

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-3198

Appeal MA14-298

York Regional Police Services Board

May 15, 2015

**Summary:** The appellant submitted a request for records relating to a complaint he made to the police about a fraudulent real estate transaction. The police granted the appellant access to most of the information contained in their investigation report, including the names of 4 individuals. However, the police withheld their birthdates, driver licence numbers, sex, and personal contact information claiming that this information qualifies for exemption under section 38(b). This order finds that the withheld information qualifies for exemption and dismisses the appeal.

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

### BACKGROUND:

[1] The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to York Regional Police Services Board (the police) for records relating to a complaint he made to the police.

[2] The police conducted a search for responsive records and identified a police report. The police disclosed most of the report to the appellant, including the names of four individuals known to the appellant, but withheld their birthdates, driver licence numbers, sex and personal contact information. The police submit that disclosure of

the withheld information to the appellant would constitute an unjustified invasion of other individual's personal privacy under section 38(b).

[3] The appellant appealed the police's decision to this office and a mediator was assigned to the appeal. With his letter of appeal, the appellant provided copies of documents relating to the real estate transaction he alleges was fraudulent. He also provided copies of correspondence he exchanged with the Law Society of Upper Canada (the law society) regarding his complaint about his former real estate lawyer.

[4] During mediation, the appellant expressed dissatisfaction with how the police and the law society handled his complaints. The mediator wrote to the appellant to advise that our office does not have the jurisdiction to review the police's and law society's handling of his complaints. The appellant was referred to the Office of the Independent Police Review Director and the law society's Complaint Resolution Commissioner.

[5] The appellant also advised the mediator that he would like to correct information contained in the police report released to him. The mediator advised the appellant that he is entitled to request a correction of his personal information if he believes there are errors or omissions. The mediator also advised the appellant that he must make his initial correction request to the police directly and provided him with the contact information for the police's freedom of information office.

[6] The parties were unable to resolve the remaining issues in the appeal by mediation and it was subsequently transferred to the adjudication stage of the appeal process. During adjudication, the police and appellant provided representations to this office.

[7] In this order, I uphold the police's decision and dismiss the appeal.

## **RECORDS:**

[8] The information at issue in this appeal is the withheld information relating to four individuals identified on pages 2 and 3 of the police occurrence report disclosed to the appellant.

## **ISSUES:**

- A. Do the records contain "personal information" as defined in section 2(1)?
- B. Would disclosure of the "personal information" at issue constitute an unjustified invasion of personal privacy under section 38(b)?
- C. Did the police properly exercise its discretion under section 38(b)?

## **DISCUSSION:**

### **A. Do the records contain “personal information” as defined in section 2(1)?**

[9] 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.

[10] 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.<sup>1</sup>

[11] 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.<sup>2</sup>

[12] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.<sup>3</sup>

[13] The police do not dispute that the records contains the personal information of the appellant. However, the police claim that the records also contain the personal information of other identifiable individuals. In support of its position, the police state:

The York Regional Police investigated a fraud complaint reported to them by the appellant. During the course of the investigation of this complaint information was obtained including names, sex, dates of birth, addresses, telephone number and driver licence numbers of four individuals, the affected parties. The appellant requested access to a copy of the police report as well as copies of the statements obtained from him during the investigation and copies of documents he had provided to police during the investigation. Access was denied to the addresses, personal telephone numbers, dates of births and driver licence numbers of four individuals contained in the police report.

Section 2(1) of the legislation states personal information means recorded information about an identifiable individual, including subsection (a) sex and age, (c) identifying number and (d) address and telephone numbers.

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<sup>1</sup> Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

<sup>2</sup> Orders P-1409, R-980015, PO-2225 and MO-2344.

<sup>3</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

Therefore it is the position of the police service that the record at issue is the personal information of 4 individuals or the affected parties.

[14] Though the appellant provided extensive representations to this office, his submissions did not specifically address this issue. The bulk of the appellant's representations consist of voluminous copies of correspondence exchanged between himself, the law society and his former lawyer's office.

[15] Having regard to the representations of the parties and the records themselves, I find that the withheld information contains the personal information of other identifiable individuals within the meaning of the definition of that term in section 2(1). This information relates to the age, sex, addressees, telephone numbers and driver licence numbers of four individuals appearing with their names (which were disclosed to the appellant). I find that this information falls within the ambit of the definition of "personal information" in paragraphs (a), (c), (d) and (h) of the definition in section 2(1).

[16] Accordingly, I will go on to determine whether disclosure of the "personal information" at issue to the appellant would constitute an unjustified invasion of personal privacy under section 38(b).

**B. Would disclosure of the "personal information" at issue constitute an unjustified invasion of personal privacy under section 38(b)?**

[17] Section 38(b) of the *Act* is the discretionary personal privacy exemption under Part II of the *Act*. Section 38(b) provides:

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.

[18] 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.<sup>4</sup>

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

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<sup>4</sup> Order M-352.

[20] In the circumstances of this appeal, it must be determined whether disclosing the personal information of the 4 affected individuals would constitute an unjustified invasion of their personal privacy under section 38(b).

[21] Sections 14(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Section 14(2) provides some criteria for the police to consider in making this determination; section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. The parties have not claimed that any of the exclusions in section 14(4) apply and I am satisfied that none apply.

[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 under section 38(b). Given that the affected individuals have not consented to the release of their information, the only exception that could apply is section 14(1)(f), which states:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except if the disclosure does not constitute an unjustified invasion of personal privacy.

[23] If the information at issue 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 personal information against the other individual's right to protection of their privacy.

***14(3)(b): investigation into violation of law***

[24] The police submits that the presumption at section 14(3)(b) applies in the circumstances of this appeal. Section 14(3)(b) states:

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

[25] 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.<sup>5</sup> The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.<sup>6</sup>

[26] The police submit that the withheld information was collected as part of its investigation into a possible violation of law, namely the fraud complaint initiated by the appellant. I have reviewed the records and it is clear from the circumstances that the information at issue was compiled and is identifiable as part of the police's investigation into a possible violation of law under the *Criminal Code*, and thus falls within the presumption in section 14(3)(b).

[27] As the records also contain the personal information of the appellant, I will go on to determine whether the factor favouring disclosure at section 14(2)(d) could also apply.

***14(2)(d): fair determination of rights***

[28] As noted above, the appellant provided extensive representations to this office, most of which comprised of copies of documents relating to his law society complaint or the real estate transaction he alleges was fraudulent. Many of the documents are duplicated several times and contain the appellant's handwritten comments or notations. I have carefully reviewed the documents provided by the appellant and find that the appellant's handwritten comments or the content of the documents themselves do not address the issue of whether disclosure of the withheld information would constitute an unjustified invasion of personal privacy. However, throughout the appeal process, the appellant has raised concerns about the adequacy of the police's and law society's investigations into his complaints. Though this office does not have the jurisdiction to review these investigations, the fact that the appellant filed complaints in an effort to protect his legal rights is relevant. Accordingly, I am satisfied that the appellant's submissions give rise to the possible application of the factor favouring disclosure at section 14(2)(d). Section 14(2)(d) states:

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

[29] For section 14(2)(d) to apply, the appellant 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

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<sup>5</sup> Orders P-242 and MO-2235.

<sup>6</sup> Orders MO-2213, PO-1849 and PO-2608.

- (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.<sup>7</sup>

[30] Given that the police conducted an investigation into the appellant's allegations of fraud under the *Criminal Code*, I am satisfied that the circumstances to this appeal relate to matters which affect the appellant's legal rights. Accordingly, I find that the first part of the four part test under section 14(2)(d) has been met.

[31] However, in order for the factor at section 14(2)(d) to be given any consideration in this appeal, the appellant's evidence must establish that all four parts of the test has been met.

[32] In my view, the appellant has failed to establish that his legal rights are related to a proceeding which exists or is being contemplated as required by part 2 of the test in section 14(2)(d). The documentary evidence provided by the appellant does not indicate that he commenced civil proceedings or is contemplating civil proceedings to address his concerns about the real estate transaction that occurred over ten years ago.

[33] In any event, even if I found that the appellant had established that legal proceedings had commenced or were being contemplated, I am not satisfied that parts 3 and 4 of the test in section 14(2)(d) has been met.

[34] Given the nature of the personal information at issue, I find that disclosure of birth dates, driver licence numbers, sex and personal contact information of the affected individuals would have no bearing or significance to the determination of the appellant's legal rights. I also find that disclosure of the personal information at issue is not required in order for the appellant to prepare for a proceeding or ensure an impartial hearing. In making my decision, I took into consideration that the affected individuals are known to the appellant and their names were disclosed to him. Accordingly, it cannot be said that disclosure of the personal information at issue is required in order for the appellant to prepare for a proceeding by identifying potential defendants. Having regard to the above, I find that parts 3 and 4 of the test in section 14(2)(d) has not been met, and find that this factor has no application in this appeal.

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<sup>7</sup> 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.).

[35] Given the application of the presumption in section 14(3)(b) and the fact that no factors in favour of disclosure have been established, I am satisfied that disclosure of the withheld personal information to the appellant would constitute an unjustified invasion of personal privacy under section 38(b). Though the appellant is aware of the identities of the individuals whose personal information is at issue, there is no evidence that the appellant would know or recall their birthdates, addresses, telephone numbers and driver licence numbers. Accordingly, I also find that the absurd result principle has no application in the circumstances of this appeal.<sup>8</sup>

[36] Having regard to the above, I find that the personal information at issue is exempt from disclosure under section 38(b), subject to my assessment of whether the police exercised their discretion properly.

### **C. Did the police properly exercise its discretion under section 38(b)?**

[37] 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.

[38] 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.

[39] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>9</sup> This office may not, however, substitute its own discretion for that of the institution.<sup>10</sup>

[40] The police submit that they properly exercised their discretion to withhold the personal information at issue. In support of their position, the police state they took into consideration:

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<sup>8</sup> Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may not be exempt under sections 14(1), because to withhold the information would be absurd and inconsistent with the purpose of the exemption (see Orders M-444 and MO-1323)

<sup>9</sup> Order MO-1573.

<sup>10</sup> Section 43(2).



- the purpose of the *Act*, specifically the principle that individuals should have a right of access to their own personal information and balanced this principle with the principle that the privacy of individuals should be protected; and
- that the appellant's personal information was disclosed to him and the only information withheld contains "personal identifiers of four individuals".

[41] The appellant's representations did not specifically address the issue of whether the police properly exercised their discretion under section 38(b). Having regard to the police's evidence and the nature of the appeal, I am satisfied that the police properly exercised their discretion and in doing so took into account relevant considerations such as the sensitive nature of the withheld information. I also am satisfied that the police did not exercise their discretion in bad faith or for an improper purpose, nor is there any evidence that they took into account irrelevant considerations.

[42] In making my decision, I note that the police considered that one of the purposes of the *Act* includes the principle that requesters should have a right to access their own information. However, in my view, the nature of the personal information at issue and the sensitivity of it outweighs this principle, particularly when I also consider the amount of information the police have already disclosed to the appellant.

[43] Having regard to the above, I find that the police properly exercised their discretion to withhold the information I found exempt under section 38(b).

**ORDER:**

I uphold the police's decision to deny the appellant access to information relating to the birth dates, driver licence numbers, sex, personal addresses and telephone numbers for the 4 named individuals on page 2 and 3 of the police report.

Original signed by: \_\_\_\_\_  
Jennifer James  
Adjudicator

\_\_\_\_\_ May 15, 2015