Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3070

Appeal MA12-283

Toronto Police Services Board

June 14, 2014

Summary: The appellant submitted an access request under the *Municipal Freedom of Information and Protection of Privacy Act* to the Toronto Police Services Board for the records relating to a police investigation into allegations that she was engaging in criminal harassment. The police disclosed a number of records to her but claimed that the "information" that was sworn by an officer to obtain a warrant for her arrest is a "court document" and is not in the police's custody or under their control for the purposes of section 4(1) of the *Act*. In addition, they denied access to three pages of a police officer's notes in full under the discretionary exemption in section 38(b) (personal privacy) of the *Act*.

In this order, the adjudicator finds that the "information" that is kept in a court file is not in the custody or under the control of the police. However, he finds that if the police retained a copy of this "information" in their own record holdings, this record is in their custody or under their control for the purposes of section 4(1) and is subject to the *Act*. He orders the police to search their own record holdings for a copy of the "information" and to issue a decision letter to the appellant. In addition, he finds that disclosing the personal information in the officer's notes to the appellant would constitute an unjustified invasion of the personal privacy of the two individuals who were interviewed by that officer. He upholds the police's decision to withhold those pages of the officer's notes under section 38(b).

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"), 4(1), 14(3)(b) and 38(b).

Orders and Investigation Reports Considered: Order P-994.

OVERVIEW:

[1] The appellant submitted an access request to the Toronto Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following records:

> . . . [A]ll officers' memo book notes related to [specific file number] – previous access and privacy request.
>
> . . . [A]ny and all documents including photographs related to this file number.

[2] By way of background, the police investigated a complaint that the appellant was engaging in criminal harassment. An officer then swore an "information" that was used to obtain a warrant from the court for the appellant's arrest. She was subsequently arrested at her home and charged under the *Criminal Code*.

[3] The police located records that are responsive to the appellant's access request, including the memorandum book notes of several officers who conducted the investigation and photographs taken by an officer. They issued a decision letter that provided her with partial access to these records. They denied access to some information in the records under the following discretionary exemptions in the *Act*:

- section 38(a) (refusal to disclose an individual's own personal information), read in conjunction with section 8(1)(l) (commission of an unlawful act or control of crime); and
- section 38(b) (personal privacy), read in conjunction with the exception in section 14(1)(f) and the presumption in section 14(3)(b).

[4] The police's decision letter also stated that some information in the officers' notes was being withheld because it was not responsive to the appellant's access request.

[5] The appellant appealed the police's decision to the Information and Privacy Commissioner of Ontario (IPC). The appeal was assigned to a mediator, who attempted to resolve the issues in dispute between the parties.

[6] The mediator contacted two individuals identified in the records to determine if they would consent to the disclosure of their personal information to the appellant. Both of these individuals informed the mediator that they did not consent to such disclosure.

[7] The appellant advised the mediator that other records should exist that are responsive to her access request, including the memorandum book notes of a specific officer, a copy of the warrant that the police used to arrest her, and the "information" sworn by an officer that was used to obtain the arrest warrant from the court.

[8] In response, the police issued a supplementary decision letter to the appellant that stated that they were unable to locate any memorandum book notes for the specific officer named by the appellant. However, they provided the appellant with a copy of the arrest warrant and a "supplementary report" that relates to the warrant. They denied access to some information in these records under the discretionary exemption in section 38(b), read in conjunction with sections 14(1)(f) and 14(3)(b) of the *Act*.

[9] With respect to the appellant's request for the "information" sworn by an officer, the police's supplementary decision letter stated:

> Please be advised that the 'information' is completed on Court form YC 0924, 2008/03; and records such as this are considered to be under the care and/or control of the Courts. For details on how to obtain a copy of the 'Information' related to the enclosed arrest warrant in the first instance, please contact the Courtroom Clerk – Criminal, Old City Hall, 60 Queen St. West, Toronto, ON, M5H 2M4, or by telephone at (416) 327-6171. (Please note, the related 'Information' has a corresponding number of [specific number]).

[10] The appellant advised the mediator that she contacted the court office, but was unable to obtain the "information." The mediator's notes state that she also contacted the court office and was advised that although an "information" should generally be in the applicable court file, the one sought by the appellant was not.

[11] At the conclusion of mediation, the appellant advised the mediator that she disputes the police's position that the "information" that was used to obtain the warrant for her arrest is not in their custody or under their control for the purposes of section 4(1) of the *Act*, and that she is seeking access to pages 5 to 7 of the officer's notes, which the police have withheld in full under the personal privacy exemption in section 38(b) of the *Act*.

[12] This appeal could not be fully resolved during mediation, and it was moved to adjudication for an inquiry. I sought representations from both the police and the appellant on the remaining issues, but only received representations from the police.

RECORDS:

[13] The records at issue in this appeal are: (1) the "information" sworn by an officer that was used to obtain the warrant for the appellant's arrest, and (2) pages 5 to 7 of a police officer's notes. The police did not provide the IPC with a copy of the "information" but did provide a copy of the officer's notes.

ISSUES:

A. Is the "information" that was sworn by an officer in the custody or under the control of the police for the purposes of section 4(1)?

B. Do the officer's notes contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

C. Does the discretionary exemption at section 38(b) apply to the information in the officer's notes?

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

DISCUSSION:

CUSTODY OR CONTROL

A. Is the "information" that was sworn by an officer in the custody or under the control of the police for the purposes of section 4(1)?

[14] The police submit that the "information" that was sworn by an officer to obtain a warrant for the appellant's arrest is a "court document" and is not in the police's custody or under their control for the purposes of section 4(1) of the *Act*.

[15] Section 4(1) reads, in part:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless . . .

[16] Under section 4(1), the *Act* applies only to records that are in the custody or under the control of an institution. A record will be subject to the *Act* if it is in the custody or under the control of an institution; it need not be both.[1]

[1] Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

[17] A finding that a record is in the custody or under the control of an institution does not necessarily mean that a requester will be provided access to it.[2] A record within an institution's custody or control may be excluded from the application of the *Act* under one of the provisions in section 52, or may be subject to a mandatory or discretionary exemption (found at sections 6 through 15 and section 38).

[18] The courts and the IPC have applied a broad and liberal approach to the custody or control question.[3]

[19] Based on the above approach, the IPC has developed a list of factors to consider in determining whether or not a record is in the custody or control of an institution, as follows.[4] The list is not intended to be exhaustive. Some of the listed factors may not apply in a specific case, while other unlisted factors may apply.

- Was the record created by an officer or employee of the institution?[5]
- What use did the creator intend to make of the record?[6]
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?[7]
- Is the activity in question a "core", "central" or "basic" function of the institution?[8]
- Does the content of the record relate to the institution's mandate and functions?[9]
- Does the institution have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?[10]

---

[2] Order PO-2836.
[3] *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072; *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.) and Order MO-1251.
[4] Orders 120, MO-1251, PO-2306 and PO-2683.
[5] Order 120.
[6] Orders 120 and P-239.
[7] Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above.
[8] Order P-912.
[9] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above; *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.) and Orders 120 and P-239.
[10] Orders 120 and P-239.

- If the institution does have possession of the record, is it more than "bare possession"?[11]

- If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?[12]

- Does the institution have a right to possession of the record?[13]

- Does the institution have the authority to regulate the record's content, use and disposal?[14]

- Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record?[15]

- To what extent has the institution relied upon the record?[16]

- How closely is the record integrated with other records held by the institution?[17]

- What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances?[18]

[20] In addition, the *Act* only applies to those entities that are defined as an "institution" in section 2(1). It is well established in IPC jurisprudence that the courts do not fall within the definition of an "institution." In Order P-994, Adjudicator Laurel Cropley stated:

> In my view, the discussions surrounding the evolution of the [*Freedom of Information and Protection of Privacy Act (FIPPA)*] clearly contemplate that the courts and the judiciary (that is, the judicial branch of government) are to be set apart from other types of institutions and from the other branches of government generally. The unique function the courts fulfil within our society is distinct from the usual perception of

---

[11] Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.
[12] Orders 120 and P-239.
[13] Orders 120 and P-239.
[14] Orders 120 and P-239.
[15] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.
[16] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above and Orders 120 and P-239.
[17] Orders 120 and P-239.
[18] Order MO-1251.

> "government". Accordingly, I find that the courts are not part of any Ministry [of the Attorney General] and are not included in paragraph (a) of the definition of "institution".

[21] In their supplementary decision letter, the police indicated that an "information" sworn by an officer to obtain an arrest warrant "is completed on Court form YC 0924, 2008/03." The police did not provide the IPC with a copy of this form, but I find that it is a standard form which an officer uses to swear an "information" under oath to obtain a warrant from a judge or justice of the peace for the arrest of an individual.

[22] The police submit that the specific "information" sought by the appellant is not in their custody or under their control for the purposes of section 4(1) of the *Act* for the following reasons:

> . . . [T]he "Information" (court document) [was] sworn to by the Informant (PC Sutherland #8839) on September 14, 2009, in order to obtain a Court issued warrant (warrant of arrest in this instance).
>
> It is the contention of this institution, along with the Courts, that this "Information", once signed by a Justice of the Peace (or Judge) becomes a court document in effect, which allows for the police to act only upon the authority of the Court as outlined.
>
> During mediation, the analyst informed the mediator of the process in which the appellant could obtain a copy of the related "Information" by contacting the respective Court. It was also indicated that the "Information" is a *court document* (court form), under the care and control of the Court; in that, this institution has no authority to render decisions on the release of this particular record.
>
> The mediator was further informed that the appellant would have been given a copy of the "Information" at the conclusion of the court proceedings; and if she was not so provided, she could contact the Crown's office and obtain the disclosure.
>
> [emphasis in original]

[23] In determining the issue of whether the "information" is in the custody or under the control of the police, I draw a distinction between the "information" in the court file and a copy of the "information," if it exists, in the police's own record holdings. For the reasons that follow, I find that if a copy of this record is found in the police's own record holdings, this copy is in their custody or under their control for the purposes of section 4(1) of the *Act*.

[24] First, almost the entire contents of this record are created and drafted by a police officer, who is employed by an institution under the *Act*. In particular, the officer lays out the grounds for seeking a warrant for an individual's arrest in the "information," which is also sworn under oath. Second, the contents of this record directly relate to the police's mandate and functions, which include investigating crime and enforcing the law.

[25] In their representations, the police do not specify whether they retained a copy of the "information" in their own record holdings, but they cite Order P-239, in which former Assistant Commissioner Tom Wright found that "bare possession does not amount to custody for the purposes of the *Act*." In my view, retaining a copy of an "information" in the police's own record holdings would not constitute "bare possession" of such a record, particularly when its contents are drafted by a police officer and directly relate to the police's mandate and functions.

[26] The police also rely upon Order P-994 and quote passages from that decision, including the following one, in which Adjudicator Cropley stated:

> The request was for a copy of an "information". This document is a written complaint which, once sworn before a Justice of the Peace, commences the criminal proceedings. As such, it may be defined as an "originating document" to the proceedings. In my view, on a plain understanding of court proceedings, an "information" is a type of document that would clearly fall within the scope of documents which are directly related to a court action, and, accordingly, qualifies as a record which would be contained in a court file.

[27] The police further state that, "when rendering our decision to deny the appellant access to the 'information', this institution took the same position of Ms. Cropley in that, the "information" is a record contained in a court file, ergo, the records is under the custody and control of the Courts."

[28] Although the police are relying on Adjudicator Cropley's decision in Order P-994 to support their position that an "information" is not in their custody or under their control, they fail to address a key part of that decision that addresses whether a copy of a record that exists independently of a court file is in an institution's custody or under its control.

[29] In Order P-994, the appellant had submitted an access request under *FIPPA* to the Ministry of the Attorney General (the ministry) for a copy of the "information" regarding an assault charge that the appellant initiated against a dentist. In its representations to Adjudicator Cropley, the ministry indicated that no criminal process was commenced and there was, in fact, no "information." Instead, the record at issue

was a document in the court file that confirmed that the appellant attended at court to swear an "information" before a justice of the peace.

[30] In her decision, Adjudicator Cropley made the following findings:

> I have carefully considered the Ministry's representations, and I find that although the Ministry is in "possession" of records relating to a court action in a court file, its limited ability to use, maintain, care for, dispose of and disseminate them does not amount to "custody" for the purposes of the *Act*. Nor do I find, in applying the factors set out in Order 120 to the evidence before me, that there are indicia of "control" over these records by the Ministry.
>
> For these reasons, I find that the Ministry does not have custody or control over records relating to a court action in a court file within the meaning of section 10(1) of the *Act* and, accordingly, to the extent that such records are located in a "court file", they cannot be subject to an access request under the *Act*.
>
> *I am not satisfied, however, that this conclusion extends to copies of such records which exist independently of the "court file". Accordingly, to the extent that copies of these records also exist independently of the "court file", they would fall within the custody and/or control of the Ministry and, therefore, would be subject to the Act.*
>
> [emphasis added]

[31] I agree with Adjudicator Cropley's analysis but would also emphasize that determining whether copies of records that also exist independently of the "court file" are in the custody or under the control of an institution must be done on a case-by-case basis.

[32] As noted above, almost the entire contents of an "information" are drafted by a police officer and directly relate to the police's mandate and functions, which include investigating crime and enforcing the law. In the circumstances of this appeal, I find that the "information" that is kept in a court file is not in the custody or under the control of the police. However, I find that if the police retained a copy of this "information" in their own record holdings, this record is in their custody or under their control for the purposes of section 4(1) and is subject to the *Act*. This would include a copy of the final version signed by a judge or justice of the peace that the police may have retained, not simply the draft unsigned version.

[33] I will, therefore, order the police to search their record holdings for a copy of the "information" and to issue a decision letter to the appellant.

PERSONAL PRIVACY

B. Do the officer's notes contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[34] The police have withheld pages 5 to 7 of a police officer's notes under the personal privacy exemption in section 38(b) of the *Act*. Section 38(b) only applies to records that contain "personal information." Consequently, it is necessary to determine whether the officers' notes 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,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and

> (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[35] 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.[19]

[36] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[20]

[37] The police submit that the records clearly contain the personal information of identifiable individuals "as they pertain to the investigation," and that it is reasonable to expect that they will be identified if the information is disclosed.

[38] Pages 5 to 7 of the officer's notes contain the statements of two individuals whom the officer interviewed as part of the investigation into allegations that the appellant was engaging in criminal harassment. The information relating to these two individuals includes their names, ages, addresses, telephone numbers and other information. I find that all of this information qualifies as their "personal information," because it falls within paragraphs (a), (d) and (h) of the definition of this term in section 2(1).

[39] In addition, the statements of the two individuals interviewed by the officer include the appellant's name and their views and opinions about her. Consequently, I find that this information qualifies as the appellant's "personal information" because it falls within paragraphs (g) and (h) of the definition of this term in section 2(1).

[40] I will now determine whether this withheld personal information qualifies for exemption under section 38(b) of the *Act*.

C. Does the discretionary exemption at section 38(b) apply to the information in the officer's notes?

[41] 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.

---

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

[42] 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.

[43] Section 38(b) is a discretionary exemption. Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

[44] Sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold under section 38(b) is met.

[45] If the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). I find that none of these exceptions apply to the personal information in the records.

[46] In determining whether the personal information in the records is exempt under section 38(b), I must also consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties in determining whether the disclosure would constitute an unjustified invasion of personal privacy.[21]

[47] Section 14(2) lists various factors that may be relevant in determining whether disclosure of the personal information of these other individuals to the appellant would be an unjustified invasion of their personal privacy. Some of these factors weigh in favour of disclosure, while others weigh in favour of privacy protection. Neither of the parties has cited any of the section 14(2) factors in their representations. In the absence of such evidence, I find that none of these factors apply to the personal information in the records.

[48] Section 14(3) lists circumstances in which the disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy. If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the personal information is presumed to be an unjustified invasion of personal privacy. The police submit that the presumption in section 14(3)(b) applies to the personal information in the records. This provision states:

---

[21] Order MO-2954.

> 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;

[49] 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.[22] The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.[23]

[50] Pages 5 to 7 of the officer's notes relate to a police investigation into allegations that the appellant was engaging in criminal harassment. I agree with the police that the personal information that appears in these records was compiled and is identifiable as part of an investigation into possible violations of the *Criminal Code* by the appellant. Consequently, I find that the personal information clearly falls within section 14(3)(b) and its disclosure to the appellant is presumed to constitute an unjustified invasion of the personal privacy of the two individuals interviewed by the police.

[51] Section 14(4) lists circumstances in which the disclosure of personal information does not constitute an unjustified invasion of personal privacy, despite section 14(3). I find that none of the circumstances listed in section 14(4) applies to the personal information in the records.

[52] In summary, I have found that disclosing the personal information in the officer's notes is presumed to constitute an unjustified invasion of personal privacy under section 14(3)(b). In addition, the parties have not provided any evidence to show that any of the factors in section 14(2), including those favouring disclosure, apply to this personal information. In these circumstances, I conclude that the balance clearly weighs in favour of the other individuals' privacy rights rather than the appellant's access rights.

[53] In short, I find that disclosing the personal information in the officer's notes to the appellant would constitute an unjustified invasion of the personal privacy of the two individuals interviewed by the police, and this personal information is therefore exempt under section 38(b).

---

[22] Orders P-242 and MO-2235.
[23] Orders MO-2213, PO-1849 and PO-2608.

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

[54] The section 38(b) exemption 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 IPC may determine whether the institution failed to do so.

[55] In this order, I have found that the personal information in pages 5 to 7 of an officer's notes that was withheld by the police qualifies for exemption under section 38(b). I will now determine whether the police exercised their discretion in withholding this personal information under section 38(b), and, if so, whether I should uphold their exercise of discretion.

[56] The IPC may find that an 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; or
- it fails to take into account relevant considerations.

[57] The police submit that they exercised their discretion in deciding whether to apply the section 38(b) exemption to the personal information in the officer's notes, and did so in a proper manner. They state:

> The mandate and indeed, the spirit of the *Act* is the balance of privacy protection with the public's right to information held by institutions. This institution scrupulously weighs these factors in <u>each and every</u> access request. As the majority of our records contain sensitive information, we must balance the access interests of the requester with the privacy rights of other individuals.
>
> . . . [T]he decision of this institution has indeed adhered to the mandate and spirit of the *Act*. As such, should the records at issue be released, the result would contravene the *Act*.
>
> [emphasis in original]

[58] In my view, the police exercised their discretion and did so properly in withholding the personal information in the officer's notes under sections 38(b). There is no evidence before me to suggest that they exercised their discretion in bad faith or for an improper purpose. In addition, I find that they took relevant factors into account

and did not consider irrelevant ones. Consequently, I uphold their exercise of discretion under section 38(b).

ORDER:

1. I order the police to search their own record holdings for a copy of the "information" that was sworn by an officer to obtain a warrant for the appellant's arrest. If they locate a copy, they must issue a decision letter to the appellant with respect to this record, treating the date of this order as the date of the request. If they cannot locate a copy, the letter must explain in detail where they searched for this record and why a copy could not be located.

2. I uphold the police's decision to withhold pages 5 to 7 of an officer's notes in full under section 38(b) of the *Act*.

Original Signed By: July 14, 2014
Colin Bhattacharjee
Adjudicator