

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3036

Appeal MA13-180

Peel Regional Police Services Board

April 15, 2014

Summary: The police received a request under the *Act* for the statement of a witness to a motor vehicle accident. The police denied access to the statement under the exemption at section 38(b) (personal privacy), read in conjunction with the presumption at section 14(3)(b) (investigation into a possible violation of law). The requester appealed the police's decision to deny access to the witness statement. In this order, the police's decision is upheld and the appeal is dismissed.

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

OVERVIEW:

[1] A request was submitted to the Peel Regional Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a witness statement, including name and contact information, relating to an identified motor vehicle accident.

[2] The police located the witness statement and denied access to it, in full. The police claimed the application of the mandatory exemption relating to the protection of personal privacy at section 14(1), taking into account the presumption against

disclosure of personal information relating to an investigation into violation of law at section 14(3)(b) of the *Act*. The requester, now the appellant, appealed the decision.

[3] During mediation, the police clarified that because the record also contains the personal information of the appellant, they rely on the discretionary personal privacy exemption at section 38(b) of the *Act*, read with the presumption section 14(3)(b), rather than section 14(1). The mediator confirmed that the witness who made the statement does not consent to the disclosure of their personal information to the appellant.

[4] As a mediated resolution could not be reached, the file was transferred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry. I sought representations from the parties. The police provided representations that I shared in accordance with section 7 of this office's *Code of Procedure and Practice Direction Number 7*. The appellant submitted brief representations.

[5] In this order, I uphold the police's decision to deny access to the witness statement. In the discussion below, I reach the following conclusions:

- the witness statement contains the "personal information" of both the appellant, as well as that of another identifiable individual, the witness, within the meaning of the definition of that term at section 2(1);
- the discretionary exemption at section 38(b) applies to exempt the witness statement from disclosure;
- the police's exercise of discretion to deny access to the witness statement was reasonable.

RECORDS:

[6] The record at issue is a one-page witness statement.

ISSUES:

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

DISCUSSION:

A. Does the witness statement contain “personal information” as defined in section 2(1), and, if so, to whom does it relate?

[7] 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.

[8] 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). Section 2(1) reads, in part, 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,
- ...
- (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,
- ...

¹ Order M-352.

- (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;

[9] 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 However, it must be reasonable to expect that an individual may be identified if the information is disclosed.³

[10] 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.⁴ 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.⁵

[11] The police submit that the witness statement contains the personal information of the witness who provided the information to the police, in confidence. The appellant does not make any specific representations on whether the witness statement contains personal information.

[12] Having reviewed the witness statement, I find that it contains the personal information of the appellant, as well as that of the witness who was interviewed in the course of the police's investigation of the motor vehicle accident. Specifically, the information relates to the witness' age [paragraph (a)], employment history [paragraph (b)], address and telephone number [paragraph (d)] and their name together with other personal information about them [paragraph (h)]. The information also relates to the appellant as it contains the views or opinions of another individual about him [paragraph (g)].

[13] Accordingly, I find that the records at issue contain the "personal information" of both the appellant and another identifiable individual, the witness, within the meaning of the definition of that term at section 2(1) of the *Act*.

² Order 11.

³ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

⁴ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁵ Orders P-1409, R-980015, PO-2225 and MO-2344.

[14] 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 for personal privacy at section 38(b) apply to the witness statement?

[15] 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 exceptions to this general right of access, including section 38(b). Section 38(b) introduces a balancing principle that must be applied by institutions where a record contains the personal information of both the requester and another individual. In this case, the police must look at the information and weigh the appellant's right of access to his own personal information against the affected persons' right to the protection of their privacy. If the police determine that release of the information would constitute an unjustified invasion of the affected person's personal privacy, then section 38(b) gives the police the discretion to deny access to the appellant's personal information. 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

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

The presumption in section 14(3)(b)

[17] In this appeal, the police rely on the presumed unjustified invasion of personal privacy at section 14(3)(b) of the *Act*, which states:

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;

[18] 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.⁶ The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.⁷

[19] The police submit that the witness statement was compiled and is identifiable as part of an investigation into a possible violation of law as contemplated by the presumption at section 14(3)(b). Specifically, they submit that it was compiled as part of an investigation into a possible offence under the *Highway Traffic Act*.

[20] Based on my review of the witness statement, I find that it was compiled by the police in the course of their investigation into a motor vehicle accident involving the appellant. Accordingly, I accept that it was compiled and is identifiable as part of an investigation into a possible violation of law. I find that all of the information in the witness statement falls under the presumption at section 14(3)(b) of the *Act*.

The factor at section 14(2)(d)

[21] 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 witness's 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).⁸ Some of these criteria weigh in favour of disclosure, while others weigh in favour of privacy protection.

[22] In the circumstances of this appeal, the police have not raised the possible application of any of the factors at section 14(2). However, the appellant's representations appear to suggest that the factor at section 14(2)(d), in support of disclosure of the information, is relevant. That section reads:

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,

⁶ Orders P-242 and MO-2235.

⁷ Orders MO-2213, PO-1849 and PO-2608.

⁸ Order P-99.

the personal information is relevant to a fair determination of rights affecting the person who made the request;

[23] For section 14(2)(d) to apply, previous orders have stated that 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.⁹

[24] In their representations, the appellant submits that they are pursuing civil remedies as a result of the injuries sustained in the motor vehicle accident. They submit that access to the witness statement may help provide further insight into the accident and may shed light on the allocation of liability. The appellant submits that such information may be disclosed at trial and that to have the opportunity to review it prior to that time would be the most "economical and practical approach."

[25] Although the appellant refers to civil litigation they do not provide me with sufficient evidence to support a conclusion that the factor at section 14(2)(d) is relevant. They do not specifically identify the right in question being determined, whether that right relates to a proceeding which is either existing or contemplated and not already completed, whether the information contained in the witness statement is significant to the determination of the right in question and whether the information is required in order to prepare for that proceeding or to ensure an impartial hearing.

[26] I acknowledge the appellant's position that this information may subsequently be disclosed in a civil trial. However, disclosure under the *Act* is a process that is separate and distinct from that which occurs in the context of a legal dispute and raises different concerns and considerations. Also, it has previously been held that for the purposes of

⁹ 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.).

civil litigation, it may be that the discovery mechanisms available to the requester in that litigation will be sufficient to ensure a fair hearing.¹⁰

[27] Accordingly, I have not been provided with sufficient evidence to establish that section 14(2)(d) is a relevant factor that should be given any weight in the circumstances of this appeal.

[28] In summary, I have found that the presumption against disclosure at section 14(3)(b) applies to the witness statement. Also, I have found that I have insufficient evidence to support a conclusion that the factor favouring disclosure at section 14(2)(d) or any of the other factors favouring disclosure apply to the witness statement. Based on these findings, I am satisfied that the disclosure of the information contained in the witness statement would constitute an unjustified invasion of the witness' personal privacy. Accordingly, I find that the witness statement is exempt from disclosure under section 38(b) of the *Act*, subject to my review of the police's exercise of discretion.

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

[29] 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.

[30] 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.

[31] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹¹ This office may not, however, substitute its own discretion for that of the institution.¹²

Relevant considerations

¹⁰ Order PO-1833.

¹¹ Order MO-1573.

¹² Section 43(2).

[32] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹³

- 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.

[33] The police submit that their exercise of discretion was not made in bad faith or for an improper purpose. They submit that all relevant factors were taken into

¹³ Orders P-344 and MO-1573.

consideration and that generally they attempt to provide as much information as possible to a requester without disregarding the privacy rights of other individuals.

[34] The appellant does not specifically address the police's exercise of discretion.

[35] Based on my consideration of the nature of the information at issue and despite the sparse representations submitted by the police, I accept that they exercised their discretion in a proper manner, taking into account relevant factors and not taking into account irrelevant factors. Having found that the information contained in the witness statement falls within the personal privacy exemption at section 38(b) and having accepted the police exercised their discretion reasonably and in good faith, it is not within my jurisdiction to substitute their exercise of discretion for my own.¹⁴ Accordingly, I uphold the police's exercise of discretion and find that the witness statement is properly exempt under that discretionary exemption at section 38(b).

ORDER:

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

Original Signed by: _____
Catherine Corban
Adjudicator

_____ April 15, 2014

¹⁴ Section 43(2).