Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3234

Appeal MA13-207-2

West Nipissing Police Services Board

August 24, 2015

Summary: The police received a request for access to records relating to contacts with the appellants between 2006 and 2012, including any occurrence reports or police officer notes. The police disclosed many of the responsive records, in whole or in part, and denied access to the personal information contained in them that related to individuals who were identified as complainants in matters involving the appellants. The appellants appealed this decision and argued that additional records responsive to the request ought to exist. In this order, the adjudicator upholds the police decision to deny access to the undisclosed portions of the records. In addition, the search for records is upheld as reasonable and the police's exercise of discretion 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) [definition of personal information], 14(2)(d), 14(3)(b) and 38(b).

OVERVIEW:

[1] The West Nipissing Police Service Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) from two appellants, a father and son. The request was for occurrence reports, including officer notes from 2006 to 2012 concerning events involving the appellants' family.

[2] The police issued an interim decision advising that the time for responding to the request had been extended, under section 20 of the *Act*, by 60 days. The decision to

extend the statutory 30-day time limit to respond to the appeal to this office was appealed. Appeal MA13-207 was opened to address the appeal. Subsequently the police issued a final decision to the appellants and appeal MA13-207 was closed.

[3] The appellants appealed the police's final decision and appeal MA13-207-2 was opened. During mediation, the police issued a supplemental decision and provided the appellants with an index of the records. The mediator raised the possible application of sections 38(a), in conjunction with the law enforcement exemption in section 8(1)(c), the solicitor-client privilege exemption in section 12 and the public safety exemption in section 13, as well as the personal privacy exemption in section 38(b) to the records at issue, since they appear to contain personal information about the appellants.

[4] The appellants took the position that additional records exist. This position was relayed to the police who advised that they searched the record-holdings of all key personnel and all departments and no additional responsive records exist. The appellants continued to insist that additional records ought to exist.

[5] As further mediation was not possible, the appeal was transferred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act.* I sought and received the representations of the police, initially, a severed copy of which was shared with the appellants to assist them in making their representations. Portions of the police representations were withheld due to confidentiality concerns. I received two sets of representations from the appellants which set out their position on the search issue and enclosed a large number of the records that were provided to them. The appellants' representations did not specifically address the application of the exemptions claimed by the police, however.

[6] In this order, I uphold the police's decision to deny access to the undisclosed portions of the records, and find that the searches undertaken were reasonable, in the circumstances of this appeal.

RECORDS:

[7] The records at issue consist of two groups of documents. The first is comprised of the undisclosed portions of 142 pages of police occurrence summaries, while the second group of records is made up of the undisclosed portions of a further 179 pages of police officer notebook entries.

ISSUES:

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

B. Is the personal information contained in the records exempt from disclosure under the discretionary exemption in section 38(b)?

C. Does the discretionary exemption at section 38(a) in conjunction with the section 8(1)(c), 12, 13 exemptions apply to the information at issue?

D. Do the discretionary exemptions at sections 8(1)(c) and (e) apply to the records?

E. Does the discretionary exemption at section 12 apply to the records?

F. Does the discretionary exemption at section 13 apply to the records?

G. Did the institution conduct a reasonable search for records?

H. Did the institution exercise its discretion under sections 8, 12, 13 and 38? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A: Do the records contain "personal information" as that term is defined in section 2(1) of the *Act* 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 individual.[2] Even if information relates to an individual in a professional, official or

[1] Order 11.
[2] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

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]

[13] All of the records at issue in this appeal relate directly to the appellants' contacts with the police on a wide variety of matters, including complaints they initiated against other individuals and, in the majority of cases, complaints which originated with others about the appellants' behaviour. In my view, all of the records pertain to the appellants as they are concerned with their involvement with the police in relation to a multitude of issues. For this reason, I conclude that all of the records contain information that falls within the ambit of the definition of "personal information" relating directly to the appellants. In addition, I find that the records also contain the personal information of a number of other identifiable individuals who either initiated complaints against the appellants or were the subject of the appellants' own complaints about them. Clearly, such information qualifies as the "personal information" of these individuals as that term has been defined in section 2(1).

Issue B: Is the personal information contained in the records exempt from disclosure under the discretionary exemption in section 38(b)?

General principles

[14] 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.

[15] 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.

[16] Sections 14(1) to (4) provide guidance in determining whether disclosure of the information would be an unjustified invasion of personal privacy. In my view, the only exception in section 14(1) that may have any application is section 14(1)(f), which allows the release of personal information "if the disclosure does not constitute an unjustified invasion of personal privacy."

---

[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.).

Sections 14(2) and (3)

[17] 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.[5]

[18] 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). The police have claimed the application of the presumption at paragraph (b) of section 14(3), which reads:

> 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;

[19] 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] The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.[7] The presumption can apply to a variety of investigations, including those relating to by-law enforcement[8] and violations of environmental laws or occupational health and safety laws.[9]

[20] Section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.[10] The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2).[11]

[21] The appellant's representations do not refer specifically to any of the considerations in section 14(2) which favour disclosure, but appear to raise indirectly the possible application of the factor in section 14(2)(d), which reads:

---

[5] Order MO-2954.
[6] Orders P-242 and MO-2235.
[7] Orders MO-2213, PO-1849 and PO-2608.
[8] Order MO-2147.
[9] Orders PO-1706 and PO-2716.
[10] Order P-239.
[11] Order P-99.

> 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 relevant to a fair determination of rights affecting the person who made the request;

[22] In my view, all of the records at issue in this appeal were compiled and are identifiable as part of various law enforcement investigations undertaken by the police involving the appellants and their neighbours. While many of these occurrences may not have arisen as a result of a police investigation into possible violations of the *Criminal Code*, they all relate to what might be generally referred to as policing activities taking place over a seven-year period. I specifically find that all of the records identified by the police as responsive to this request fall within the ambit of the presumption in section 21(3)(b) as they were compiled and are identifiable as part of a law enforcement investigation.

[23] The appellants refer generally to their need to obtain unsevered and complete copies of all of the records in order to answer what they perceive to be unwarranted and unfair attention of their neighbours and the police. They are convinced that the police and the community in which they live have conspired to harass and interfere with their enjoyment of their property and that the disclosure of the remaining portions of the records will demonstrate and corroborate the extent of this activity. 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.[12]

[12] 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.).

[24] The appellants have not provided me with evidence to demonstrate that the personal information contained in the records is relevant to enable them to assert a legal right based on either the common law or on some statutory basis. I have also not been provided with any evidence that the personal information is required to ensure an impartial hearing or to prepare for some anticipated proceeding. Instead, the appellants refer only to their need to obtain the records in order to corroborate the conspiracy involving the police and the local community which they claim to exist.

[25] Based upon my review of the records, the disclosure of the remaining undisclosed personal information contained in them will not provide the appellants with the type of information they are seeking. The police provided the appellants with severed copies of the records, removing only the personal information of other individuals from them. In my view, the disclosure of the severed information will serve to inform the appellants as to the identities of the individuals who have made allegations about them, but will not provide them with the kind of corroborating evidence they are seeking which would serve to tie the police and the community into the "conspiracy" that they allege exists. For this reason, I find that the factor listed in section 14(2)(d) has no application to the personal information at issue in this appeal.

[26] I found above that the disclosure of the remaining personal information contained in the records would result in a presumed unjustified invasion of the personal privacy of individuals other than the appellants. As a result, I conclude that the information qualifies for exemption under the discretionary personal privacy exemption in section 38(b) and it should not be disclosed to the appellant, subject to my review of the police's exercise of discretion below.

[27] The police have also claimed the application of section 38(a), in conjunction with sections 8(1)(c) and (e), 12 and 13, to various other records or parts of records. Because I have found that all of these records are exempt under section 38(b), it is not necessary for me to consider whether they also qualify under the other exemptions claimed to apply to them or to address Issues C, D, E or F.

Issue G: Did the institution conduct a reasonable search for records?

[28] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.[13] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[29] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence

[13] Orders P-85, P-221 and PO-1954-I.

to show that it has made a reasonable effort to identify and locate responsive records.[14] To be responsive, a record must be "reasonably related" to the request.[15]

[30] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[16] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[17]

[31] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[18]

[32] During the mediation stage of the appeal, the police advised the mediator and the appellants that in response to concerns raised by the appellants about the adequacy of the searches conducted, "all key personnel were contacted and all departments were searched." The police also advise that the appellants may have had involvement with other police services, including the Ontario Provincial Police, which would have resulted in the creation of further records, which are not under the control of the West Nipissing Police Service. The police suspect that confusion about the existence of records relating to these other incidents that occurred outside their jurisdiction may exist on the part of the appellants.

[33] In support of their argument that additional records ought to exist, the appellants provided me with copies of a number of documents which relate to their involvement with the West Nipissing Police Service on a variety of matters. It appears from my review of these records that many of them were disclosed to the appellants as part of the required disclosure of documents by the Crown Attorney in relation to various criminal charges brought by the police against the appellants. Some, though not all, of these records address occurrences that are also reflected in the records that were disclosed, in whole or in part, to the appellants by the police in response to the request which gave rise to this appeal. Some of the records submitted to me by the appellants appear to post-date the request which resulted in this appeal and these are not, accordingly, found in the records at issue before me.

[34] The appellants have not, however, provided me with a reasonable basis for their belief that additional records ought to exist. Their representations do not address with any degree of specificity what records or types of records they expected to have

[14] Orders P-624 and PO-2559.
[15] Order PO-2554.
[16] Orders M-909, PO-2469 and PO-2592.
[17] Order MO-2185.
[18] Order MO-2246.

disclosed to them. As a result, I am unable to determine the reasons behind their contention that further records relating to these occurrences should be maintained by the police. I can only surmise that some of their concerns arise from the fact that portions of the records that were disclosed to them were severed and that the personal information and other personal identifiers of complainants were not disclosed. Unfortunately, the representations do not contain sufficient information to enable me to make a finding that the searches undertaken by the police were inadequate in their scope.

[35] While I recognize that the appellants will be disappointed by this finding, I have not been provided with sufficiently detailed evidence to lead me to any other conclusion. Therefore, I find that the police have conducted a reasonable search for responsive records and I dismiss this aspect of the appeal.

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

[36] 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.

[37] 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.

[38] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[19] This office may not, however, substitute its own discretion for that of the institution.[20]

Relevant considerations

[39] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[21]

[19] Order MO-1573.
[20] Section 43(2).
[21] Orders P-344 and MO-1573.

- 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
- 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.

[40] The police have provided me with evidence to indicate that the appellants are in conflict with others in their community. This fact is reflected in the records and particularly in the severances made by the police to the records that were disclosed to the appellants. It is clear that the severances made to the records were done with a view to protecting the identities of complainants who initiated contact with the police about the conduct of the appellants. The police submit that the information that remains undisclosed is of such a nature that its disclosure could reasonably be expected to provoke further conflict between the appellants and others in their community.

[41] The appellants for their part deny any culpability in the incidents which have given rise to the creation of the records. They maintain that the community and the police are attempting to force them to leave.

[42] In my view, the police have taken into account legitimate concerns about the negative impact upon the already frayed relationships in the appellants' community which disclosure may exacerbate. By considering these factors, I find that the police have properly exercised their discretion to deny access to the information that was severed from the records that were provided to the appellants. I uphold this aspect of the police's decision and will not, accordingly, disturb that exercise of discretion on appeal.

ORDER:

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

Original Signed By: August 24, 2015
Donald Hale
Adjudicator