photographs and statements relating to the occurrence, but did not locate any additional records.

[5] Also during mediation, one of the individuals mentioned in the records consented to disclosure of her personal information. As a result, the police issued a revised decision letter, and provided the appellant with access to the additional portions of the records that related to this individual.

[6] Mediation did not resolve this appeal and it was transferred to the inquiry stage of the process, where an adjudicator conducts an inquiry under the *Act*.

[7] After this file was transferred to the inquiry stage of the process, this office received an additional consent from another individual named in the records (affected party B), consenting to the disclosure of all information relating to her.

[8] I sent a Notice of Inquiry identifying the facts and issues in this appeal to the police, initially. Along with the Notice of Inquiry, I also sent the police a copy of the consent received from affected party B, and asked the police to identify the specific portions of the records that contained the personal information of affected party B, and indicate their position regarding the disclosure of this information, in light of the consent recently received from affected party B.

[9] The police responded by sending the appellant a further revised access decision. In that decision, the police indicated that because of the new consent received from affected party B, they were granting access to additional information contained in the records. The police also stated that, on further examination of the records, a decision was made to reconsider portions of the records that had been withheld, and to grant access to further information contained throughout the records. The police also indicated that access to some remaining information was denied on the basis of the exemptions in sections 14(1) and 38(b) of the *Act*.

[10] The police provided me with a copy of the revised decision letter, and a copy of the newly-released records. In addition, the police also provided representations on the application of the exemptions claimed for the remaining records, in response to the Notice of Inquiry sent to them.

[11] I then sent the Notice of Inquiry, along with a complete copy of the representations of the police, to the appellant. The appellant provided brief representations in response.

[12] In this order I find that, if names and other personal identifiers are severed, some portions of the remaining records can be disclosed as they no longer contain the personal information of identifiable individuals. I uphold the decision of the police that the remaining portions of the records that relate to identifiable individuals qualify for exemption under section 38(b).

RECORDS:

[13] The records remaining at issue are the remaining undisclosed portions of various Occurrence Reports (portions of 12 pages).

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1)?
- B. Does the discretionary exemption at section 38(b) apply to the information remaining at issue?

DISCUSSION:

Issue A. Do the records contain "personal information" as defined in section 2(1)?

[14] 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 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] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.¹

[16] The police take the position that the portions of the records remaining at issue contain information about identifiable individuals other than the appellant. They state:

The police, when conducting investigations, speak to individuals and record personal information about those individuals. The records identify involved parties by name and contain statements provided by the parties, describing their involvement in the incident. The records contain personal views and opinions of the named individuals. They also contain dates of birth and addresses of involved parties. While the incident occurred more than forty years ago, this information may still identify the individuals.

¹ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[17] The police also take the position that it is reasonable to expect that an individual may be identified if the information is disclosed, and state:

The personal information of the affected parties includes names, addresses, and dates of birth. Though the incident occurred more than forty years ago, this may afford the appellant the opportunity to identify, locate, or contact these individuals at present.

[18] The appellant does not address the issue of whether the records contain personal information; however, he does indicate that he is the victim in the circumstances which gave rise to the creation of the records. He also states that he is not interested in certain names of individuals.

Analysis and findings

[19] On my review of the portions of the records remaining at issue in this appeal, I note that the police have disclosed a very large percentage of the information at issue. Many of the pages at issue contain detailed narratives of the incident and statements made by parties, and most of the records have been disclosed. In some cases, only names and identifiers have been withheld from the appellant. In other cases, some additional information has been withheld. Pages 10 and 12 have been disclosed in full.

[20] On my review of the records, the information which has not been disclosed consists of the following:

- Page 1: the name and address of an affected party;
- Pages 2, 3, 4, 6 and 14: the names and other identifiers of affected parties;
- Page 5: the names and other identifiers of affected parties, and two excerpts from the narrative relating to an affected party – one concerning the affected party and one containing statements about the appellant made by the affected party;
- Page 7: the name of an affected party, and statements this party made to the police about himself (including information about his health and emotional state);
- Page 8: the names and other identifiers of affected parties, a brief identification one of the affected party's status at the time, and a statement containing information about the plans of certain affected parties;

- Page 9: the names of affected parties, a continuation of the statement containing information about the plans of certain affected parties, and observations about some of the affected parties;
- Page 11: the name of an affected party, and a list of other information about him (including date of birth, physical descriptors, marital status, religion, and other information);
- Page 13: the name of an affected party, and information about the criminal charge brought against him.

[21] I have carefully reviewed the records at issue, which relate to an incident involving the appellant. In the circumstances, because the appellant is named in the records, I find that the records contain the appellant's personal information, as his name appears with other personal information relating to him (paragraph (h) of the definition).

[22] I also find that the withheld records or portions of records also contain the personal information of a number of identifiable individuals other than the appellant. This information includes their age, sex, marital or family status [paragraph (a)], their address or telephone number [paragraph (d)], their personal opinions or views [paragraph (e)], the views or opinions of another individual about them [paragraph (g)] and their names, along with other personal information relating to them [paragraph (h)].

[23] These remaining withheld portions of the records contain information which predominantly relates directly to the named affected parties. In many instances, it is only the names of the affected parties that were not disclosed. In some instances, it is the names along with other information relating directly to those affected parties. However, in two instances, the withheld information also relates directly to the appellant and/or one of the affected parties who consented to disclosure.

[24] The first instance is a statement by an affected party contained on page 5 of the records. The affected party makes a statement which includes observations this individual makes about the appellant, and comments about him. In the circumstances, I am satisfied that if the name and personal identifiers about the individual making the statement are withheld, the remaining portions of this statement, which contain only the personal information of the appellant, would not contain or reveal the personal information of an affected party. As a result, this information cannot be withheld under the personal privacy provisions of the *Act*, and can be disclosed to the appellant.

[25] The second instance is a portion of the statement contained on page 9 of the records. An affected party makes a statement about the plans of other affected parties, and part of this statement contains information relating specifically to the appellant and one of the affected parties who consented to disclosure. Again, in the circumstances, I am satisfied that if the name and personal identifiers about the individual making the statement and any other affected parties are withheld, the remaining portion of this statement, which contains only the personal information of the appellant and/or the personal information of an individual who consented to disclosure, would not contain or reveal the personal information of other affected parties. As a result, this information cannot be withheld under the personal privacy provisions of the *Act*,² and can be disclosed to the appellant.

[26] As a result of these findings, I will order that the portions of pages 5 and 9 referred to above be disclosed to the appellant.

[27] I find that the remaining portions of the records at issue contain the personal information of the appellant, as well as that of other identifiable individuals.

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

[28] 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.

[29] Under section 38(b), where a record contains the 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, and the institution may refuse to disclose that information to the requester.

[30] 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.

[31] 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 the affected person’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

² This is because the information either relates to the appellant himself, or to an individual who consented to disclosure (see section 14(1)(a)).

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).

[32] The police submit that disclosure of the withheld portions of the record would constitute an unjustified invasion of privacy and that, in the circumstances, section 38(b) applies to this information. In addition, the police submit that the factor in section 14(2)(h) and the presumption in section 14(3)(b) apply to the withheld information. The appellant did not provide representations on the factors or presumptions in section 14.

[33] Sections 14(2)(h) and 14(3)(b) read:

(2) 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,

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

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

(b) 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;

The factor in section 14(2)(h):

[34] In support of its position that this factor applies, the police state:

This factor applies if 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.

Section 14(2)(h) was claimed by [the police]. It is essential to the operation of police that [the police] maintain the trust bestowed upon [them] by protecting the personal information obtained in the course of investigations. When providing information to police, victims, witnesses

and individuals under investigation expect police to maintain confidentiality. If [the police] did not, members of the public would be wary of providing information to police.

[35] Based on the nature of the information contained in the records, I am satisfied that much of the information remaining at issue was provided by the named individuals to the police in the course of dealing with the incident which is described in the records, and that the expectation of confidentiality is reasonable in the circumstances. As a result, I find that the factor in section 14(2)(h) applies.

The presumption in section 14(3)(b)

[36] Regarding the application of the presumption in section 14(3)(b), the police state:

The Appellant requested a police report containing information about him when he was a young child. Waterloo Regional Police Service received a complaint regarding abuse, which was thoroughly investigated by officers who ultimately laid a Criminal Code charge. The information contained in the police report was created as part of an investigation into this violation of law.

[37] Previous order have confirmed that, 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.³ However, section 14(3)(b) does not apply if the record was created after the completion of an investigation into a possible violation of law.⁴

[38] On my review of the records at issue, I am satisfied that they were compiled by the police in the course of their investigation of the circumstances surrounding the incident involving the appellant and others, and that they were compiled and are identifiable as part of the police investigation into a possible violation of law under section 14(3)(b).

[39] Based on my findings that the factor in section 14(2)(b) and/or the presumption in section 14(3)(b) applies to the information, I find that the disclosure of the personal information of the affected parties contained in the withheld portions of the record at issue would constitute an unjustified invasion of the personal privacy of those individuals, and that this information is exempt from disclosure under section 38(b) of the *Act*, subject to my review of the police's exercise of discretion, below.

³ Orders P-242 and MO-2235.

⁴ Orders M-734, M-841, M-1086, PO-1819 and PO-2019.

Exercise of Discretion

[40] The section 38(b) exemption is discretionary and permits the police to disclose information, despite the fact that it could be withheld. On appeal, this office may review the police's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so.⁵

[41] 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.

[42] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.⁶ This office may not, however, substitute its own discretion for that of the institution.⁷

[43] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:⁸

- 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

⁵ Orders PO-2129-F and MO-1629.

⁶ Order MO-1573.

⁷ Section 43(2).

⁸ Orders P-344, MO-1573.

- 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

[44] In their representations, the police acknowledge that the records contain both the personal information of the appellant and the affected parties. The police refer to a number of factors they considered in exercising their discretion, and state:

Section 38(b) was applied in this case, taking into account the Appellant's right of access to information against the affected parties' right to protection of their privacy. To the extent the records contained personal information about both the Appellant and another individual, the Institution exercised its discretion based on the belief that the unjustified invasion of another individual's personal privacy outweighed the Appellant's right to information and applied the exemption accordingly.

In considering the balance between the requester's right of access and affected parties rights of privacy, [the police] took into account the requester's young age at the time the records were created. The [police] also considered the relationship between the Appellant and the affected parties when making the determination to apply 38(b).

[45] The appellant does not provide specific representations on this issue. He does, however, indicate that he is the victim in this case, and states that he is interested in the information regarding the abuse that was inflicted on him.

[46] In response to the request resulting in this appeal, the police disclosed significant portions of the records to the appellant and, after receiving the consent of an additional affected party, the police disclosed additional significant portions of the remaining records to the appellant. As a result of my finding above, the police are also ordered to disclose two additional portions of the records to the appellant.

[47] As a result of these disclosures, the appellant has been granted access to the information relating directly to him and to the abuse that was inflicted on him. The only information which has not been disclosed to the appellant consists of: the names, addresses or other identifiers of certain affected parties severed from the identified pages; a portion of a narrative relating only to an affected party on page 5 (two sentences); statements an affected party made to the police about himself on page 7 (three sentences); a brief identification one of the status of an affected party, and a statement containing information about the plans of certain affected parties, and observations about some of the affected parties on pages 8-9 (six sentences); and the information about a criminal charge brought against an affected party on page 13 (one sentence).

[48] Based on the representations of the parties, and based particularly on the nature of the brief portions of the records that remain at issue, I am satisfied that the police properly exercised their discretion to deny access to the information remaining at issue.

ORDER:

1. I order the police to disclose to the appellant by **April 25, 2014** but not before **April 17, 2014** certain portions of pages 5 and 9 of the records, as these portions only contain the personal information of the appellant and/or an affected party who consented to disclosure. For greater certainty, I have highlighted in yellow the portions of pages 5 and 9 which the police are to disclose on the copy of those pages sent to the police along with this order. I have highlighted in green the portions of those pages which should not be disclosed.
2. I uphold the decision by the police to withhold the remaining severed portions of the records on the basis of the exemption in section 38(b) of the *Act*.

Original Signed by: _____
Frank DeVries
Adjudicator

_____ March 19, 2014