

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3119

Appeal MA13-301

Toronto Police Services Board

October 31, 2014

Summary: The appellant sought access to an occurrence report related to an incident involving her and other individuals. The police located the responsive occurrence report and issued a decision granting the appellant partial access to it. The police relied on the discretionary exemption in section 38(b) (invasion of privacy) with reference to the presumption in section 14(3)(b) to withhold portions of the occurrence report. The police's decision to deny access to portions of the record is partially upheld. Other parts of the withheld occurrence report are ordered disclosed under the absurd result principle.

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).

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 an occurrence report related to a domestic incident involving the requester, her stepdaughter and her estranged husband. The police located the responsive occurrence report and granted the requester partial access to it. The police relied on the discretionary exemptions in section 38(a) (discretion to refuse requester's own information), in conjunction with section 8(1)(l) (facilitate commission of unlawful act),

and section 38(b) (invasion of privacy) with reference to the presumption in section 14(3)(b) to deny access to the undisclosed portions of the record.

[2] The requester, now the appellant, appealed the decision of the police to this office. Mediation did not resolve the issues in the appeal. Accordingly, the appeal was transferred to the adjudication stage of the appeal process for an inquiry under the *Act*. I sought and received representations from the police and the appellant and shared these in accordance with section 7 of this office's *Code of Procedure and Practice Direction Number 7*. I also sought the representations of two individuals whose interests could be affected by disclosure of the records (the affected parties). The affected parties did not submit representations.

[3] In this order, I uphold the decision of the police that most of the withheld information is exempt under section 38(b). I find that some withheld information is not exempt under section 38(b) as it is within the appellant's knowledge and it would be absurd to withhold it from her.

RECORDS:

[4] The sole record at issue consists of the withheld portions of a nine page occurrence report.

ISSUES:

A. Does the record 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. Did the institution exercise its discretion under sections 38(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

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

[5] 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), 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,
...
- (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,
...
- (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;

[6] 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 To qualify as personal information, the information must be about the individual in a personal capacity and it must be reasonable to expect that an individual may be identified if the information is disclosed.²

[7] The police state that the occurrence report was created in response to a domestic incident at the appellant’s home. They explain that the report contains the personal information of several affected parties who are identifiable to the appellant. They submit that the affected parties’ personal information consists of their names, addresses, dates of birth and personal opinions, and it falls within paragraphs (a), (c), (d), (e), (g) and (h) of the definition of personal information in section 2(1) of the *Act*.

¹ Order 11.

² Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[8] The appellant does not address this issue in her representations, however, she identifies the specific personal information of her estranged husband that she seeks and that she assumes is contained in the report.

[9] The occurrence report at issue contains the names, telephone numbers, addresses, dates of birth, personal opinions, views about others, as well as other information of a personal nature of the appellant and various affected parties who would be identifiable if the information were disclosed. I find that this information qualifies as personal information of the appellant and a number of affected parties under paragraphs (a), (d), (e), (f), (g) and (h) of the definition of personal information in section 2(1) of the *Act*.

[10] Having found that the report contains the mixed personal information of the appellant and various affected parties, I will consider the appellant's right to access the report under section 38(b) of the *Act*.

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

[11] Section 38 of the *Act* provides a number of exemptions from individuals' general right of access under section 36(1) to their own personal information held by an institution. Section 38(b) gives the police the discretion to refuse to disclose the appellant's personal information to her in this appeal if the record contains her personal information in addition to that of the affected parties and disclosure of the information would constitute an "unjustified invasion" of the affected parties' personal privacy. 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

[12] Even if the information falls within the scope of section 38(b), the police may exercise their discretion to disclose the information to the appellant after weighing the appellant's right of access to her own personal information against the affected parties' right to protection of their privacy. Section 14 provides guidance in determining whether the unjustified invasion of personal privacy threshold is met. If the information fits within any of the paragraphs of sections 14(1) or 14(4), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b).

[13] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), this office will consider, and weigh, the factors and presumptions in sections 14(2) and 14(3) and balance the interests of the parties.³ If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 38(b). In this appeal, the police assert that the presumption in paragraph 14(3)(b) applies. This presumption 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;

[14] 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.⁴

Absurd Result

[15] 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.⁵ The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement⁶
- the requester was present when the information was provided to the institution⁷
- the information is clearly within the requester's knowledge⁸

[16] However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.⁹

³ Order MO-2954.

⁴ Orders P-242 and MO-2235.

⁵ Orders M-444 and MO-1323.

⁶ Orders M-444 and M-451.

⁷ Orders M-444 and P-1414.

⁸ Orders MO-1196, PO-1679 and MO-1755.

Representations

[17] The police submit that I must consider the nature of their work when assessing the need for protecting individuals' privacy interests. They state that the role of law enforcement institutions, in great part, is to record information relating to unlawful activities, crime prevention activities or activities involving members of the public who require assistance and intervention. They explain that the occurrence report at issue was created in response to a call from one of the affected parties asking for assistance in gaining entry to the appellant's home. The police refer me to a passage from Order MO-2985 in which Adjudicator Catherine Corban found that a report prepared by the police describing an incident involving a requester that included witness statements made to the police during the investigation into the incident fell under the ambit of the presumption in section 14(3)(b) and was exempt under section 38(b).

[18] The police also submit that I should not give effect to the absurd result principle in this appeal because the withheld information was not provided by the appellant, nor is it apparent that the appellant was present when the information was provided.

[19] In her representations, the appellant states that she seeks specific information about her estranged husband in the occurrence report so that she may use it for immigration and social services purposes. She states that she requires this information in order to challenge false information that her estranged husband provided to both the immigration and social services authorities.

Analysis and findings

[20] I agree with the position of the police that the presumption against disclosure in section 14(3)(b) applies in this appeal because the personal information in the occurrence report was compiled and is identifiable as part of an investigation into a possible violation of law. The occurrence report at issue was created by the police as part of their investigation into a possible violation of law which occurred during a domestic incident involving the appellant, her estranged husband and her stepdaughter.

[21] Because the appellant's personal information is contained in the occurrence report, I must consider and weigh any applicable factors in balancing the appellant's and the affected parties' interests. Although the appellant does not directly rely on it, she alludes to the factor in section 14(2)(d) in her representations when she submits that she needs to obtain access to her estranged husband's personal information in the occurrence report to provide it to immigration and social services authorities to establish his fraudulent motives and actions. The section 14(2)(d) factor favours disclosure in situations where the personal information at issue is relevant to a fair determination of

⁹ Orders M-757, MO-1323 and MO-1378.

rights affecting a requester. 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
- (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.¹⁰

[22] The appellant has not provided adequate evidence in her representations to satisfy me that the personal information belonging to her estranged husband in the report is relevant to a fair determination of her rights. She has not identified her legal right in question, nor has she explained why the personal information she seeks has some bearing on the determination of this right. She has simply provided her assumption of what is contained in the occurrence report. The appellant's assumption that such information is contained in the occurrence report and her further assumption that the information will be helpful to her are not adequate to meet the four-part test set out above. Accordingly, I find that the factor in section 14(2)(d) does not apply in this appeal.

[23] However, I find that the absurd result principle applies to some of the personal information at issue in this appeal. I disagree with the police's position that the absurd result principle does not apply to any of the withheld information. Based on my review of the report, the appellant provided some of the withheld information herself, she was present when other withheld information was provided to the police, and finally, much of the withheld information is clearly within her knowledge. I am limited by the confidentiality concerns in this appeal as to how extensively I can explain my reasoning. However, it is apparent from the records and from the other materials before me that the appellant knew much of the information contained in the occurrence report.

[24] The investigation pertained to an incident at the appellant's home where she was residing with her stepdaughter, who was a minor. At that time, the appellant was

¹⁰ 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.).

responsible for her stepdaughter's welfare. In the circumstances, I find that most of the information contained in the "History" section at page 1 of the occurrence report is within the appellant's knowledge. This section contains information about the formation and dissolution of the appellant's marriage, her living arrangements with her estranged husband, the care she provided to her stepdaughter, and communications with her stepdaughter's biological mother. I find that it would be absurd to withhold this information from the appellant as it either originated with her or is clearly within her knowledge.

[25] Similarly, I find that some information contained in the "Synopsis" portion of the occurrence report at page 2 about the appellant's estranged husband and his attendance at the appellant's house on the date of the investigation is within the appellant's knowledge. This section of the report also contains information about the dissolution of the appellant's marriage, her living arrangements with her estranged husband, the care she provided to her stepdaughter and her communications with her stepdaughter's biological mother. I find that it would also be absurd to withhold this information from the appellant for the same reasons described above.

[26] Finally, page 6 of the report contains information relating to the appellant's joint attendance at a police station with her estranged husband. As the appellant was present when this information was provided to the police, I find it would be absurd to withhold it from her.

[27] Applying the absurd result principle, I find that information contained on pages 1, 2 and 6 is not exempt under section 38(b) and I will order it disclosed below.

[28] As for the remaining information withheld in the occurrence report that I have found falls within the ambit of the presumption against disclosure in section 14(3)(b), I find it is exempt under section 38(b) because its disclosure would result in an unjustified invasion of the personal privacy of individuals other than the appellant.

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

[29] 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.

[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 include:

- 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 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
- 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.

[32] The police submit that they exercised their discretion in good faith and took into account only relevant considerations. They state that an important principle of the *Act* is that is that personal information should be protected by institutions from unauthorized disclosure. They state that the information they collected was supplied to the

¹¹ Order MO-1573.

¹² section 43(2).

investigating police officers in the course of an investigation into a possible law enforcement matter. They continue that police investigations imply an element of trust that the police will act responsibly in dealing with recorded personal information. This is in addition to the possibility that based on any potential release of their personal information, the affected parties in this appeal could be exposed to further negative attention from the appellant.

[33] The police submit that given the unique status of law enforcement institutions and their authority under the *Act* to collect personal information, they view the spirit and content of the *Act* as placing a greater responsibility in safeguarding the privacy interests of individuals, including those directly or incidentally involved in the events. The police assert that it is not possible to release the withheld information to the appellant without violating the privacy rights of the affected parties. Accordingly, they argue it is reasonable and mandatory in the circumstances to refuse disclosure of the appellant's personal information since its disclosure would constitute an unjustified invasion of another individual's privacy. The police acknowledge that from the appellant's perspective, disclosure may be relevant to a fair determination of her rights, however, after considering all of the relevant factors, and balancing the protection of the privacy right of others, they have exercised their discretion to protect the affected party's privacy rights.

[34] The appellant does not address this issue in her representations.

[35] I find that the police properly exercised their discretion under section 38(b) in denying the appellant access to portions of the occurrence report at issue. I am also satisfied that they did not exercise their discretion in bad faith or for an improper purpose as there is no evidence before me that this is the case. The police considered the principles that the appellant should be able to access her own personal information and that the affected parties should have their privacy protected. They have also considered the specific interests protected by the presumption in section 14(3)(b) as well as the wording of the section 38(b) exemption. Finally, the police have given due regard to the nature and sensitivity of the information in the specific circumstances of this appeal and I have upheld their decision with respect to most of the information they have claimed is exempt. Accordingly, I find that the police took relevant factors into account and I uphold their exercise of discretion in this appeal.

ORDER:

1. I uphold the decision of the police with respect to all of the information they have withheld as exempt under section 38(b), with the exception of the portions identified in provision 2 below.

2. I do not uphold the decision of the police to withhold under section 38(b) the information in pages 1, 2 and 6 of the occurrence report which I order the police to disclose under the absurd result principle. For clarity, I attach to this order a copy of pages 1, 2 and 6 highlighting in green the information that I have found is not exempt. I order the police to disclose this highlighted information by **December 8, 2014**, but not before **December 3, 2014**.
3. I reserve the right to require the police to provide me with a copy of the records disclosed in accordance with order provision 2.

Original Signed by: _____
Stella Ball
Adjudicator

_____ October 31, 2014