

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3076

Appeal MA13-479

Toronto Police Services Board

July 25, 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 records relating to a police investigation into allegations that he had been the victim of an assault in a nightclub. The police disclosed a number of records to him, in whole or in part, but denied access to portions of an occurrence report, an ICAD summary and police officer notes under the discretionary exemption in section 38(b) (personal privacy) of the *Act*.

In this order, the adjudicator finds that disclosing the personal information relating to other identifiable individuals in the records to the appellant would constitute an unjustified invasion of the personal privacy of the other individuals whose personal information appears in the records. Accordingly, he upholds the police's decision to withhold that information under section 38(b).

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

Orders and Investigation Reports Considered: Order MO-2954.

OVERVIEW:

[1] The Toronto Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a specified police report and various investigation records relating to an incident in which

the appellant was seriously injured in an assault by staff at an after-hours nightclub. Specifically, the request was for access to the following information:

- Copy of police report [specified number] dated 2009 July 5th
- Copy of photos taken by police as well as copies of police memobook "notes" while investigating "club bouncers" and health professionals.
- Information related to the business owner "club" at the time of the assault. Names of bouncers.
- Any and each document, report, witness lists or any other piece of information contained in the file and/or pertaining the assault. "whole file"

[2] The police identified an occurrence report, an ICAD¹ report and police officer notebook entries as responsive to the request and issued a decision to the requester granting partial access to these records. The police denied access to some information in the records pursuant to the discretionary exemptions in section 38(a), taken in conjunction with section 8(1)(l) (facilitate commission of unlawful act) and section 38(b) (invasion of privacy) of the *Act*. The police also advised that some information was denied as it was not responsive to the request.

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

[4] During mediation, the appellant advised the mediator that he was not interested in the police codes which were severed from the records. As a result, that information and sections 8(1)(l) and 38(a) of the *Act* are no longer at issue in this appeal. The appellant also confirmed that he is not interested in the name or contact information for one identified individual or the information severed as non-responsive in the officer notebook entries only. As a result, pages 1, 3, 4, 5, 11, 15, 16, 18 (in part), 19, 26 (in part), 31, 36, 37 (in part) and 38 are no longer at issue in this appeal. The appellant confirmed that he seeks access to the full ICAD report and the remaining information in the occurrence report and the officer notebook entries.

[5] As no further mediation was possible, the appeal was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. I sought and received representations from the police and the appellant. Representations were shared in accordance with section 7 of the *IPC Code of Procedure and Practice Direction 7*.

¹ Integraph Computer Aided Dispatch

[6] In this order, I uphold the police's decision to deny access to the undisclosed portions of the responsive records.

RECORDS:

[7] The records remaining at issue consist of the undisclosed portions of an occurrence report, an ICAD report and officer notebook entries.

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the discretionary exemption at section 38(b) apply to the undisclosed personal information at issue?
- C. Did the police properly exercise their discretion under section 38(b)?

DISCUSSION:

Issue A: Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[8] 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 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;

[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 [Order 11].

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

(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.

[11] 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.²

² Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

[12] 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.³

[13] I have reviewed the contents of the records and find that they contain the appellant's personal information, specifically his name and other information about the events that took place at the time of the assault.

[14] The occurrence report excerpt that comprises page 2 of the records contains the personal information of the appellant, another individual who accompanied the appellant on the night of the assault and the name, address, telephone number and date of birth of one of the nightclub employees. I find that this document contains the personal information of both the appellant and the employee, in accordance with paragraphs (d) and (h) of the definition of that term in section 2(1).

[15] The majority of the information in the ICAD printout described as pages 6 to 9 has already been disclosed to the appellant as it contains his personal information. The information not disclosed relates to the individual whose personal information is not being sought, as well as coding information that falls within the ambit of section 8(1)(l), which was removed from the scope of the appeal by the appellant.

[16] The undisclosed portions of the notebook entries at pages 13-14, 17-18, 32-35 and 37 contain the personal information of the appellant, the individual whose information is not being sought and several other individuals who were identified as employees or patrons of the nightclub, including their names, physical descriptions, racial origin, dates of birth, address, telephone number and the license plate numbers of their vehicles. I find that this information qualifies as the personal information of these individuals under paragraphs (a), (c), (d), (e) and (h) of the definition of personal information in section 2(1).

Issue B: Does the discretionary exemption at section 38(b) apply to the undisclosed personal information at issue?

[17] 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. 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.

³ Orders P-1409, R-980015, PO-2225 and MO-2344.

[18] 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.

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

[20] 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.⁴

[21] 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. The appellant does not refer directly to any of these considerations, though he alludes in his representations to the applicability of the factor in section 14(2)(d), which applies when the personal information is relevant to a fair determination of rights affecting the requester. Section 14(2)(d) states:

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,

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

[22] For section 14(2)(d) to apply, the 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

⁴ Order MO-2954.

- (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.⁵

[23] The appellant has provided me with evidence that he is pursuing a civil action against the individuals who assaulted him in the Superior Court of Justice and that the identities of the persons interviewed by the police, as well as any other personal information relating to them, will assist him in pursuing this action. I am satisfied that the appellant has satisfied the requirements of section 14(2)(d) and has met his onus of proof in establishing the relevance of this consideration, which favours the disclosure of the personal information at issue in the records.

[24] 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:

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;

[25] 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

[26] The remaining undisclosed information in the records relates to a police investigation into the appellant's allegations that he had been assaulted at a nightclub. 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

⁵ 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.).

⁶ Orders P-242 and MO-2235.

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

Criminal Code by the individuals who assaulted 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 individuals interviewed by the police whose personal information appears in the records.

[27] 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.

[28] In summary, I have found that disclosing the personal information in the records is presumed to constitute an unjustified invasion of personal privacy under section 14(3)(b). In addition, I find that the appellant has established the application of the factor favouring disclosure in section 14(2)(d) to the personal information.

[29] Balancing the presumption in section 14(3)(b) which favours privacy protection against the factor in section 14(2)(d), I find that the balance clearly weighs in favour of the other individuals' privacy rights rather than the appellant's access rights. In my view, in the circumstances of this appeal, the application of the presumption in section 14(3)(b) operates to overcome the operation of the factor in section 14(2)(d).

[30] By way of summary, I find that disclosing the personal information in the records to the appellant would constitute an unjustified invasion of the personal privacy of the individuals interviewed by the police, and this personal information is, therefore, exempt under section 38(b).

D. Did police properly exercise their discretion under section 38(b)?

[31] 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.

[32] In this order, I have found that the personal information in the records 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.

[33] 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.

[34] 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 each and every 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.

[emphasis in original]

[35] In my view, the police exercised their discretion and did so properly in withholding the personal information in the records 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:

I uphold the police decision to deny access to the undisclosed portions of the records and dismiss the appeal.

Original Signed By:
Donald Hale
Adjudicator

July 25, 2014