

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3244

Appeal MA14-457

Toronto Police Services Board

September 23, 2015

Summary: The appellant made an access request to the police under the *Municipal Freedom of Information and Protection of Privacy Act* for the name and address of an individual who the appellant believes assaulted him. A police investigation into the alleged assault had concluded that the fight was consensual and no charges were laid against either party. The police withheld the requested information pursuant to section 38(b) of the *Act* on the basis that its disclosure would be an unjustified invasion of the personal privacy of the other individual. In this order, the adjudicator upholds the decision of the police.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 38(b).

Orders and Investigation Reports Considered: Order MO-2980.

OVERVIEW:

[1] The appellant submitted a request to the Toronto Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to an individual who the appellant believes assaulted him. The appellant's request reads as follows:

On [a date in August 2014], two arrived police officers at the corner [of] Spadina and College corner (north west) and [cornered] a male person who assaulted me on [a date in March] 2014. The two police officers 14

Division, did not give me the information of the person who assaulted me (name address of the person etc...). I need this information to [lay] a charge against him.

[2] The police identified responsive records, consisting of police Memorandum Book entries and Event Details Reports. The police then issued a decision granting partial access to these records, with access to some records and portions of records denied on the basis of the personal privacy exemptions at sections 14(1) and 38(b) of the *Act*.

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

[4] During mediation, the appellant stated that he is seeking only the name and address of the individual who was questioned by the police on a particular date in August 2014 (the affected party). The remainder of the withheld information is, therefore, not at issue in this appeal.

[5] The police advised that they could not disclose the name and address of the affected party to the appellant without the affected party's consent. Citing concerns for the safety of the affected party, neither the police nor the mediator contacted him to explore the possibility of consent.

[6] As no further mediation was possible, the file was moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. I sought representations from the police and the affected party, initially. The police filed representations, while the affected party did not. Pursuant to *Practice Direction 7* on the sharing of representations, the police agreed to share their representations with the appellant, and I provided a copy to the appellant and invited him to make representations. However, he did not do so.

[7] In this order, I uphold the decision of the police to withhold the affected party's name and address from the appellant pursuant to the discretionary personal privacy exemption found in section 38(b) of the *Act*.

RECORDS:

[8] The information remaining at issue consists of certain redacted portions of the Memorandum Book entries of two police officers. The only information that the appellant seeks is the name and address of the affected party, which appears in both Memorandum Book entries. In this order, I refer to this information as "the information at issue" or "the affected party's contact information".

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 personal privacy exemption at section 38(b) apply to the information at issue?
- C. Did the institution exercise its discretion under section 38(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Background

[9] By way of background, the police advise in their representations as follows:

The [appellant] contacted Police twice in regard to the [alleged assault]. Initially, the appellant reported an alleged assault. Police investigated and no witnesses or suspect were identified. The incident was parked pending further information being made available. Some five months later, the appellant contacted Police again and reported that he "believed" he saw the "alleged" assailant at a Shelter. Police further investigated and subsequently, both parties were advised to stay away from each other. There was no finding or determination of who was the aggressor/victim.

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

[10] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain "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,

(d) the address, telephone number, fingerprints or blood type of the individual,

(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;

[11] 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

[12] 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 However, 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

Representations and findings

[13] The police submit that the records were created in connection with a police investigation into the appellant’s complaint that he was assaulted, and that they are comprised of information that was collected or created during the investigation. The records contain the name and address of the affected party.

[14] From my review of the records, I find that they contain the personal information of the affected party under paragraphs (d) and (h) of the definition of personal information as the information consists of his name along with his address.

[15] I also find that the record contains the affected party’s personal information under paragraph (h), based on the fact that his name appears in police notes. Disclosure of the affected party’s name as it appears in the police notes would disclose the fact that the affected party was involved with the police, which I find constitutes his personal information under the introductory wording of the definition, “recorded information about an identifiable individual”.

[16] The records also contain information about the appellant, which I find is his personal information under the introductory wording of the definition. The information relates to a police investigation of the appellant’s allegation that he was assaulted. This is also recorded information about an identifiable individual and relates to the appellant in his personal capacity, rather than any professional capacity.

[17] I conclude that the Memorandum Book entries of the two police officers contain the personal information of both the appellant and the affected party.

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

[18] 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

¹ Order 11.

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.

exemptions from this right.

[19] 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.⁴

[20] Since the records at issue in this appeal contain the personal information of both the appellant and the affected party, I must decide whether disclosure of the information at issue would be an unjustified invasion of the affected party’s personal privacy.

[21] Sections 14(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy.

[22] If the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). However, I find that none of these paragraphs apply in the circumstances of this appeal. In particular, paragraph (a), which would allow disclosure in the event of the consent of the affected party, does not apply. The affected party did not provide representations and did not consent to the disclosure of his personal information.

[23] 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 considers, and weighs, the factors and presumptions in sections 14(2) and (3) and balances the interests of the parties.⁵

[24] 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 rely on section 14(3)(b), which reads:

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

(b) 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;

⁴ See below in the “Exercise of Discretion” section for a more detailed discussion of the institution’s discretion under section 38(b).

⁵ Order MO-2954.

[25] Section 14(2) lists additional factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.⁶ 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).⁷ The following paragraphs of section 14(2) are potentially relevant to this appeal:

(2) 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,

- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
- (f) the personal information is highly sensitive;
- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

[26] The factor listed in paragraph 14(2)(d), if present, favours disclosure, while the factors listed in paragraphs (e), (f) and (i) favour non-disclosure.

Representations

[27] The police submit that in August 2014 the investigating officers spoke to the involved parties and witnesses and concluded that the fight was consensual. The police did not identify an aggressor; nor were they able to unequivocally determine whether the affected party was, in fact, the person involved in the fight with the appellant in March 2014.

[28] The police submit that disclosure of the affected party's name and address would be an unjustified invasion of his personal privacy. They argue that the presumption at section 14(3)(b) applies because that information was compiled and is identifiable as part of an investigation into a possible violation of law. The police submit that their investigation implies an element of trust that the law enforcement agency will act responsibly in the manner in which it deals with recorded personal information. After a review of the circumstances of the dispute, it was determined that no charges would be laid against either party. The police submit that the release of the personal information of the affected party would be tantamount to the police determining that the affected

⁶ Order P-239.

⁷ Order P-99.

party is a guilty party, whereas the officer's investigation into this incident did not make that determination.

[29] The police further submit that under the *Police Services Act*, there is a process in place for personal contact information to be released to victims of crime; however, in this case, the investigating officers spoke to the involved parties and witnesses and determined that the fight was consensual.

[30] Finally, the police acknowledge that it might be argued, from the appellant's perspective, that disclosure of the information is relevant to a fair determination of the appellant's rights (section 14(2)(d)). The police argue, however, that this factor must be balanced against the protection of the affected party's privacy rights.

[31] As noted above, neither the affected party nor the appellant filed representations.

Analysis and findings

[32] To determine whether the disclosure of the information at issue would be an unjustified invasion of the affected party's personal privacy under section 38(b), I must now consider and weigh the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.⁸

Factors and presumptions favouring non-disclosure

Paragraph 14(3)(b): investigation into a possible violation of law

[33] The police rely on the presumption found at section 14(3)(b). 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.⁹ Section 14(3)(b) does not apply, however, if the records were created after the completion of an investigation into a possible violation of law.¹⁰

[34] I find that this presumption applies in the circumstances of this appeal. The police created the records during the course of their investigation into an alleged assault, which would be a violation of section 266 of the *Criminal Code*.¹¹

Paragraphs 14(2)(e), (f) and (i)

[35] The police made representations which raise the possibility of the application of the factors listed in these paragraphs, but did not directly rely on any of them. Instead,

⁸ Order MO-2954.

⁹ Orders P-242 and MO-2235.

¹⁰ Orders M-734, M-841, M-1086, PO-1819 and PO-2019.

¹¹ R.S.C., 1985, c. C-46.

I will treat the police's concerns as unlisted factors under section 14(2) of the *Act*.

Unlisted factors under section 14(2)

[36] I find it relevant that, as submitted by the police, their investigation concluded that the fight was consensual and made no finding of who was the aggressor or the victim. I find that this is a factor that weighs against disclosure of the affected party's contact information, and I give it considerable weight.

[37] Finally, the police submit that they were not able to unequivocally determine whether the affected party was, in fact, the same individual as the person involved in the fight with the appellant in March 2014. This, too, is a factor favouring non-disclosure of the affected party's contact information and I give it considerable weight.

Factors favouring disclosure

[38] The appellant did not file representations. I find that the only factor favouring disclosure with potential application to this appeal is the one identified by the police: section 14(2)(d) (fair determination of rights). Previous orders have ordered disclosure of an individual's name, for example, where that information was necessary to allow a requester to commence legal proceedings against the individual.¹²

[39] However, although the appellant stated in his access request that he requires the information at issue in order to lay charges against the affected party, he did not file representations in this appeal. Even if he still seeks the affected party's contact information for that purpose, I find it relevant that the police did not conclude that he was a victim of assault and that any legal proceeding against the affected party is, therefore, unlikely to be successful. I conclude, therefore, that the factor at section 14(2)(d) is, at most, a weak factor favouring disclosure.

Balancing the factors

[40] There are several factors favouring non-disclosure, one of which is a presumption in favour of non-disclosure. I have found that these factors are deserving of considerable weight. There is only one possible factor (section 14(2)(d)) favouring disclosure and, even assuming it applies, I find it to be a weak factor in favour of disclosure.

[41] Balancing the interests of the parties, therefore, I conclude that disclosure of the information at issue would result in an unjustified invasion of the affected party's personal privacy. Subject to my findings on the police's exercise discretion, below, I find that the information at issue is exempt from disclosure pursuant to section 38(b) of the *Act*.

¹² See, for example, Order MO-2980.

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

General principles

[42] 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.

[43] 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.

[44] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹³ This office may not, however, substitute its own discretion for that of the institution.¹⁴

Relevant considerations

[45] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹⁵

- 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

¹³ Order MO-1573.

¹⁴ Section 43(2).

¹⁵ Orders P-344 and MO-1573.

- 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.

Representations and findings

[46] The police submit that, in exercising their discretion in favour of non-disclosure of the information at issue, they considered the following factors:

- a. Section 29 of the *Act* authorizes the indirect collection of personal information for the purpose of law enforcement. Section 28 introduces safeguards to the collection of personal information. In the case at issue, the police decided that the balance between the appellant's right of access and the protection of the affected party's privacy tips in favour of protecting the privacy of the affected party.
- b. In assessing the value of protecting the privacy interest of an individual other than the requester, one needs to consider the nature of the institution. The function of a law enforcement institution is in great part to record information relating to unlawful activities, crime prevention activities, or activities involving members of the public who require assistance and intervention by the police.
- c. The circumstances of the alleged assault.

[47] Taking into account these factors, the police decided to exercise their discretion in favour of maintaining the privacy of the affected party.

[48] In my view, the police took into account relevant considerations in exercising their discretion. The circumstances of the alleged assault were a particularly pertinent factor that the police appropriately considered. Further, there is no indication that the police took into account irrelevant considerations or exercised their discretion in bad faith or for an improper purpose.

[49] Therefore, I uphold the police's exercise of discretion.

ORDER:

I uphold the decision of the police to withhold the information at issue.

Original Signed by: _____

Gillian Shaw
Adjudicator

September 23, 2015 _____