

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3127

Appeal MA12-554

Hamilton Police Services Board

November 26, 2014

Summary: The appellant submitted an access request to the Hamilton Police Services Board for four occurrence reports. The police provided him with partial access to these records. It denied access to some of the appellant's own and other individuals' personal information under the discretionary exemption in section 38(b) (personal privacy). In addition, it denied access to specific police codes under section 38(a), read in conjunction with sections 8(1)(e) and (l) (law enforcement). In this order, the adjudicator finds that the withheld personal information in the records is exempt under section 38(b), and the police codes are exempt under section 38(a), read in conjunction with section 8(1)(l). He upholds the police's access decision 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"), 14(2)(f), 14(3)(b), 8(1)(l), 38(a) and 38(b).

Orders and Investigation Reports Considered: Order M-757.

OVERVIEW:

[1] The appellant submitted an access request to the Hamilton Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for "copies of four separate occurrence reports that name me as undertaking criminal activity against [a named individual]."

[2] The police located two occurrence reports and provided the appellant with partial access to these records. It denied access to some information in these records under the discretionary exemption in section 38(b) (personal privacy), read in conjunction with the factor in section 14(2)(f) (highly sensitive) and the presumption in section 14(3)(b) (investigation into possible violation of law). In addition, it denied access to police codes under the discretionary exemption in section 38(a), read in conjunction with the exemptions in sections 8(1)(e) and (l) (law enforcement).

[3] The appellant appealed the police's decision to the Information and Privacy Commissioner of Ontario (IPC). During the mediation stage of the appeal process, the police located two additional occurrence reports and issued a supplementary decision letter to the appellant that denied access to these records, in full, under the same exemptions that they cited in their original decision letter.

[4] This appeal was not resolved during mediation and was moved to adjudication for an inquiry. I issued a Notice of Inquiry, setting out the facts and issues in this appeal, to both the police and the appellant. I received representations from both parties, although the appellant's representations do not, for the most part, address the issues in this appeal.

RECORDS:

[5] The four records at issue are set out in the following chart:

Record	Number of pages	Police's decision	Exemptions claimed
Occurrence report 12-535558	3	Withheld in part	s. 38(a), with ss. 8(1)(e) and (l) s. 38(b), with ss. 14(2)(f) and 14(3)(b)
Occurrence report 12-614374	5	Withheld in part	s. 38(a), with ss. 8(1)(e) and (l) s. 38(b), with ss. 14(2)(f) and 14(3)(b)
Occurrence report 12-542353	2	Withheld in full	s. 38(a), with ss. 8(1)(e) and (l) s. 38(b), with ss. 14(2)(f) and 14(3)(b)
Occurrence report 12-657546	2	Withheld in full	s. 38(a), with ss. 8(1)(e) and (l) s. 38(b), with ss. 14(2)(f) and 14(3)(b)

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 information at issue?
- C. Does the discretionary exemption at section 38(a) in conjunction with the sections 8(1)(e) and (l) exemptions apply to the information at issue?
- D. Did the police exercise their discretion under sections 38(a) and (b)? If so, should the IPC uphold their exercise of discretion?

DISCUSSION:

PERSONAL INFORMATION

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

[6] The discretionary exemptions in sections 38(a) and (b) of the *Act* apply to records that contain "personal information." Consequently, it is necessary to determine whether the occurrence reports 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;

[7] 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.¹

[8] The police submit that the four occurrence reports contain the personal information of both the appellant and other individuals, and they cite paragraphs (a), (b), (d), (e) and (g) of the definition of "personal information" in section 2(1). The appellant's representations do not address whether the records contain personal information.

[9] Most of the information in the records relates to the appellant and other individuals, particularly the individual who complained to the police about him. The information relating to these 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), (c), (d) (e), (g) and (h) of the definition of that term in section 2(1). The police have disclosed some of the appellant's own personal information to him from the occurrence reports, but have also withheld some of his own and other individuals' personal information under section 38(b).

¹ Order 11.

PERSONAL PRIVACY

B. Does the discretionary exemption at section 38(b) apply to the information at issue?

[10] 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.

[11] 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.

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

[13] 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.

[14] 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.²

[15] Section 14(2) lists various factors that may be relevant in determining whether disclosing the withheld personal information in the occurrence reports to the appellant would be an unjustified invasion of other individuals' personal privacy. The factors in paragraphs (a), (b), (c) and (d) of section 14(2) generally weigh in favour of disclosure, while those in paragraphs (e), (f), (g), (h) and (i) weigh in favour of privacy protection.³

² Order MO-2954.

³ Order PO-2265.

[16] The police claim that the factor in section 14(2)(f), which weighs in favour of privacy protection, applies to the personal information of the individual who complained to the police about the appellant. This provision 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 highly sensitive;

[17] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.⁴

[18] Based on my review of the occurrence reports, it is evident that there is a highly adversarial relationship between the complainant and the appellant. I am satisfied that it is reasonable to expect that disclosing the complainant's personal information to the appellant would cause her significant personal distress. Consequently, I find that her personal information is highly sensitive and the section 14(2)(f) factor is applicable.

[19] As noted above, the police have disclosed some of the appellant's own personal information to him from the occurrence reports, but have also withheld some of his own and other individuals' personal information under section 38(b).

[20] Section 14(3) lists circumstances in which disclosing personal information is presumed to constitute an unjustified invasion of personal privacy. If any of paragraphs (a) to (h) of section 14(3) apply, disclosing 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;

[21] 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

⁴ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

into a possible violation of law.⁵ The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.⁶

[22] The four occurrence reports relate to police investigations that resulted from complaints that another individual made about the appellant. 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 of both the appellant and other individuals that has been withheld by the police 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 other individuals, particularly the individual who complained to the police about him.

[23] 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.

[24] In summary, I have found the factor in section 14(2)(f), which favours privacy protection, applies to the personal information of the individual who complained to the police about him. In addition, I have found that disclosing the withheld personal information of both the appellant and other individuals to him is presumed to constitute an unjustified invasion of the other individuals' personal privacy under section 14(3)(b). 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.

[25] In short, I find that disclosing the personal information in the occurrence reports to the appellant would constitute an unjustified invasion of other individuals' personal privacy, and this personal information is, therefore, exempt under section 38(b).

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/LAW ENFORCEMENT

C. Does the discretionary exemption at section 38(a) in conjunction with the sections 8(1)(e) and (l) exemptions apply to the information at issue?

[26] Section 38(a) reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

⁵ Orders P-242 and MO-2235.

⁶ Orders MO-2213, PO-1849 and PO-2608.

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.

[27] Section 38(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.⁷

[28] Where access is denied under section 38(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

[29] In their decision letter to the appellant, the police stated that they were denying access to codes, such as patrol zones codes, under section 38(a), read in conjunction with sections 8(1)(e) and (l). These provisions read:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,

(e) endanger the life or physical safety of a law enforcement officer or any other person;

. . . .

(l) facilitate the commission of an unlawful act or hamper the control of crime.

[30] It appears that the police have severed a number of codes in the occurrence reports, including patrol zones codes. Patrol zone codes are codes used to identify the particular areas of the city in which an officer is patrolling.

[31] The police submit that disclosing such codes to the public would limit their effectiveness and allow individuals intent on engaging in criminal activity to "counter the actions of the police in response to a variety of emergency situations." They further submit that disclosure could reasonably be expected to result in harm to either police officers or members of the public involved in a police investigation.

[32] Previous IPC orders have consistently found that the disclosure of such information could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime under section 8(1)(l).⁸ For example, in Order M-757, Inquiry Officer Anita Fineberg stated:

⁷ Order M-352.

⁸ See, for example, Orders MO-2175, M-757 and PO-2970.

The purpose of the exemption in section 8(1)(l) is to provide the police with the discretion to preclude access to records in circumstances where disclosure could reasonably be expected to result in the harm set out in this section. I am satisfied that, in this case, the police have provided sufficient evidence to establish that disclosure of the "ten" codes, patrol zones and patrol car identification numbers, and the rules and regulations governing the frequency that an officer is to check the cells where prisoners are lodged could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. Accordingly, I find that the requirements for exemption under section 8(1)(l) have been met with respect to this information.

[33] In the circumstances of this particular appeal, I am satisfied that disclosing the codes in the occurrence reports, including patrol zone codes, could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. Regardless of the appellant's intentions in seeking such information, disclosing these codes to him would amount to disclosure to the world. In short, I find that this information qualifies for exemption under section 8(1)(l). Given that I have found that such information qualifies for exemption under section 38(a), read in conjunction with section 8(1)(l), it is not necessary to assess whether it is also exempt under section 8(1)(e).

EXERCISE OF DISCRETION

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

[34] The sections 38(a) and (b) exemptions are discretionary, and permit 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.

[35] In this order, I have found that the information in the occurrence reports that was withheld by the police qualifies for exemption under sections 38(a) and (b). Consequently, I will assess whether the police exercised their discretion properly in applying these exemptions to this withheld information.

[36] 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.

[37] The police submit that they exercised their discretion in deciding whether to apply the sections 38(a) and (b) exemptions to the withheld information in the records, and did so in a proper manner. With respect to section 38(b), they submit that because the occurrence reports contain mixed personal information, they balanced the appellant's access rights with the privacy rights of other individuals.

[38] In his brief representations, the appellant states that he submitted his access request to the police because an individual made "false complaints" about him and disclosing the records would reveal this. In essence, he is arguing that despite the application of sections 38(a) and (b) to some of the information in the records, the police should have exercised their discretion to disclose this information, rather than withholding it.

[39] In my view, the police exercised their discretion properly in withholding specific information in the occurrence reports under sections 38(a) and (b). They decided to disclose some of the appellant's own personal information to him, while exercising their discretion to withhold other information that falls within the purview of these exemptions. I am not persuaded that they failed to take relevant factors into account or that they considered irrelevant factors. Consequently, I uphold the police's exercise of discretion under sections 38(a) and (b) with respect to the information that I have found qualifies for exemption under those provisions.

ORDER:

I uphold the police's access decisions and dismiss the appeal.

Original signed by: _____
Colin Bhattacharjee
Adjudicator

_____ November 26, 2014