Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3324

Appeal MA15-200

Durham Regional Police Services Board

June 23, 2016

Summary: The appellant made a request for records relating to an allegation of criminal wrongdoing made against him. The sole record in this appeal is a videotaped witness statement to which the police denied access, in full, on the basis of section 38(b) of the *Municipal Freedom of Information and Protection of Privacy Act*. The adjudicator upholds the police's decision to withhold the record in full.

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), (e), (f), (h), (i), 14(3)(b), 38(b).

OVERVIEW:

[1] The appellant made a request to the Durham Regional Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to an allegation of criminal wrongdoing filed by his spouse, the complainant, against him.

[2] The police issued a decision granting partial access to an incident report and denying access, in full, to the complainant's videotaped witness statement. In denying the appellant access to his own personal information in these records, the police relied on the discretionary exemption at section 38(b) of the *Act* (denial of access to own information), with reference to section 14(1) (unjustified invasion of personal privacy) and the presumption against disclosure at section 14(3)(b) (investigation into possible violation of law).

[3] The appellant appealed the police's denial of access to this office. During mediation, the appellant confirmed he seeks access to the videotaped statement only. As a result, the withheld portions of the incident report are not at issue in this appeal.

[4] The appellant also requested that the mediator not attempt to seek the consent of the complainant. The police confirmed that it had not attempted to seek the consent of the complainant, whose current contact information is unknown to them.

[5] As no mediation was possible, this appeal was transferred to the adjudication stage of the appeal process for an inquiry under the *Act*. During my inquiry, I sought and received representations from the appellant and the police, which were exchanged in accordance with this office's Code of Procedure and *Practice Direction 7.* I determined it was unnecessary to notify the appellant's spouse, the complainant in this matter.

[6] In this order, I uphold the police's decision to withhold the videotaped statement in full. I dismiss the appeal.

RECORD:

[7] The sole record at issue is a CD containing a videotaped interview with the complainant.

ISSUES:

A. Does the record contain "personal information" as defined in section 2(1) of the *Act*, and, if so, to whom does it belong?

B. Does the discretionary exemption at section 38(b) apply to the record? If so, did the police exercise their discretion under section 38(b)?

DISCUSSION:

[8] The police have withheld the record in full on the basis of section 38(b).

[9] Section 36(1) of the *Act* gives an individual a general right of access to his own personal information held by an institution. Section 38 provides a number of exemptions from this right. 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.

[10] To determine whether section 38(b) applies, it is first necessary to determine

whether the record contains "personal information" as defined in the *Act*, and, if so, to determine to whom the personal information relates.

A. Does the record contain "personal information" as defined in section 2(1) of the Act, and, if so, to whom does it belong?

[11] Section 2(1) of the *Act* sets out a definition of "personal information" that reads, in part:

> "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,
> >
> > (e) the personal opinions or views of the individual except if they relate to another individual,
> >
> > (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[.]

[12] 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]

[13] The record contains the complainant's account of domestic assault, theft and other wrongdoing committed against her by the appellant and his family members. This information comprises the personal information of the complainant within the meaning of paragraphs (a), (b), (e) and (h) of the definition at section 2(1). It also comprises the personal information of the appellant and his family members within the meaning of paragraphs (a), (b), (g) and (h) of section 2(1).

[14] As the record contains the personal information of the appellant and a number of other parties, I will next consider whether the exemption at section 38(b) applies.

---

[1] Order 11.

B. Does the discretionary exemption at section 38(b) apply to the record? If so, did the police exercise their discretion under section 38(b)?

[15] By withholding the record under section 38(b), the police claim that its disclosure would be an "unjustified invasion" of the personal privacy of the complainant and other individuals.

[16] Sections 14(1) to (4) of the *Act* provide guidance in determining whether disclosure of the information would be an unjustified invasion of personal privacy under section 38(b).

[17] In making this determination, this office will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.[2] 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). Section 14(4) also lists situations where disclosure is not an unjustified invasion of personal privacy.

[18] In claiming that the record is exempt in full under section 38(b), the police cite the presumption against disclosure at section 14(3)(b), and the factors at sections 14(2)(e), (f), (h) and (i).

[19] The appellant's representations implicitly raise the factor at section 14(2)(d) and the application of the absurd result principle.

[20] The relevant sections of section 14 state:

> (1) A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > (f) if the disclosure does not constitute an unjustified invasion of personal privacy.
>
> (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;

[2] Order MO-2954.

> (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
>
> (i) the disclosure may unfairly damage the reputation of any person referred to in the record.
>
> (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[.]

[21] For the reasons that follow, I find that the factors and presumptions in section 14(2) and (3) support the application of the exemption at section 38(b) to the record. I also conclude that the absurd result principle does not apply.

Section 14(3) presumption

[22] The police submit, and I accept, that the presumption at section 14(3)(b) applies in these circumstances. The record is a videotaped witness statement given by the complainant in relation to an allegation of domestic assault and other wrongdoing on the part of the appellant and his family members. The record was compiled as part of the police's investigation into a possible violation of the *Criminal Code of Canada,* which resulted in charges being laid against the appellant. Although the appellant indicates that the allegations are false and that the charges have since been withdrawn, there need only have been an investigation into a possible violation of law for the presumption at section 14(3)(b) to apply.[3] Section 14(3)(b) therefore weighs in favour of non-disclosure of the record.

Section 14(2) factors

[23] I also find applicable some factors favouring non-disclosure of the record. In particular, I accept that the information in the record is highly sensitive, involving as it does detailed allegations of abuse made by the complainant against her spouse, the appellant, and his family members. Given the nature of the allegations and the relationship of the parties involved, I find it reasonable to expect that the parties would experience significant personal distress if the record were disclosed.4 I also accept that the complainant made her statement to the police in confidence, and that both the complainant and the police reasonably expected that information in a witness statement would be treated confidentially. I therefore conclude that the factors favouring non-disclosure at sections 14(2)(f) and (h) apply to the record.

[24] The police also cite the factors at sections 14(2)(e) and (i). For section 14(2)(e)

---

[3] Orders P-242 and MO-2235.
[4] Orders PO-2518, PO-2617, MO-2262 and MO-2344.

to apply, the evidence must demonstrate that disclosure will or foreseeably may expose the individual to whom the information relates to pecuniary or other harm, and that this damage or harm would be "unfair" to the individual. For section 14(2)(i) to apply, there must be a risk that disclosure may unfairly damage the reputation of any person referred to in the record. I have insufficient evidence to conclude that either circumstance is present in this case.

[25] In his representations, the appellant makes extensive submissions in support of his position that the complainant fabricated the allegations against him as part of an immigration scheme. In other communications filed during the appeal process, the appellant indicates that he requires the record in order to check its contents against the other documents he has obtained from police. The appellant's submissions implicitly raise the factor at section 14(2)(d), which favours disclosure of a record that is relevant to a fair determination of the requester's rights. 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

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.[5]

[26] The appellant has not provided sufficient information to show that any of these criteria has been met. The appellant suggests that with the record, he will be able to disprove the allegations made against him and take some sort of action against the complainant. These allusions, without more, do not establish that disclosure of the record at issue in this appeal is necessary to ensure a fair determination of the appellant's legal rights in an existing or contemplated proceeding, as required by section 14(2)(d).

[27] I conclude that the presumption and factors favouring non-disclosure at sections 14(3)(b) and 14(2)(f) and (h) apply to the record. I find that no factor favouring disclosure applies. I also find that none of the exceptions at section 14(1) or 14(4) applies in the circumstances.

[28] I have also considered whether there is any possibility of severing the exempt information from the record, in order to provide the appellant with access to his own

[5] 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.).

information. The appellant's personal information is intertwined with the exempt information in a manner that does not permit reasonable severance for this purpose. The record is therefore exempt, in full, under 38(b).

Absurd result

[29] The absurd result principle may apply in circumstances where denying access to information would yield manifestly absurd or unjust results. In discussions with the mediator, the appellant alluded to having viewed at least parts of the record, possibly as part of the disclosure given to his lawyer during the criminal proceeding. In his representations, the appellant refers to specific allegations made by the complainant in the videotaped statement contained in the record. Given this, I considered whether the absurd result principle applies in the circumstances.

[30] 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.[6] The absurd result principle has been applied, for example, where the requester was present when the information was provided to the institution,[7] and where the information was clearly within the requester's knowledge.[8]

[31] It is unclear in this case whether the appellant has already seen all or parts of the record, or is aware of its contents in some other way. The appellant has not provided any evidence to support disclosure on this basis. Although he may be familiar with some of the record's contents, this alone does not establish that denying access on the basis of section 38(b) would yield manifestly absurd or unjust results, or be inconsistent with the purposes of the exemption. I note that this finding is consistent with many other orders of this office addressing access to third-party witness statements, including those containing accounts of incidents in which the requester was involved, and of which he may therefore have some knowledge.[9]

[32] The absurd result principle has no application in these circumstances.

Exercise of discretion

[33] As section 38(b) is a discretionary exemption, the police may choose to disclose a record subject to section 38(b), even though it may withhold it. An institution must exercise its discretion. On appeal, this office may determine whether the institution failed to do so.

[34] In this case, I am satisfied that the police exercised their discretion in choosing to withhold the record, in full, under section 38(b), and that they did so appropriately, taking into account relevant factors and not taking into account irrelevant factors. The

---

[6] Orders M-444 and MO-1323.
[7] Orders M-444 and P-1414.
[8] Orders MO-1196, PO-1679 and MO-1755.
[9] Orders MO-3036, MO-2777, PO-3160, PO-3581 and others.

police indicate that in making their decision on access, they took into account considerations including the appellant's right of access to his own information, the nature and sensitivity of the information contained in the record, and the protection of victims and other vulnerable individuals who report matters to the police.

[35] The appellant makes extensive representations challenging the allegations against him, and making his own allegations about the complainant's motives and actions, but these do not relate to the police's exercise of discretion, or any other issue within the scope of this appeal or within the power of this office to address.

[36] I uphold the police's exercise of discretion to withhold the record, in full, under section 38(b). I dismiss the appellant's appeal.

ORDER:

I uphold the police's decision to withhold the record in full.

Original Signed by: June 23, 2016

Jenny Ryu
Adjudicator