

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3118

Appeal MA14-179

Toronto Police Services Board

October 30, 2014

Summary: The appellant filed a request for records relating to a complaint she made to the police about a named individual. The police granted the appellant partial access to the responsive records claiming that disclosure of the withheld information would constitute an unjustified invasion of another individual's personal privacy under section 38(b). This order finds that the withheld information is exempt under section 38(b) and dismisses the appeal.

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" and 14(3)(b).

OVERVIEW:

[1] A requester submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to a complaint she made to the Toronto Police Services Board (the police).

[2] The police granted the appellant partial access to the responsive records. The police claim that disclosure of the withheld portions of the records would constitute an unjustified invasion of another individual's personal privacy under the discretionary personal privacy exemption in section 38(b) taking into consideration the presumption at section 14(3)(b). The police also claim that small portions of the records qualify for exemption under the discretionary exemption in section 38(a) in conjunction with

section 8(1)(i) (facilitate the commission of an unlawful act or hamper the control of crime) of the *Act*.

[3] The requester (now the appellant) appealed the police's decision to this office and a mediator was assigned to the appeal.

[4] At the end of mediation, the appellant confirmed that she no longer seeks access to the small portions of the records withheld under section 38(a) in conjunction with section 8(1)(i) of the *Act*. However, she continues to seek access to the portions of the records withheld under the personal privacy provisions of the *Act*.

[5] As mediation did not resolve the entire appeal, the file was moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. I began my inquiry by inviting the police's written representations. The police submitted representations in response and disclosed additional information contained in the records to the appellant. The appellant did not submit representations in response to those of the police but advised that she continues to seek access to the withheld information.

[6] In this order, I find that the withheld information qualifies for exemption under section 38(b).

RECORDS:

[7] The records at issue consist of the withheld information contained in the handwritten notes of three police officers (pages 4, 5, 10-12, 14-19) and a two-page general occurrence report (pages 22 and 23).

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1)?
- B. Would disclosure of the "personal information" at issue constitute an unjustified invasion of personal privacy under section 38(b)?
- C. Did the police properly exercise its discretion under section 38(b)?

DISCUSSION:

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

[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.

[9] 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.¹

[10] 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.²

[11] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.³

[12] The police’s representations state:

The records at issue, were created in connection with a police investigation into a complaint regarding an alleged assault. The investigating officers attended the scene and interviewed individuals and recorded these interactions in their memorandum books and in turn prepared a related police report. The records contain personal information of an identified individual other than the appellant. The records contain the names, addresses and other identifying information about third parties and information they provided.

[13] The appellant requested that this office not contact any affected party to determine if they were prepared to consent to the release of their information.

[14] Having reviewed the police’s representations and the records, I find that the withheld information contains the personal information of the appellant and other identifiable individuals. Most of the withheld information relates to the individual the appellant alleged assaulted her. The records contain information about this individual’s race, ethnic origin, religion, age, sex, martial or family status, address, telephone and

¹ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

² Orders P-1409, R-980015, PO-2225 and MO-2344.

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

name along with his or her views or opinions as defined in paragraphs (a), (d), (e), (g) and (h) of the definition of "personal information" in section 2(1).

[15] Also included in the records is information which another individual, a building supervisor, provided the police. The building supervisor is identified by name in the portions of the records disclosed to the appellant. However, other information the building supervisor provided the police was withheld. Accordingly, I must determine whether this information reveals something of a personal nature of the building supervisor. Following the analysis set forth in Order PO-2225, the first question I must ask is: "*In what context does the name of the individual appear?*" The second question I must ask is: "*Is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about this individual?*"

[16] With respect to the first question, I am satisfied that the information contained in the records which relates to the building supervisor appears in a professional, official or business context. With respect to the second question, I have carefully reviewed the records and am satisfied that the withheld portions relating to the building supervisor contains information about his age, address and telephone number [paragraphs (a) and (d) of the definition of "personal information" in section 2(1)] along with his name where it appears with other personal information relating to him [paragraph (h)]. Accordingly, though this information appears to be associated with the building supervisor in a professional capacity, I am satisfied that the withheld information reveals something of a personal nature about him.

[17] In addition, some of the withheld portions of the records also contain the appellant's personal information. Specifically, the records include, other individuals' views and opinions about the appellant that falls within the ambit of paragraph (g) of the definition of "personal information" in section 2(1) along with her name where it appears with other personal information relating to her [paragraph (h)].

[18] Having regard to the above, I will go on to determine whether the information I found constitutes "personal information" qualifies for exemption under section 38(b) of the *Act*.

B. Would disclosure of the "personal information" at issue constitute an unjustified invasion of personal privacy under section 38(b)?

[19] Section 38(b) of the *Act* is the discretionary personal privacy exemption under Part II of the *Act*. Section 38(b) provides:

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.

[20] 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.⁴

[21] In other words, where a record contains personal information of both the requester and another individual, and the 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.

[22] In the circumstances of this appeal, it must be determined whether disclosing the personal information of the affected parties would constitute an unjustified invasion of their personal privacy under section 38(b).

[23] 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. The parties have not claimed that any of the exclusions in section 14(4) apply and I am satisfied that none apply.

[24] 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). Given that the affected parties have not consented to the release of their information, the only exception that could apply is section 14(1)(f), which states:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except if the disclosure does not constitute an unjustified invasion of personal privacy.

[25] If the information at issue falls within the scope of section 38(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her personal information against the other individual's right to protection of their privacy.

⁴ Order M-352.

Section 14(3)(b)

[26] The police submit that the presumption in section 14(3)(b) applies to the personal information that remains at issue. Section 14(3)(b) states:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal information 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.

[27] The police submit that the records “initially were created and compiled for the purpose of an investigating a complaint regarding an alleged assault”. The police advise that once the complaint was investigated, a determination was made that no charges would be laid.

[28] I have reviewed the records and it is clear from the circumstances that the information at issue was compiled and is identifiable as part of the police’s investigation into a possible violation of law, namely the *Criminal Code of Canada*. Accordingly, I find that the records were compiled and are identifiable as part of an investigation into a possible violation of law and falls within the presumption in section 14(3)(b) of the *Act*.

[29] Given the application of the presumption in section 14(3)(b) and the fact that no factors in favour of disclosure were claimed or otherwise established, I am satisfied that the disclosure of the withheld personal information would constitute an unjustified invasion of other identifiable individuals’ personal privacy. While I recognize that some of the withheld information also contains the appellant’s personal information, I find that her personal information is inextricably linked with the personal information of other identifiable individuals and cannot be disclosed without resulting in an unjustified invasion of their personal privacy. I also find that the absurd result principle has no application in the circumstances of this appeal.⁵ In making this decision, I considered and accept the police’s evidence that although the appellant was present when they attended the premises to investigate, she was not privy to any subsequent conversations between the officers and any of the other parties.

[30] Having regard to the above, I find that the information at issue is exempt from disclosure under section 38(b) of the *Act*, subject to my assessment of whether the police exercised their discretion properly.

⁵ Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may not be exempt under section 38(b), because to withhold the information would be absurd and inconsistent with the purpose of the exemption (see Orders M-444 and MO-1323)

C. Did the police properly exercise its 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 Commissioner may determine whether the institution failed to do so.

[32] 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.

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

[34] The police submit that they properly exercised their discretion to withhold the personal information at issue. In support of their position, the police states that they took into consideration:

- that the information was supplied to investigating officers as a result of a law enforcement activity;
- that police investigations imply an element of trust in the manner information from victims, accused persons and witnesses are treated;
- that the information relating solely to the appellant was disclosed to her; and
- the nature and sensitivity of the withheld personal information.

[35] In my view, the police's evidence demonstrates that they properly exercised their discretion and in doing so took into account relevant considerations such as the sensitive nature of the withheld information. I am satisfied that the police did not exercise their discretion in bad faith or for an improper purpose, nor is there any evidence that they took into account irrelevant considerations.

[36] In making my decision, I note that the police considered that one of the purposes of the *Act* includes the principle that requesters should have a right to access their own information. However, in my view, the nature of the personal information at issue and the sensitivity of it outweigh this principle, particularly when I also consider

⁶ Order MO-1573.

⁷ Section 43(2).

the amount of information the police have already disclosed to the appellant as a result of this request and appeal.

[37] Having regard to the above, I find that the police properly exercised their discretion to withhold the information I found exempt under section 38(b).

ORDER:

I uphold the police's decision to deny the appellant access to the records at issue.

Original signed by: _____
Jennifer James
Adjudicator

_____ October 30, 2014