

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3113

Appeal MA13-216

Durham Regional Police Services Board

October 20, 2014

Summary: The appellant seeks access to a specific incident report. The police granted the appellant partial access to the report, claiming the discretionary exemption in section 38(b) (personal privacy) to withhold certain portions of it. The police's decision to deny access to portions of the responsive record is upheld.

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

OVERVIEW:

[1] The Durham Regional 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 incident report regarding an armed person at a specified address.

[2] In their decision, the police identified an incident report and granted the appellant partial access to it. The police advised the appellant that access to portions of the report was denied pursuant to the discretionary exemption in section 38(b) (personal privacy) of the *Act*. In support of their section 38(b) claim, the police raised the application of the presumption in section 14(3)(b) (investigation into violation of law).

[3] The appellant appealed the police's decision to this office.

[4] During mediation, the appellant advised the mediator that the record disclosed to him was not responsive to his request. The appellant stated that the police provided him with an incident report from 2008, but the incident referred to in his request occurred in December 2012.

[5] The police conducted a further search and located the record responsive to the appellant's request. The police issued a second decision granting the appellant partial access to the record. The police advised the appellant that access to portions of the report was denied pursuant to the discretionary exemption in section 38(b) (personal privacy) and again raised the application of the presumption in section 14(3)(b) (investigation into violation of law) to this record.

[6] The mediator contacted an individual who may have an interest in the contents of the record (the affected party). The affected party advised that they do not consent to the release of the withheld portions of the record.

[7] The mediator identified a second individual whose personal information is contained on page 2 of the record. The appellant advised the mediator that he does not seek access to the information on page 2 of the record. Accordingly, the information withheld on page 2 is no longer at issue in this appeal. The appellant confirmed that he seeks access to the other severed portions on pages one, three and four of the record.

[8] As mediation did not resolve all of the issues in this appeal, it was transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. I began my inquiry by inviting the police to make representations in response to the issues raised in a Notice of Inquiry. The police submitted representations in response to the Notice. I then invited the appellant to make representations. The police's arguments were shared with the appellant in accordance with section 7 of this office's *Code of Procedure* and *Practice Direction 7*, along with a Notice of Inquiry. The appellant did not submit representations.

[9] In the discussion that follows, I find that the withheld portions of the record contain the "personal information" of the appellant and affected party, as that term is defined in section 2(1) of the *Act*. I uphold the police's decision to withhold this personal information under section 38(b) and uphold their exercise of discretion.

RECORD:

[10] The information at issue in this appeal consists of the severed portions of a four-page incident 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 police exercise their discretion under section 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?

[11] 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 where 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;

[12] 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

[13] 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

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

[15] In their representations, the police submit that the information at issue contains the personal information of the affected party, including her name, date of birth, address, telephone number, personal views and statement.

[16] Based on my review of the record, I find that they contain "personal information", as that term is defined in section 2(1) of the *Act*. Specifically, I find that the record contains the "personal information" of the appellant, including his date of birth, sex, race, national or ethnic origin, colour (paragraph (a)), his driver's licence number (paragraph (c)), his address and telephone number (paragraph (d)), his personal opinions or views (paragraph (e)), the views or opinions of the affected party about him (paragraph (g)) and his name as it appears with other personal information relating to him (paragraph (h)). As the record relates to an incident the appellant was involved in, I find that it can be considered to contain his personal information, as that term is defined in section 2(1) of the *Act*.

¹ Order 11

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

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

[17] In addition, I find that the record contains the personal information of the affected party, including their age (paragraph (a)), their address and telephone number (paragraph (d)), their personal opinions or views (paragraph (e)), the views or opinions of another individual about them (paragraph (g)) and their name as it appears with other personal information relating to them (paragraph (h)).

[18] The record also contains the personal information of another identifiable individual, including his date of birth, sex, race, national or ethnic origin, colour (paragraph (a)), his driver's licence number (paragraph (c)), his address and telephone number (paragraph (d)), his personal opinions or views (paragraph (e)) and his name as it appears with other personal information relating to him (paragraph (h)). During mediation, the appellant advised that he does not seek access to the withheld portions of the records that contain this identifiable individual's personal information. As a result, the information withheld on page 2 of the records is not at issue in this appeal.

[19] As noted above, I have reviewed the information that remains at issue and find that it contains the personal information of the appellant and the affected party. Based on my review of the record, I find that the personal information at issue on pages 1 and 4 of the record relate solely to the affected party. However, I find that the personal information at issue on page 3 relates to both the appellant and the affected party.

[20] As I have found that the information at issue contains the personal information of the appellant and/or the affected party, I will consider whether it qualifies for exemption under Part II of the *Act*.

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

[21] 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.

[22] 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

⁴ Order M-352.

[23] 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.

[24] In the circumstances of this appeal, it must be determine whether disclosing the personal information of the appellant and the affected party would constitute an unjustified invasion of the affected party’s personal privacy under section 38(b). 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. In addition, 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).

[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.

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 state that, as a law enforcement agency mandated under the *Police Services Act*, they are responsible for investigating offences under the *Criminal Code of Canada*. The police state that the record at issue was produced as a result of an armed person call, which may, after an investigation, relate to many different offences under the *Criminal Code of Canada*. The police submit that they collected the personal information from the affected party for the purposes of a firearm/neighbour dispute investigation. The police advised that the investigating officer gathered all of the

pertinent information and concluded that there was no evidence to file any criminal charges and the record was filed for police information only.

[28] I note that the appellant did not make submissions in response to the Notice of Inquiry.

[29] Based on my review of the information remaining at issue and the representations of the police, I find that the presumption in section 14(3)(b) applies to the information at issue. This office has previously found that 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.⁵ The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.⁶

[30] I have reviewed the record at issue and it is clear from the circumstances that the personal information in it was compiled and is identifiable as part of the police's investigation into a possible violation of law, namely the *Criminal Code of Canada*.

[31] Accordingly, I find that the personal information in the occurrence report was compiled and is 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*.

[32] 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 personal information that remains at issue in the record would constitute an unjustified invasion of the affected party's personal privacy. While I recognize that the severed portion of page 3 of the record also contains the appellant's personal information, I find that his personal information is inextricably linked with that of the affected party and cannot be disclosed without resulting in an unjustified invasion of the affected party's personal privacy. Accordingly, I find that this information is exempt from disclosure under section 38(b) of the *Act*, subject to my assessment of whether the police exercised their discretion properly.

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

[33] 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, this office may review the police's decision to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so.⁷

⁵ Orders P-242 and MO-2235.

⁶ Orders MO-2213 and PO-1849.

⁷ Orders PO-2129-F and MO-1629.

[34] In addition, I 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; or
- it fails to take into account relevant considerations.

[35] In either case, I may send the matter back to the institution for an exercise of discretion based on proper considerations.⁸ I may not, however, substitute its own discretion for that of the institution.

[36] In their representations, the police submit that they properly exercised their discretion under section 38(b). The police state that section 38(b) of the *Act* requires them to balance the personal privacy rights of the affected party with the appellant's right to access his own personal information. The police submit that while the appellant does have a right to access his own personal information, the information at issue is mixed with that of the affected party, who has a right to privacy. In addition, the police submit that they properly withheld the information at issue as the affected party did not consent to the disclosure of their personal information.

[37] The appellant did not make submissions on this issue.

[38] Based on my review of the police's representations and the information at issue, I am satisfied that the police weighed the interests in favour of disclosure against those favouring non-disclosure and properly exercised their discretion to withhold the information at issue. I also find that the police properly balanced the appellant's right to information with the affected party's right to privacy. I am not persuaded that the police failed to take relevant factors into account or that they considered irrelevant factors in withholding the personal information in the occurrence reports. Therefore, I find that the police exercised their discretion under section 38(b) and did so in a proper manner.

⁸ Order MO-1573.

ORDER:

I uphold the police's decision and dismiss the appeal.

Original signed by: _____
Justine Wai
Adjudicator

_____ October 20, 2014