Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2992

Appeal MA12-253

Timmins Police Services Board

December 31, 2013

Summary: The appellant submitted a request for access to information pertaining to him. The police granted partial access to the requested information relying on section 38(b) (personal privacy) of the *Act*, to deny access to the portion they withheld. During the inquiry stage of this appeal the police raised the potential application of section 38(a) (discretion to refuse to disclose requester's own information) in conjunction with sections 8(2)(a) (law enforcement report) and 8(2)(c) (disclosure would expose person to civil liability). In addition, the police agreed to disclose two of the five records originally at issue to the appellant. In this order, the adjudicator finds that the police are not entitled to rely on section 38(a) in conjunction with sections 8(2)(a) and 8(2)(c) to deny access to the requested information. The adjudicator also finds that it would be absurd to withhold certain information from the appellant, but otherwise upholds the decision of the police with respect to the application of the section 38(b) exemption.

Statute Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 2(1), 2(2.1), 2(2.2), 4(2), 8(2)(a), 8(2)(c), 14(3)(b), 38(a), 38(b).

Order Considered: Order PO-2113.

OVERVIEW:

[1] The Timmins Police Service (the police) received the following request for access to information under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*):

> Records: occurrence reports, investigation reports, witness statements, telephone contacts at TPS, court records and/or reports submitted by persons assigned by the Timmins Police during court process in the Ontario court of Justice in Timmins, Ontario. Report and witness statements concerning the taking of my DNA samples at the Timmins Police station on [specified date], as investigated in October 2011, meetings with TPS. All records pertaining to written and electronic reports, as indicated to own personal information and my identity.

[2] After notifying two affected parties and receiving one affected party's consent to disclosure, the police granted partial access to the requested information for a fee. The police relied on section 38(b) of the *Act* (personal privacy) to deny access to the portion it withheld.

[3] The requester (now the appellant) appealed the police's decision. In the Appeal Form the appellant also alleged that the police failed to conduct a reasonable search for responsive records.

[4] In the course of mediation, the issue of the reasonableness of the police's search for responsive records was resolved, the fee was reduced and only the information that the police withheld from Records 4, 20, 26, 27 and 28, as described in the police's index of records, remained at issue.

[5] As the matter was not resolved at mediation it was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*.

[6] I commenced the inquiry by sending a Notice of Inquiry setting out the facts and issues in the appeal to the police and four individuals whose interests may be affected by disclosure of the records. Only the police and one affected party provided responding representations. The responding affected party consented to the disclosure to the appellant of any of their information that appears in the records at issue.

[7] In their representations the police raised, for the very first time, the potential application of sections 8(2)(a) (law enforcement report) and 8(2)(c) (disclosure would expose person to civil liability). As the records contain the personal information of the appellant, this effectively means that the institution is claiming the application of the discretionary exemption at section 38(a) of the *Act* in conjunction with sections 8(2)(a)

and 8(2)(c). I therefore added the late raising of this discretionary exemption as an issue in the appeal.

[8] I then sent the appellant a Notice of Inquiry accompanied by the representations of the responding affected party and the non-confidential representations of the police. The appellant provided responding representations. I decided that the appellant's representations raised issues to which the police should be given an opportunity to respond. Accordingly, I sent a letter to the police along with a copy of the appellant's non-confidential representations inviting their representations in reply. In the letter, I advised the police that the responding affected party had consented to the disclosure of their personal information to the appellant. I also asked the police to provide me with a copy of any supplementary decision letter that is issued to the appellant as a result of the consent.

[9] In response, the police advised that they had decided to release Records 27 and 28 to the appellant. Accordingly, those records are no longer at issue in the appeal. The police maintained their position with respect to Records 4, 20 and 26.

RECORDS:

[10] At issue in this appeal are the withheld portions of Record 4 (a General Occurrence Report), and all of Records 20 (a Supplementary Occurrence Report) and 26 (a General Occurrence Report).

ISSUES:

A. Should the police be permitted to rely on section 38(a), in conjunction with sections 8(2)(a) and 8(2)(c) of the *Act*, to deny access to the withheld information?

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?

E. Can the records be reasonably severed without revealing exempt information?

DISCUSSION:

A. Should the police be permitted to rely on section 38(a), in conjunction with sections 8(2)(a) and 8(2)(c) of the *Act*, to deny access to the withheld information?

[11] Section 11.01 of this office's *Code of Procedure* provides:

> In an appeal from an access decision, excluding an appeal arising from a deemed refusal, an institution may make a new discretionary exemption claim only within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

[12] In their initial decision letter, the police only claimed the application of the discretionary exemption at section 38(b) of the *Act*. In their representations, the police raised, for the very first time, the potential application of sections 8(2)(a) and 8(2)(c). As the records contained the personal information of the appellant, this raised the possible application of the discretionary exemption at section 38(a), in conjunction with sections 8(2)(a) and 8(2)(c). The police provide no explanation for their failure to raise the application of this discretionary exemption earlier.

[13] The appellant objects to the late raising of this discretionary exemption. The appellant submits that he will be prejudiced by the late raising of the discretionary exemption. He further submits that the police "chose not to raise" section 38(a) in conjunction with sections 8(2)(a) and 8(2)(c) at the request stage, and that the police did not issue a supplementary decision claiming the application of section 38(a) in conjunction with sections 8(2)(a) and 8(2)(c).

Analysis and Findings

[14] The purpose of this office's 35-day policy is to provide institutions with a window of opportunity to raise new discretionary exemptions, but only at a stage in the appeal where the integrity of the process would not be compromised and the interests of the requester would not be prejudiced. The 35-day policy is not inflexible, and the specific circumstances of each appeal must be considered in deciding whether to allow discretionary exemption claims made after the 35-day period.[1] The 35-day policy was

[1] Orders P-658 and PO-2113.

upheld by the Divisional Court in *Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg.*[2]

[15] In Order PO-2113, dealing with the provincial equivalent of the *Act*, Adjudicator Donald Hale set out the following principles that have been established in previous orders with respect to the appropriateness of an institution claiming additional discretionary exemptions after the expiration of the time period prescribed in the Notice of Mediation:

> In Order P-658, former Adjudicator Anita Fineberg explained why the prompt identification of discretionary exemptions is necessary in order to maintain the integrity of the appeals process. She indicated that, unless the scope of the exemptions being claimed is known at an early stage in the proceedings, it will not be possible to effectively seek a mediated settlement of the appeal under section 51 of the *Act*. She also pointed out that, where a new discretionary exemption is raised after the Notice of Inquiry is issued, this could require a re-notification of the parties in order to provide them with an opportunity to submit representations on the applicability of the newly claimed exemption, thereby delaying the appeal. Finally, she pointed out that in many cases the value of information sought by appellants diminishes with time and, in these situations, appellants are particularly prejudiced by delays arising from the late raising of new exemptions.
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> The objective of the 35-day policy established by this Office is to provide government organizations with a window of opportunity to raise new discretionary exemptions, but to restrict this opportunity to a stage in the appeal where the integrity of the process would not be compromised or the interests of the appellant prejudiced. The 35-day policy is not inflexible. The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.

[16] In the circumstances of this appeal, I am not prepared to allow the police to rely on section 38(a),[3] in conjunction with sections 8(2)(a) and 8(2)(c) of the *Act*, to deny access to the information in Records 4, 20 and 26.

[17] The police have provided no explanation for the late raising of this discretionary exemption nor provided any submissions to counter the appellant's allegation of prejudice.

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[2] (21 December 1995), Toronto Doc. 110/95, leave to appeal refused [1996] O.J. No. 1838 (C.A.).
[3] Section 38(a) provides that a head may refuse to disclose to the individual to whom the information relates personal information, if section 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

[18] The police claim that section 8(2)(a) of the *Act* applies to all of the records remaining at issue, which consist of two General Occurrence Reports and a Supplementary Occurrence Report. Section 8(2)(a) provides that a head may refuse to disclose a record that is "a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law." Occurrence reports, supplementary reports and similar records of various police agencies have been found in previous orders not to meet the definition of "report" under the *Act*, because they have been found to be more in the nature of recordings of fact than formal, evaluative accounts of investigations.[4] I see nothing in the records remaining at issue that merits any different treatment.

[19] The police claim that section 8(2)(a) of the *Act* applies to Record 4. Section 8(2)(c) provides that a head may refuse to disclose a record that is "a law enforcement record if the disclosure could reasonably be expected to expose the author of the record or any person who has been quoted or paraphrased in the record to civil liability". The police make this claim with respect to Record 4, which has been partially disclosed to the appellant, but provide no evidence of what the nature of the "civil liability" might be, nor provide any explanation as to how that may reasonably be expected to occur if the remaining information is disclosed. The appellant submits that there is no civil matter involving the individual referred to by the police in their representations. In my view, the representations of the police fall far short of establishing the application of section 8(2)(c).

[20] In the circumstances, I find that any prejudice to the police in disallowing its claim that section 38(a), in conjunction with sections 8(2)(a) and 8(2)(c), applies to the information remaining at issue would not outweigh any possible prejudice to the appellant in allowing it. As a result, I will not consider the application of section 38(a), in conjunction with sections 8(2)(a) and 8(2)(c), to the records remaining at issue in this appeal.

B. Do the records contain personal information?

[21] 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,

[4] See Orders M-1109, MO-1238, MO-2065, PO-1845 and PO-1959.

> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
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> (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,
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> (c) any identifying number, symbol or other particular assigned to the individual,
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> (d) the address, telephone number, fingerprints or blood type of the individual,
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> (e) the personal opinions or views of the individual except where they relate to another individual,
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> (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,
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> (g) the views or opinions of another individual about the individual, and
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> (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.

[22] 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.[5]

[23] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[6]

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

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[5] Order 11.
[6] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

> 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.
>
> 2.2 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.

[25] 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.[7]

[26] 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.[8]

[27] The police take the position that they have withheld from disclosure the personal information of identifiable individuals other than the appellant. That said, the police do acknowledge in their representations that the information in Record 4 was generated as a result of a complaint from the appellant, and that Record 20 contains the opinions of another individual about the appellant.

[28] The appellant submits that Record 4 was generated as a result of a complaint from the appellant arising from a message left on his telephone answering machine. With respect to Record 20, the appellant submits that if the information in that record was provided by an individual acting in their professional capacity, then it should be disclosed to the appellant. The appellant does submit, in the alternative:

> However, it cannot be said that these people were identified, contacted or interviewed in a manner that relates to their employment or professional responsibilities. Rather they were contacted in relation to their capacities as "complainant", "witness" or "participant".

[29] 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. The records also contain the personal information of other identifiable individuals which was collected in the course of a criminal investigation. I also find in particular that, notwithstanding the manner in which

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[7] Orders P-257, P-427, P-1412, P-1621, R-980015 and PO-2225.
[8] Orders P-1409, R-980015, PO-2225 and MO-2344.

Record 20 was generated, that the bulk of the information in that record, qualifies as personal rather than professional information.

[30] Accordingly, I conclude that all of the records contain the personal information of the appellant as well as the personal information of other identifiable individuals.

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

[31] Section 38(b) states:

> 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.

[32] 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.[9]

[33] 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.

[34] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), this office will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.[10]

[35] The police rely generally on the application of the discretionary exemption at section 38(b), taking the position that disclosing the withheld information would constitute an unjustified invasion of another individual's personal privacy. The appellant's representations do not specifically refer to the application of any presumption under section 14(3) of the *Act*, nor do they refer to any specific factors in section 14(2) that might favour disclosure.

[36] In my view, the presumption at section 14(3)(b) of the *Act* is relevant to the determination whether disclosure of the withheld information would constitute an unjustified invasion of personal privacy.

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[9] Order M-352.
[10] Order MO-2954.

[37] As stated above, the appellant makes no representations on the potential application of the section 14(3)(b) presumption but does submit that there is no longer any ongoing law enforcement investigation with respect to the matter set out in Record 20.

[38] 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.

[39] 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.[11] The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.[12]

[40] 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.

[41] 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.

[42] Given the application of the presumption in section 14(3)(b) and that fact that no factors that favour disclosure were claimed or otherwise established, I am satisfied that the disclosure of the remaining withheld personal information in all three records at issue 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*.

[43] Furthermore, I have considered the circumstances surrounding this appeal and the police's representations and I am satisfied that the police have not erred in the exercise of their discretion with respect to section 38(b) of the *Act* regarding the withheld information that will remain undisclosed as a result of this order.

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[11] Orders P-242 and MO-2235.
[12] Orders MO-2213 and PO-1849.

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

[44] 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.[13]

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

- the requester sought access to his or her own written witness statement[14]
- the requester was present when the information was provided to the institution[15]
- the information is clearly within the requester's knowledge.[16]

[46] 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.[17]

[47] I have carefully reviewed all of the records at issue and find that because the withheld information in Record 4 was provided by the appellant or is otherwise clearly within his knowledge, it would be absurd to withhold that information from him under section 38(b). As a result, I will order the police to disclose only that information to the appellant.

E. Can the records be reasonably severed without revealing exempt information?

[48] Where a record contains exempt information, section 4(2) requires the police to disclose as much of the record as can reasonably be severed without disclosing the exempt information. This office has held, however, that a record should not be severed where to do so would reveal only "disconnected snippets", or "worthless", "meaningless" or "misleading" information. Further, severance will not be considered reasonable where an individual could ascertain the content of the withheld information from the information disclosed.[18]

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[13] Orders M-444, M-451, M-613, MO-1323, PO-2498 and PO-2622.
[14] Order M-444.
[15] Orders M-444, P-1414 and MO-2266.
[16] Orders MO-1196, PO-1679, MO-1755 and MO-2257-I.
[17] Orders MO-1323, PO-2622 and PO-2642.
[18] Order PO-1663 and *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.).

[49] Based upon my review of the information in Records 20 and 26, in the circumstances of this case, any possible severance of those records would either reveal exempt information or result in disconnected snippets of information being revealed.

ORDER:

1. I order the police to disclose to the appellant the withheld portions of Record 4 by sending it to him by **February 5, 2014** but not before **January 31, 2014**.

2. I uphold the decision of the police with respect to Records 20 and 26.

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 Record 4 as disclosed to the appellant.

Original signed by: December 31, 2013
Steven Faughnan
Adjudicator