

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3116

Appeal MA13-176

York Regional Police Services Board

October 27, 2014

Summary: The appellants sought access to records related to a complaint they had filed with the police, including a specified Interpol report. The police located records responsive to the request and relied on the discretionary exemption in section 38(b) (invasion of privacy), in conjunction with the presumption in section 14(3)(b) (investigation into a possible violation of law), to deny access to some of the records in part, and to the Interpol report in its entirety. During their appeal of the police's decision, the appellants narrowed the scope of the appeal to include only the Interpol report, arguing that they needed access to the report in order to address family inheritance issues. The decision of the police to deny complete access to the report 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(2)(d), 14(2)(h), 14(3)(b) and 38(b).

OVERVIEW:

[1] The appellant submitted a request to the York Regional Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to a complaint she had filed with the police. In her request, the appellant specified that she also sought access to an Interpol¹ report

¹ Interpol (the International Criminal Police Organization) is a non-governmental organization facilitating international police cooperation.

that related to her complaint. The police located records responsive to the request and issued a decision granting the appellant partial access to them. The police relied on the discretionary exemption in section 38(b) (invasion of privacy), in conjunction with the presumption in section 14(3)(b) (investigation into a possible violation of law), to deny access to portions of the records and to the Interpol report in its entirety.

[2] The appellant² and her husband (the appellants) appealed the decision of the police to this office. During the mediation stage of the appeal, the appellants confirmed that they only sought access to the Interpol report. Accordingly, the other records which were partially withheld by the police are no longer at issue in this appeal. Mediation did not resolve the appeal, and it was moved to adjudication for an inquiry under the *Act*.

[3] During my inquiry, I sought and received representations from the police and the appellants and shared these in accordance with section 7 of this office's *Code of Procedure* and *Practice Direction Number 7*. I did not seek the representations of an individual whose interests could be affected by disclosure of the record (the affected party) as the affected party passed away during the course of my inquiry. I also decided it was not necessary to seek representations from a second affected party.

[4] In this order, I uphold the decision of the police to deny access to the Interpol report.

RECORDS:

[5] The sole record at issue is the one page general occurrence hardcopy containing the Interpol report, which the police have withheld in its entirety.

ISSUES:

A. Does the Interpol report 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 personal information at issue?

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

² When I refer in this order to the appellant, I refer to the female appellant who is also the original requester.

DISCUSSION:

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

[6] 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,
- (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,
...
- (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 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;

[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.³ 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.⁴

³ Order 11.

⁴ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

Representations

[8] In their representations, the police state that the record contains the personal information of both the appellant and the affected party. The police submit that the personal information consists of medical information, information regarding financial transactions, personal views and personal views about another individual as set out in paragraphs (b), (e), and (g) of the definition of "personal information" in section 2(1) of the *Act*. The police also submit that the affected party's information appears throughout the record and subsumes the personal information of the appellant, thus making it impossible to sever and disclose the appellant's personal information without revealing the affected party's personal information.

[9] The appellants do not directly address this issue in their representations. However, their representations indicate they believe that the record contains personal information relating to one or both of them, and to the affected party.

Analysis and findings

[10] The Interpol report at issue documents an interview conducted by a foreign police agency of the affected party at her home in Germany. The record contains information about the affected party's age, financial transactions, psychological state, personal opinions and views, including her views of the appellant, and other information that along with her name, reveals personal information about her. I find that this information qualifies as the personal information of the affected party as that term is defined in paragraphs (a), (b), (e) and (h) of the definition of "personal information" in section 2(1) of the *Act*. I also find that the record contains the personal information of the appellant as that term is defined in paragraphs (a) and (g) of the definition of personal information. I further find that the record contains the name of a second affected party, including other personal information about this second affected party which qualifies as personal information under paragraph (h) of the personal information definition.

[11] Also, I agree with the police that the personal information of the affected party is contained throughout the record and subsumes both the personal information of the appellant, as well as that of the second affected party. I find that it is not possible to sever the appellant's personal information without revealing personal information belonging to the affected party. Furthermore, I find that the affected party's privacy rights are not diminished in this appeal as a result of her death during my inquiry. I base my finding on section 2(2) of the *Act* which relates to the definition of personal information and states:

Personal information does not include information about an individual who has been dead for more than thirty years.

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

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

[13] 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

[14] 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).

[15] 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.⁵ 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,

⁵ Order MO-2954.

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;

[16] 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

Representations

[17] The police submit that disclosure of the information in the record would be an unjustified invasion of the affected party's personal privacy. They explain that the appellant filed an extortion complaint with them that they subsequently investigated. The police continue that during the course of their investigation into the appellant's complaint, they requested, through Interpol, the assistance of German authorities; specifically, they asked the German authorities to interview the affected party, who was the reported victim of the extortion alleged by the appellant. The police state that the German authorities forwarded the results of the interview to them and they received these results as part of their investigation.

[18] The police submit that none of the paragraphs of sections 14(1) or 14(4) apply in this appeal. They further explain that the appellant and the affected party are mother and daughter, and considering the particular circumstances of this appeal, they did not seek the affected party's consent because they believed it would have caused her significant stress. They argue that because they received the record as part of their investigation into a possible violation of law, disclosure of the record is presumed to be an unjustified invasion of the affected party's personal privacy. Although the police acknowledge the appellant's right to access her personal information contained in the record, they submit that they cannot disclose any portion of the Interpol report because it contains the personal information of the affected party throughout, and it is not possible to sever and disclose the appellant's personal information without concurrently disclosing the affected party's personal information.

[19] The appellants do not directly address this issue in their representations. Instead, they provide extensive details about their family situation and a number of events that they allege are relevant to this appeal. They also make allegations about the actions and motives of their family members, and they argue that their version of the family dispute is the true one. The appellants state that they need a copy of the record to clear their name and to challenge in a German court the affected party's decision to disinherit the appellant. In support of their various allegations against their family members, including the main allegation that these family members conspired to

⁶ Orders P-242 and MO-2235.

have the appellant disinherited, the appellants provide copies of purported correspondence between them and their family members.

Analysis and findings

[20] I have reviewed the appellants' extensive representations and supporting documentation, and I find that they contain little, if any, information that is relevant to the issue of whether the discretionary exemption in section 38(b) or the presumption in section 14(3)(b) applies. The scope of this appeal is limited to the Interpol report and whether the appellants are entitled to obtain access to a copy of it under the *Act*. This office communicated the extent of my jurisdiction to the appellants and repeatedly directed them to the issues to be addressed; however, they provided representations that repeated their allegations against their family members in what is essentially, a dispute over inheritance.

[21] 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 Interpol report was compiled and is identifiable as part of an investigation into a possible violation of law. The record itself confirms that the affected party was interviewed at the request of the police in connection with the police's investigation into a possible violation of law. The appellants also acknowledge the connection between their complaint to the police and the subsequent interview of the affected party, when they state in their representations that they were irate when the police advised them that German authorities would interview the affected party as part of the investigation of their complaint.

[22] Because the appellant's personal information is contained in the Interpol report, I must consider and weigh any applicable factors in balancing the appellant's and the affected party's interests. I have decided it is unnecessary to consider the second affected party's interests separately in this appeal because the second affected party's personal information is subsumed within that of the affected party, and my consideration and protection of the affected party's privacy interests obviates this need.

[23] Although the appellants do not directly rely on it, they allude to the factor in section 14(2)(d) in their representations when they submit that they need a copy of the Interpol report to challenge the affected party's decision to disinherit the appellant. The section 14(2)(d) factor favours disclosure in situations where the personal information at issue is relevant to a fair determination of rights affecting the requester. For section 14(2)(d) to apply, the appellants 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.⁷

[24] The appellants have not provided adequate evidence in their representations to satisfy me that the affected party's personal information in the Interpol report is relevant to a fair determination of their rights. Their representations indicate that they would like to challenge the validity of the affected party's will and they believe that the Interpol report will support their contention that the appellant's siblings, and not the appellant, were extorting the affected party. The appellants have not provided me with information explaining why the affected party's personal information in the report has some bearing on a potential challenge to the validity of her will, or why it is required to prepare for any estate litigation contemplated by the appellants or to ensure an impartial estates proceeding. The appellants' assumption as to what is contained in the Interpol report and their assumption that it will be helpful to them is 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.

[25] Another factor that may apply is section 14(2)(h), which favours the protection of the affected party's privacy. Section 14(2)(h) applies if the both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. None of the parties has raised the possible application of this factor. However, based on the content of the record itself and on my understanding of the family circumstances set out in the appellants' representations, I am satisfied that it applies. The interview of the affected party by the German authorities at the request of the police took place in the context of a contentious family dispute with allegations of extortion being made by and against multiple family members. An objective assessment of the circumstances leads me to conclude that the affected party provided the personal information and the German authorities received it with a reasonable expectation that the information would be treated confidentially. Accordingly, I find that the factor in section 14(2)(h) applies and it weighs against disclosure of the affected party's personal information.

⁷ 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.).

[26] Having found that the information at issue falls within the ambit of the presumption against disclosure in section 14(3)(b), and that the only factor that applies weighs against disclosure, I find that the Interpol report is exempt under section 38(b), subject to my review of the police's exercise of discretion.

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

[27] 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. 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.

[28] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.⁸ This office may not, however, substitute its own discretion for that of the institution.⁹

[29] In this appeal, the police submit that they exercised their discretion with due regard to the purposes of the *Act*; namely that individuals should have a right of access to their own personal information and that the privacy of individuals should be protected. The police state that the record contains personal information of the affected party and other sensitive information. They add that although the appellant is the affected party's daughter, she does not have the consent of her mother, nor does she have a legal right to obtain her mother's personal information. The police further state that they exercised their discretion to not release the affected party's personal information to the appellant because protection of the affected party's privacy outweighed any factor that would favour disclosure to the appellant. The police conclude by stating that in exercising their discretion, they also considered the affected party's wish not to be involved in the complaint anymore; a fact that they say is documented in the Interpol report.

[30] The appellants do not address this issue in their representations.

[31] I am satisfied that the police took relevant considerations into account in exercising their discretion under section 38(b). These considerations include the nature

⁸ Order MO-1573.

⁹ Section 43(2).

of the record and the sensitivity of the personal information it contains, the context in which the information appears, and the lack of consent of the affected party. I accept the submissions of the police that the information in the record is inherently personal to the affected party and cannot be severed so as to provide the appellant with her personal information. I am satisfied that the police exercised their discretion in good faith and did not take irrelevant considerations into account, and I have upheld their decision that the record is exempt in its entirety, and that the appellant's personal information in it cannot be severed and disclosed without unjustly invading the privacy of the affected party. For these reasons, I uphold the police's exercise of discretion.

[32] Finally, I note that the appellants in their representations indicate their desire to object to what they perceive as a "false interpretation" of their family situation in related police records which are not at issue in this appeal. They also ask me to advise them how to address this issue in the event that this appeal process is not the proper forum. In this regard, I refer the appellants to their correction rights under sections 36 and 37 of the *Act*.

ORDER:

I uphold the decision of the police and dismiss this appeal.

Original Signed By: _____
Stella Ball
Adjudicator

_____ October 27, 2014