

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3245

Appeal MA14-5

Windsor Police Services Board

September 29, 2015

Summary: The appellants sought access to records relating to complaints made by and against them, to the police. The police located responsive records and denied access to portions of them pursuant to the discretionary personal privacy exemption at section 38(b) of the *Act*. This order upholds the police's decision and dismisses the appeal.

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

OVERVIEW:

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

All records including but not limited to incident reports, statements, and officer notebook entries generated, considered, or linked to occurrences:

[6 identified occurrence numbers]

Excepting records generated while communicating with outside organizations regarding these matters, such as those between the Crown or the Children's Aid Society, to which an index is requested.

[2] The requester subsequently provided the police with a letter from his wife stating that the request should be considered a joint request by both of them. As a result the police considered both the requester and his wife as the requesters.

[3] Pursuant to section 20 of the *Act*, the police extended the time to respond to the access request by an additional 30 days. Subsequently, they issued a decision denying access to portions of the responsive records pursuant to the discretionary personal privacy exemption at section 38(b), read with the presumption at section 14(3)(b) (compiled as part of an investigation into a possible violation of law). The police also advised that in order to obtain partial access to the records, the requesters were required to pay a fee of \$12.20 for the cost of photocopying the records. The requesters paid the fee and were granted partial access to the records.

[4] The requesters, now the appellants, appealed the police's decision.

[5] During mediation, the appellants advised the police they were of the belief that six additional reports exist. They also asked the police to provide them with an index of the responsive records and a confirmation that no other records relating to the Children's Aid Society exist.

[6] Although the police took the position that this was expanding the scope of the original request, they conducted an additional search and then issued a supplementary decision letter granting partial access to three officer notebook entries and the six reports referred to by the appellants. Access was denied to portions of the records pursuant to the discretionary personal privacy exemptions at section 38(a), read in conjunction with the law enforcement exemptions at sections 8(1)(l) and 8(1)(i) and section 38(b), read in conjunction with the presumption at section 14(3)(b). The police also advised that some of the information that was not disclosed was not responsive to the request.

[7] After reviewing the portions of the additionally located records that were disclosed to them, the appellants advised that they sought access to additional reports that were mentioned in those records. The police agreed to conduct another search for responsive records and issued a second supplementary decision letter granting partial access to an additional report. Access to portions of that report were denied pursuant to section 38(a), read in conjunction with section 8(1)(l), and section 38(b), read in conjunction with section 14(3)(b).

[8] The appellants advised that they are not pursuing access to the information that was deemed to be not responsive to the request. Accordingly, responsiveness is not at issue in this appeal. The appellants also advised that they are not pursuing access to the police codes which were withheld pursuant to section 38(a), read in conjunction with section 8(1)(i) and 8(1)(l). Accordingly, these exemptions are also not at issue in this appeal. The appellants advised however, that they wish to pursue access to the other information that has been withheld from the responsive records pursuant to

section 38(b).

[9] As a mediated resolution could not be reached, this file was transferred to the adjudication stage of the appeal process for an adjudicator to conduct an inquiry. I sought and received representations from the police initially, and those representations were shared with the appellants in accordance with this office's *Practice Direction Number 7* and section 7 of its *Code of Procedure*. The appellants did not submit representations.

[10] For the reasons that follow, I uphold the police's decision and dismiss the appeal.

RECORDS:

[11] The records at issue include general occurrence reports, officer notebook entries and call for service reports. Portions of the following records remain at issue:

Records 1, 2, 4, 5, 6, 10, 12, 13, 14, 15 and 16.

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(b) apply to the information at issue?
- C. Did the police exercise their discretion under section 38(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

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

[12] Under the *Act*, different exemptions may apply depending on whether a record at issue contains or does not contain the personal information of the requester.¹ Where the records contain the requester's own personal information, access to the records is addressed under Part II of the *Act* and the discretionary exemptions at section 38 may apply. Where the records contain the personal information of individuals other than the requester but do not contain the personal information of the requester, access to the records is addressed under Part I of the *Act* and the mandatory exemption at section

¹ Order M-352.

14(1) may apply.

[13] Accordingly, 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) of the *Act*. The portions of the definition that might be relevant to the current appeal are the following:

“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,

...

(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;

[14] 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.²

[15] 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.³ 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.⁴

[16] To qualify as personal information, it must be reasonable to expect that an

² Order 11.

³ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁴ Orders P-1409, R-980015, PO-2225 and MO-2344.

individual may be identified if the information is disclosed.⁵

Representations

[17] The police submit that the records contain the personal information relating to both the appellants and that of other identifiable individuals, as contemplated by the definition of “personal information” set out in section 2(1) of the *Act*.

[18] In their representations, the police explain that the records relate to complaints made by the appellants or complaints made by other identifiable individuals about the appellants. They identify each record at issue and describe the specific type of personal information that each of them contains and identify to whom the personal information relates.

[19] The police submit that the personal information includes the names of the appellants and other identifiable individuals together with other personal information relating to them (paragraph (h)) including ethnicity, age, sex, and marital status (paragraph (a)), criminal and employment history (paragraph (b)), drivers’ licence numbers (paragraph (c)), as well as their addresses and telephone numbers (paragraph (d)).

[20] The police also submit that the records include information that falls under paragraph (g) of the definition of personal information in section 2(1) of the *Act*, consisting of the views or opinions of another individual about the individual.

Analysis and findings

[21] Having reviewed the responsive records, I find that all of them contain the personal information of both the appellants and other identifiable individuals. I agree with the submissions of the police that describe this personal information as being the names of the appellants and other identifiable individuals as well as other personal information about them, including their race, ethnicity, sex, age, marital status, criminal or employment history, driver’s licence number, address and telephone number. I also agree that the information contains personal information of the type describe in paragraph (g) of the section 2(1) definition as the records include the views or opinions of the appellants about other identifiable individuals, as well as the views or opinions of other identifiable individuals about the appellants.

[22] In sum, I find that the records at issue contain the “personal information” of both the appellants and that of other identifiable individuals within the meaning of the definition of that term at section 2(1) of the *Act*. As described above, in circumstances where an appellant’s personal information is mixed with that of another identifiable

⁵ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

individual, Part II of the *Act* applies and I must consider whether the information is properly exempt pursuant to the discretionary exemptions at sections 38.

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

[23] Under section 38(b), 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.

[24] If the information falls within the scope of section 38(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester’s right of access to his or her own personal information against the other individual’s right to protection of their privacy.

[25] Sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met. The information at issue in this appeal does not fit within any of paragraphs (a) to (e) of section 14(1).

[26] The factors and presumptions in section 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 14(1)(f). That section reads:

A head shall refuse to disclose personal information to any person other than the individual to whom it relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

[27] If any of paragraphs (a) to (c) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). In this case, paragraphs (a) to (c) of section 14(4) do not apply.

[28] 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. Section 14(2) lists various factors that may be relevant in determining whether disclosure of the personal information would be an unjustified invasion of personal privacy, and the information will be exempt unless the circumstances favour disclosure.⁶

[29] For records claimed to be exempt under section 38(b) (i.e., records that contain the requester’s personal information), this office will consider, and weigh, the factors

⁶ Order P-239.

and presumptions in sections 14(2) and (3) and balance the interests of the parties in determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy.⁷

Representations, analysis and findings

[30] The police claim that the discretionary personal privacy exemption at section 38(b) applies to the information that they have severed from the records at issue and its disclosure would consist of an unjustified invasion of personal privacy. From my review, this information consists of only the personal information of identifiable individuals other than the appellant and includes names, addresses, and telephone numbers.

[31] As noted above, in this appeal, to determine whether an unjustified invasion of personal privacy in section 38(b) has been established with respect to the personal information at issue, I must consider the possible presumptions at section 14(3) and the factors at section 14(2).

Section 14(3)(b)- compiled as part of an investigation into a possible violation of law

[32] The only presumption in section 14(3) that the police have claimed, and the only presumption that appears to be applicable to the information at issue in this appeal, is that set out in section 14(3)(b). This presumption relates to records compiled as part of an investigation into a possible violation of law.

[33] 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.⁸ The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.⁹

[34] From my review of the records at issue it is clear that they were compiled by the police in the course of their investigations of numerous complaints involving the appellant and several other identifiable individuals. As previously described, the records include occurrence reports describing the police's investigation into various incidents, as well as police notes describing their investigations into those incidents. Accordingly, I find that all of the information in the records at issue falls under section 14(3)(b) of the *Act* and its disclosure constitutes a presumed unjustified invasion of the personal privacy of identifiable individuals other than the appellants under section 38(b). The police however, have exercised their discretion to disclose a large part of the information contained in the occurrence reports and sever only limited portions. Accordingly, I find that section 14(3)(b) applies to the information for which it has been

⁷ Order MO-2954.

⁸ Orders P-242 and MO-2235.

⁹ Orders MO-2213, PO-1849 and PO-2608.

claimed.

Section 14(2)(h) – factor weighing against disclosure: information supplied in confidence

[35] Section 14(2) provides some factors for the police to consider in making a determination on whether the disclosure of personal information would result in an unjustified invasion of the affected parties' personal privacy. The list of factors under section 14(2) is not exhaustive. The police must also consider any circumstances that are relevant, even if they are not listed under section 14(2).¹⁰ Some of these criteria weigh in favour of disclosure, while others weigh in favour of privacy protection.

[36] The police have not specifically raised the possible application of any of the factors listed at section 14(2) or any other relevant factors and the appellants have not submitted any representations on this, or any other issue. Nevertheless, on my review of the information before me, the consideration weighing against disclosure listed at section 14(2)(h) might be relevant. That section reads:

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 has been supplied by the individual to whom it relates in confidence;

[37] The factor at section 14(2)(h) weighs in favour of privacy protection. For it to apply, both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Thus, section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.¹¹

[38] In my view, the context and surrounding circumstances of the complaints that form the subject matter of the records at issue are such that a reasonable person would expect that the information that they supplied to the police as a complainant would be subject to a degree of confidentiality. Accordingly, in this appeal, I find that the factor in section 14(2)(h) is a relevant consideration that weighs in favour of protecting the privacy of the individuals other than the appellants and of withholding their personal information.

Summary

[39] As noted above, for records claimed to be exempt under section 38(b) (i.e.,

¹⁰ Order P-99.

¹¹ Order PO-1670.

records that contain the requester's personal information), this office will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties in determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy.¹² Accordingly, in conclusion, I must consider the interests of the parties in light of the presumption at section 14(3)(b) and the factor at section 14(2)(h), both of which I have found to apply in the circumstances of this appeal.

[40] I have found that the presumption at section 14(3)(b) applies to the personal information at issue, specifically, the personal information belonging to identifiable individuals other than the appellants, because it was compiled as part of an investigation into a possible violation of law. Accordingly, the disclosure of this information is presumed to result in an unjustified invasion of the personal privacy of identifiable individuals other than the appellants. I have also found that the factor weighing against disclosure at section 14(2)(h) is a relevant consideration as the information at issue was, in my view, supplied to the police in confidence. However, I have been provided with insufficient evidence to support a conclusion that any factors or criteria weighing in favour of the disclosure of the personal information of individuals other than the appellants might apply.

[41] As a result, I find that the disclosure of the information at issue would constitute an unjustified invasion of personal privacy of the individuals to whom it relates and the discretionary exemption at section 38(b) applies to it. Accordingly, subject to my discussion below on the police's exercise of discretion, I uphold their decision not to disclose it.

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

[42] The exemption at section 38(b) 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.

¹² Order MO-2954.

[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

[45] With respect to its exercise of discretion, the police submit that the records at issue were carefully reviewed, in good faith, and the appellants were provided with access to information related exclusively to them. The police submit that the information that was withheld constitutes the sensitive personal information of individuals other than the appellants and they take the position that its disclosure would amount to an unjustified invasion of their personal privacy and therefor qualifies for exemption under section 38(b).

[46] The police further submit that they are of the view that the privacy rights of the individuals other than the appellants with respect to their personal information outweigh the appellants' right to access that information. They submit that given the contentious nature of the incidents as well as the expectations of the other identifiable individuals that their personal information would be kept in confidence, they appropriately withheld the information at issue under the discretionary personal privacy exemption at section 38(b).

[47] Considering the circumstances, I am satisfied that the police exercised in good faith and for a proper purpose taking into account all relevant factors. The police disclosed the majority of the information in the records at issue and made only limited severances. I accept that they did not err in exercising their discretion to deny the appellants access to the information that I have found subject to the discretionary personal privacy exemption in section 38(b). Accordingly, I find that the police considered all relevant factors and exercised their discretion under section 38(b) of the *Act* appropriately.

ORDER:

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

Original Signed by: _____
Catherine Corban
Adjudicator

September 29, 2015 _____

¹³ Order MO-1573.

¹⁴ Section 43(2).