Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3196

Appeal MA13-549

York Regional Police Services Board

May 11, 2015

Summary: The appellant requested records pertaining to a "flag" notation and all records in relation to a specified general occurrence report, including the attending officers' notes as well as a 911 call. The York Regional Police Services Board identified two police officer's notes along with a recording of a 911 call as being responsive to the request. Relying on the discretionary exemption at section 38(b) (personal privacy) of the *Act*, the police denied access to portions of the police officers' notes, as well as the entirety of the 911 call. The appellant appealed the access decision and at mediation took the position that additional responsive records ought to exist, challenging the reasonableness of the police's search for responsive records. This order finds that it would be absurd to withhold the information severed from the officers' notes, but upholds the reasonableness of the police's search for responsive records and the decision of the police to deny access to the recording of the 911 call.

Statute Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 2(1), 14(2)(a), 14(3)(b), 17 and 38(b).

Order Considered: MO-1378 and MO-2321.

OVERVIEW:

[1] The York Regional Police Services Board (the police) received a two-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

1. Any records related to a "flag record" bearing a specified number.

2. Any records related to a General Occurrence Report bearing a specified number, including officer's notes and a 911 call.

[2] The police identified records responsive to the second part of the request and issued a decision letter granting partial access to these responsive records, relying on section 38(b) (personal privacy) of the *Act* to deny access to the portion they withheld.

[3] With respect to the first part of the request, the police advised the requester that:

> You have also requested access to any records related to FR [specified number]. This is a flag record that is added to information on file with [the police]. … This is an administrative function and there are no independent records created from this.

[4] The requester (now the appellant) appealed the police's decision.

[5] During mediation, the appellant asserted that additional responsive records exist. Accordingly, the reasonableness of the police's search for responsive records was added as an issue in the appeal. In response, the police conducted additional searches for responsive records, ultimately locating or creating additional records, including a record described in the Mediator's Report as a Flag Record Hardcopy. In two separate supplementary decision letters, the police granted the appellant full access to these records.

[6] The appellant maintained her position that additional responsive records exist and that she should be granted access to the withheld portion of the records that the police identified as being responsive to the second part of her request.

[7] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. I commenced my inquiry by sending a Notice of Inquiry to the police and an individual whose interests may be affected by disclosure. Only the police provided responding representations. I then sent a Notice of Inquiry to the appellant along with the police's representations. The appellant provided representations in response.

RECORDS REMAINING AT ISSUE:

[8] Remaining at issue in this appeal are the withheld portions of two police officers' notes, and a recording of a 911 call on a CD, which was withheld in full.

DISCUSSION:

Issue A: Did the police conduct a reasonable search for responsive records?

[9] 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.[1] 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.

[10] 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 to show that it has made a reasonable effort to identify and locate responsive records.[2] To be responsive, a record must be "reasonably related" to the request.[3]

[11] 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.[4]

[12] 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.[5]

[13] 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.[6]

The representations

[14] In a letter sent to the Mediator in the course of mediation, the appellant asserts that:

> … there must be some paperwork; some medical report or court order that would allow such flag on a person, otherwise the system would perpetuate abuse … .

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[1] Orders P-85, P-221 and PO-1954-I.
[2] Orders P-624 and PO-2559.
[3] Order PO-2554.
[4] Orders M-909, PO-2469 and PO-2592.
[5] Order MO-2185.
[6] Order MO-2246.

[15] The appellant provided responding representations, but they did not provide any further grounds for her belief that additional records ought to exist.

[16] The police submitted that it made a reasonable effort to identify and locate responsive records, including following up with an additional officer that had attended at the appellant's residence to determine if he had any responsive records. In support of their position that they conducted a reasonable search for responsive records, the police relied on the affidavit of their Freedom of Information Analyst. The affidavit describes in detail her search efforts and confirms that all responsive records were identified in the decision letters to the appellant. The affiant deposes in particular:

> … I confirmed with the York Regional Police Information Management Bureau, Data Quality Verification Unit, that when an officer enters a flag record on the RMS [York Regional Police records management system], this is done electronically and there are no paper records created. They also confirmed that a flag record is only entered on the police service's records management system and is not entered on any external data base, including CPIC. All records were collected by this office and identified in the decision letter to the requester.
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> During the mediation of this appeal, the appellant indicated that another officer was involved in the occurrence. … as a result that officer was requested to provide his notes to the Freedom of Information Unit. Also during mediation it was established that although flagging of an individual is an administrative function and no paper records exist a computer printout of the flag record could be created.
>
> The appellant was granted full access to a computer printout of the 911 call history, partial access to the officers' notebook entries, and full access to the computer printout of the flag record. Access was denied to the voice recording of the 911 call.

[17] The issue before me is whether the search carried out by the police for records responsive to the appellant's request was reasonable in the circumstances.

[18] As set out above, the *Act* does not require the police to prove with absolute certainty that the records do not exist, but only to provide sufficient evidence to establish that it made a reasonable effort to locate any responsive records. 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. In my view, the employee who conducted the search for responsive records is an experienced employee, who is knowledgeable in the subject matter of the request. Based on the evidence before me, I am also satisfied that they

conducted a reasonable search for any responsive record pertaining to the appellant's request.

[19] Accordingly, I find that the police have provided me with sufficient evidence to demonstrate that they have made a reasonable effort to identify and locate responsive records within their custody and control. I find that the searches were conducted by an experienced employee who was knowledgeable in the subject matter of the request and that she expended a reasonable effort to locate any additional responsive records. However, no additional responsive records were found.

[20] Accordingly, I am satisfied that the police's search for records that are responsive to the appellant's request is in compliance with their obligations under the *Act*.

Issue B: Do the records contain personal information?

[21] The discretionary exemption in section 38(b) of *MFIPPA* applies to "personal information". Consequently, it is necessary to determine whether the records contain "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 where 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
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> (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.

[22] 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.[7]

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

> 2(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(2.2) 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.

[24] 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.[8]

[25] 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.[9]

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[7] Order 11.
[8] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[9] Orders P-1409, R-980015, PO-2225 and MO-2344.

[26] I have reviewed the records remaining at issue. I find that the recording of the 911 call contains the personal information of the appellant, as well as another identifiable individual within the meaning of the definition of personal information set out in section 2(1) of *MFIPPA*. It is also clear to me, however, that as a result of the information already disclosed to the appellant, that the appellant is aware of the identity of the individual who made the 911 call at issue in this appeal. I also find that the withheld information at issue in the officers' notes contains information that qualifies as the personal information of an identifiable individual other than the appellant.

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

[27] 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.

[28] 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.[10]

[29] In other words, where a record contains personal information of both the requester and another individual, and 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.

[30] 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.[11]

[31] The police submit that:

> The records at issue, particularly the voice recording of the 911 call is highly personal and sensitive. … . There is no way that the disclosure of this record is desirable for the purpose of subjecting the activities of the police service to public scrutiny. The rights of the appellant have not been

[10] Order M-352.
[11] Order MO-2954.

> affected. The appellant was granted access to the hardcopy of the call history, so she is fully aware of the circumstances surrounding the reason for the call. The information contained in the 911 call is highly sensitive and there is a reasonable expectation of significant personal distress … if disclosed … . Releasing the voice recording would only continue to cause distress … .
>
> When an individual calls 911, they are seeking the support of fire, ambulance or police or in some cases all three. Although their call is being taped, there is a reasonable expectation that the call will only be shared with the appropriate services in order to provide assistance and not become a public record. Particularly in relation to this type of call, wherein highly personal and sensitive information is collected.

[32] The police specifically refer to the presumption at section 14(3)(b) of the *Act* in support of their decision to withhold the information at issue. The appellant's representations do not specifically refer to the application of any presumption under section 14(3) of the *Act*, nor do they refer to any specific factors in section 14(2) that might favour disclosure. That said, the appellant challenges the basis for the police attendance and takes issue with their conduct on the day in question which is described in the responsive records. I infer from her submissions that she is seeking the information to understand why the attendance took place and the reason for their conduct. This may raise the possible application of the factor favouring disclosure at section 14(2)(a) of the *Act*. In addition, the police's representations discuss certain elements pertaining to sections 14(2)(f) and (h).

[33] Sections 14(2)(a), (f) and (h) read:

> 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,
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;
>
> (f) the personal information is highly sensitive;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence.

[34] Section 14(3)(b) 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.

Section 14(2)(a)

[35] The objective of section 14(2)(a) of the *Act* is to ensure an appropriate degree of scrutiny of government and its agencies by the public. After reviewing the materials provided by the appellant and the records, I conclude that disclosing the subject matter of the withheld personal information, including the recording of the 911 call, would not result in greater scrutiny of the police. The appellant's submissions challenging the basis for the police attendance and their conduct are not sufficient to displace my determination in this regard. Additionally, in my view, the subject matter of the information sought does not suggest a public scrutiny interest.[12]

[36] Accordingly, in the circumstances, I find that the factor at section 14(2)(a) is not a relevant consideration.

Section 14(3)(b)

[37] 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.[13] The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.[14]

[38] I have reviewed the records 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.

[39] Accordingly, I find that the personal information in the records 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). I find that the disclosure of the withheld personal information is presumed to constitute an unjustified invasion of personal privacy of other identifiable individuals under section 14(3)(b).

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[12] See Order PO-2905 where Assistant Commissioner Brian Beamish found that the subject matter of a record need not have been publicly called into question as a condition precedent for the factor in section 21(2)(a) of *FIPPA* (the provincial equivalent of section 14(2)(a) of *MFIPPA*) to apply, but rather that this fact would be one of several considerations leading to its application.
[13] Orders P-242 and MO-2235.
[14] Orders MO-2213 and PO-1849.

[40] As I have found that section 14(3)(b) applies and there are no factors favouring disclosure, it is not necessary for me to also consider whether sections 14(2)(f) and (h) might also apply.

[41] Given the application of the presumption in section 14(3)(b), and the fact that no factors favouring disclosure were established, and balancing all the interests, I am satisfied that the disclosure of the remaining withheld personal information at issue would constitute an unjustified invasion of another individual's personal privacy. Accordingly, I find that this personal information is exempt from disclosure under section 38(b) of the *Act*.

Issue C: Does the absurd result principle apply in the circumstances of this case?

[42] 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.[15]

[43] The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement[16]
- the requester was present when the information was provided to the institution[17]
- the information is clearly within the requester's knowledge[18]

[44] 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.[19]

[45] The police take the position that the absurd result principle should not be given effect in the circumstances of this appeal:

> It would not be absurd to withhold [the information at issue]. The appellant was supplied with a hardcopy of the call history of the 911 call, so she is well aware of the circumstances of the complaint and only personal identifiers of [an identifiable individual] was withheld from the

[15] Orders M-444 and MO-1323.
[16] Orders M-444 and M-451.
[17] Orders M-444 and P-1414.
[18] Orders MO-1196, MO-1755 and PO-1679.
[19] Orders MO-1323 and PO-2662.

> officers' notebook entries and it is not known of the appellant is aware of this information, as she was advised during mediation what type of informant this was, but was still insistent on obtaining it.

[46] In my view, in light of the information that has already been disclosed to the appellant and considering all the circumstances of this appeal, it would be absurd to withhold the information that was severed from the officers' notes. The appellant is well aware of this personal information.

[47] However, I concur with the police with respect to the withholding of the recording of the 911 call and find that the absurd result principle does not apply in that information. In reaching this conclusion, I rely on the analysis of Adjudicator Daphne Loukidelis in Order MO-2321 where she found:

> In Order PO-2285, former Senior Adjudicator David Goodis reviewed the issue of disclosure and consistency with the purpose of the section 14(3)(b) exemption. He stated:
>
> > Although the appellant may well be aware of much, if not all, of the information remaining at issue, this is a case where disclosure is not consistent with the purpose of the exemption, which is to protect the privacy of individuals other than the requester. In my view, this situation is similar to that in my Order MO-1378, in which the requester sought access to photographs showing the injuries of a person he was alleged to have assaulted.
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> The former Senior Adjudicator then proceeded to review the following excerpt from Order MO-1378:
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> > The appellant claims that the photographs should not be found to be exempt because they have been disclosed in public court proceedings, and because he is in possession of either similar or identical photographs.
> >
> > In my view, whether or not the appellant is in possession of these or similar photographs, and whether or not they have been disclosed in court proceedings open to the public, the section 14(3)(b) presumption may still apply. In similar circumstances, this office stated in Order M-757:
> >
> > > Even though the agent or the appellant had previously received copies of [several listed records] through other processes, I find that

> the information withheld at this time is still subject to the presumption in section 14(3)(b) of the *Act*.
>
> In my view, **this approach recognizes one of the two fundamental purposes of the *Act*, the protection of privacy of individuals** [see section 1(b)]**, as well as the particular sensitivity inherent in records compiled in a law enforcement context.** The appellant has not persuaded me that I should depart from this approach in the circumstances of this case [emphasis added].

[48] I have carefully considered the contents of the 911 call, and have done so bearing in mind the background to the creation of the record, and the nature of the investigation undertaken by the police. I find that there is a particular and inherent sensitivity to the information in the recording of the 911 call, and that disclosure would not be consistent with the fundamental purpose of the *Act* described by former Senior Adjudicator Goodis in Order MO-1378. Accordingly, in consideration of protecting the privacy of an identifiable individual, as well as the particular sensitivity inherent in records compiled in a law enforcement context, I find that the absurd result principle does not apply to the 911 recording in this appeal.

[49] Furthermore, I have considered the circumstances surrounding this appeal and the police's representations and I am satisfied that the police have not erred in the exercise of their discretion with respect to section 38(b) of the *Act* regarding the withholding of the recording of the 911 call that will remain undisclosed as a result of this order.

ORDER:

1. I uphold the reasonableness of the police's search for responsive records.

2. I order the police to disclose to the appellant the withheld portions of the officers' notes at issue by sending it to her by **June 16, 2015** but not before **June 10, 2015**.

3. I uphold the decision of the police not to disclose the recording of the 911 call to the appellant.

4. In order to verify compliance with this order, I reserve the right to require the police to provide me with a copy of the pages of the officers' notebooks as disclosed to the appellant.

Original Signed By: May 11, 2015
Steven Faughnan
Adjudicator