

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3168

Appeal MA13-559

Waterloo Regional Police Services Board

March 13, 2015

Summary: The appellant sought access to an occurrence summary and investigation records relating to his own arrest and conviction. The police denied access to all of the 18-page occurrence summary, claiming the application of the discretionary exemption in section 38(a), in conjunction with sections 8(1)(c), (g) and 8(2)(a). In addition, the police denied access to portions of 33 pages of investigation records on the basis that they are exempt under section 38(b). In this decision, the adjudicator does not uphold the application of sections 38(a)/8(1)(c), (g) or 8(2)(a) to the occurrence summary in pages 1 to 18 and orders that they be disclosed. The application of section 38(b) to the other records, comprising pages 19 to 52, is upheld, however.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, definition of 'personal information' in section 2(1), sections 8(1)(c) and (g), 8(2)(a), 14(2)(h), 14(3)(b) and sections 38(a) and (b).

OVERVIEW:

[1] The Waterloo 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 information described as follows:

On Nov, 25 1988 a complaint was filed about me by [named individual].
The occurrence #88-121315 report should also contain statements from

[two named individuals], et al. I would like a copy of this file and related data.

[2] The police located responsive records and issued a decision granting partial access to them. Access was denied to the withheld portions of the records under section 38(a), in conjunction with the discretionary law enforcement exemptions in sections 8(1)(c), 8(1)(d), 8(1)(g), 8(1)(h), 8(1)(l) and 8(2)(a), and the discretionary personal privacy exemption in section 38(b), in conjunction with section 14(1) of the *Act*. The requester (now the appellant) appealed the police's decision to deny access to the withheld parts of the records.

[3] During mediation, the police issued a revised decision regarding pages 1-18 of the records, an index of occurrences, to the appellant stating:

... we have reviewed the pages 1-18 of the records requested under our file number 13440, and have granted further disclosure to information contained on pages 1, 3, 6, 7, 13 and 14. In further review of these records, we have chosen to withdraw Sections 14(5) and 8(3), since the index of your occurrences – as requested in your letter of August 6, 2013 - confirms the existence of these records. Access is denied to some information contained on pages 1-18, as per ...

[4] The police indicated their reliance on the law enforcement and personal privacy exemptions described above with respect to the withheld portions of pages 1-18 of the records (the index of occurrences). The appellant advised that he was no longer pursuing access to the police codes which the police claimed to be exempt under section 8(1)(l) of the *Act*. Accordingly, the parts of the records withheld pursuant to section 8(1)(l) of the *Act* are no longer at issue.

[5] As no further mediation was possible, the appeal was moved to the adjudication stage of the process, where an adjudicator conducts an inquiry under the *Act*. During my inquiry I sought and received representations from the police in which they advise that they are no longer relying on the discretionary exemption in section 8(1)(h) with respect to the information on pages 19-52. The non-confidential portions of the police representations were shared with the appellant, while other portions were withheld because they satisfy the confidentiality criteria in *Practice Direction 7* and section 7 of the *IPC Code of Procedure*. I also received representations from the appellant.

[6] In this order, I uphold the police decision to deny access to the undisclosed portions of the occurrence and other investigation-related reports, but do not uphold the decision to deny access to the index of occurrences.

RECORDS:

[7] The records remaining at issue consist of the undisclosed portions of 52 pages of records, consisting of an index of occurrences covering from 1989 to the present (pages 1-18) and an occurrence report and supplementary occurrence reports (pages 19-52).

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(a) in conjunction with the discretionary exemptions in sections 8(1)(c), (g) and 8(2)(a), apply to the information at issue in pages 1 to 18 of the records?
- C: Does the discretionary exemption at section 38(b), in conjunction with section 14(1), apply to the information at issue in pages 19 to 52 of the records?
- D: Did the institution exercise its discretion under section 38(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

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

[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. 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;

[9] 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

[10] Sections 2(2.1) and (2.2) also relate to the definition of personal information. These sections state:

(2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[11] 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

¹ Order 11.

individual.² 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.³

[12] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁴

Findings

[13] All of the records at issue in this appeal contain information relating to the appellant's contacts with law enforcement agencies and, as such, contain his personal information, as that term is defined in paragraphs (a), (b), (c), (g) and (h) of section 2(1).

[14] In addition, pages 19 to 52 of the records also contain personal information relating to other identifiable individuals, specifically, information about their age, sex and marital status (paragraph (a)), their employment history (paragraph (b)), their address and telephone numbers (paragraph (d)), their views or opinions (paragraph (e)) and their names along with other personal information about them (paragraph (h)) of the definition of "personal information" in section 2(1).

[15] The records also contain references to other identifiable individuals, such as police officers, in their professional or official capacity. Such information cannot, however, qualify as their personal information within the meaning of that definition in the *Act*.

Issue B: Does the discretionary exemption at section 38(a), in conjunction with sections 8(1)(c), (g) and 8(2)(a), apply to the information at issue in pages 1 to 18 of the records?

[16] Section 36(1) 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. This section reads:

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

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. [my emphasis]

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

³ Orders P-1409, R-980015, PO-2225 and MO-2344.

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

[17] 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, as is the case in this appeal.⁵

[18] 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. In this case, the institution relies on section 38(a) in conjunction with sections 8(1)(c), (d), (g) and 8(2)(a).

Pages 1-18 of the records

[19] The police submit that the undisclosed portions of pages 1-18 of the records "relate to investigations into possible contraventions of the *Criminal Code of Canada*, as well as intelligence information regarding the appellant, due to his involvement in criminal activity." The police go on to submit that:

Intelligence information gathered by police regarding an individual's activities - whether criminal activities, or observations of non-criminal activities of an individual involved in organized crime - is collected and analyzed in order to detect and prevent potential violations of law. One method of collecting this information involves 'street checks', and to reveal information gathered under these records could interfere with the gathering of future information if the individuals involved become aware of information that has been obtained. Police use this information to predict future activity of the individuals, and individuals could reasonably be expected to alter their behaviour if they became aware of what has been observed. Further, disclosing the ways in which police gather intelligence information through street checks may reveal investigative techniques and procedures used in law enforcement, such as techniques used during surveillance.

[20] Without referring directly to it, I assume that the police are relying upon the exemption in section 8(1)(c), as well as 8(1)(g), which read:

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

(c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

⁵ Order M-352.

(g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;

[21] Pages 1 to 18, with the exception of one more recent entry, address contacts made by the police with the appellant between 1989 and 2001. The appellant is currently incarcerated at a federal penitentiary in British Columbia. The information contained in pages 1 to 18 describes the nature of the appellant's involvement with the police for each entry, whether it be as a suspect, an individual subject to observation or as someone accused of a specific crime. Each entry goes on to describe in the most general terms the occurrence report number, the type of contact, the time and date and rough notes as to the nature of the incident or observation.

[22] Some of the observations referred to by the police in their representations describe events that took place between 1989 and 2000. In my view, the disclosure of information regarding the appellant's observed behaviour with respect to events which are up to 26 years old cannot reasonably be expected to reveal investigative techniques which would cause the appellant to alter his behaviour or take action to avoid detection of his activities. I also find that the disclosure of pages 1 to 18 could not reasonably be expected to interfere with the gathering of or reveal law enforcement intelligence information about the appellant or any other individual. The information is now many years old and is concerned with the criminal activities of the appellant at that time. I find that I have not been provided with sufficient evidence on the part of the police to enable me to find that disclosure of the contents of pages 1 to 18 could reasonably be expected to give rise to the harms in either section 8(1)(c) or (g).

[23] I note that the appellant is in custody and it is not reasonable to expect that the disclosure of the information in these records would be used by him to avoid detection or conceal criminal behaviour. For these reasons, I find that sections 8(1)(c) and (g) have no application to pages 1 to 18 of the record and they are not, therefore, exempt under section 38(a).

[24] The police also rely on section 8(2)(a) to exempt the contents of pages 1 to 18 from disclosure. In order for a record to qualify for exemption under section 8(2)(a) of the *Act*, the police must satisfy each part of the following three-part test:

1. the record must be a report; and
2. the report must have been prepared in the course of law enforcement, inspections or investigations; and

3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.⁶

[25] The word "report" means "a formal statement or account of the results of the collation and consideration of information". Generally, results would not include mere observations or recordings of fact.⁷ The title of a document does not determine whether it is a report, although it may be relevant to the issue.⁸

[26] Clearly, the entries recorded on pages 1 to 18 do not represent a "formal statement or account of the results of the collation and consideration of information" as required to meet the test under section 8(2)(a). As a result, I find that pages 1 to 18 do not qualify for exemption under section 8(2)(a) and they are not, accordingly, exempt under section 38(a).

[27] Because no other exemptions have been claimed for pages 1 to 18 of the records and no mandatory exemptions apply, I will order that they be disclosed to the appellant.

Issue C: Does the discretionary exemption at section 38(b), in conjunction with section 14(1), apply to the information at issue in pages 19 to 52 of the records?

[28] The police submit that the undisclosed portions of pages 19 to 52 are exempt under the discretionary exemption in section 38(b). 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.

[29] 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. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.

[30] Sections 14(1) to (4) provide guidance in determining whether disclosure of the information would be an unjustified invasion of personal privacy. 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 (3) and balance the interests of the parties.⁹ If any of paragraphs (a) to (h) of section 14(3) apply,

⁶ Orders P-200 and P-324.

⁷ Orders P-200, MO-1238 and MO-1337-I.

⁸ Order MO-1337-I.

⁹ Order MO-2954.

disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 38(b).

Pages 19 to 52 of the records

[31] The police argue that the undisclosed personal information contained in pages 19 to 52 was compiled as part of an investigation into a possible violation of law and that the presumption in section 14(3)(b) applies to it. In addition, it submits that the factor in section 14(2)(h) also applies because the personal information in the undisclosed portions of the record was supplied by the individual to whom it relates in confidence.

[32] The appellant does not directly address the application of the section 38(b) exemption to those portions of pages 19 to 52 that remain undisclosed.

[33] I find that the personal information contained in pages 19 to 52 was compiled as part of a law enforcement investigation undertaken by the police into the criminal activities of the appellant. The investigation led to charges being laid against the appellant under the *Criminal Code of Canada* and, ultimately, his conviction on those charges. As a result, I find that the disclosure of the remaining undisclosed personal information contained in pages 19 to 52 is presumed to constitute an unjustified invasion of the personal privacy of the individual or individuals identified in these records. In addition, I also find that the personal information contained in these records was provided, in part, by an individual or individuals which a reasonably-held expectation that it would be treated as confidential by the police. Accordingly, I find that the consideration favouring non-disclosure in section 14(2)(h) applies to the undisclosed personal information in pages 19 to 52.

[34] As I have not been provided with any evidence that any considerations under section 14(2), listed or otherwise, apply, I conclude that the disclosure of the remaining personal information in pages 19 to 52 would give rise to an unjustified invasion of the personal privacy of the person(s) identified therein. Accordingly, I find that this information is exempt from disclosure under the discretionary exemption in section 38(b).

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

[35] 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.

[36] 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.

[37] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁰ This office may not, however, substitute its own discretion for that of the institution.¹¹

Relevant considerations

[38] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹²

- 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 his or 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

¹⁰ Order MO-1573.

¹¹ Section 43(2).

¹² Orders P-344 and MO-1573.

- whether disclosure will increase public confidence in the operation of the institution
- 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
- the age of the information
- the historic practice of the institution with respect to similar information.

[39] The police indicate that in making their decision to apply the section 38(b) exemption to the undisclosed information in pages 19 to 52, they took into account “the Appellant’s right of access to information against the affected parties’ right to protection of their privacy.” They go on to state that they exercised their discretion in the following way:

To the extent the records contained personal information about both the Appellant and another individual, the Institution exercised its discretion based on the belief that the unjustified invasion of another individual’s personal privacy outweighed the Appellant’s right to information, and applied the exemption accordingly.

[40] The police also indicate that they considered:

- the purposes of the *Act*;
- the fact that the appellant was seeking his own personal information;
- the nature of the relationship between the appellant and any affected parties whose personal information might appear in the records;
- the nature of the information and its sensitivity; and
- the historic practices of police services with respect to similar information.

[41] Based on the police’s submissions, I am satisfied that they exercised their discretion not to disclose the remaining personal information in pages 19 to 52 of the records in a proper manner. Specifically, I find that they applied only relevant, and not irrelevant, considerations in determining whether to disclose this information. As a result, I uphold the police’s exercise of discretion and dismiss this aspect of the appeal.

ORDER:

1. I uphold the police’s decision to deny access to the undisclosed portions of pages 19 to 52 of the records.

2. I order the police to disclose pages 1 to 18 of the records to the appellant by providing him with a copy by **April 20, 2015**, but not before **April 15, 2015**.
3. In order to verify compliance with order provision 2, I reserve the right to require the police to provide me with a copy of the records that are disclosed to the appellant.

Original signed by: _____
Donald Hale
Adjudicator

_____ March 13, 2015