

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3325

Appeal MA15-433

Toronto Police Services Board

June 28, 2016

Summary: The issues in this order are whether the cell phone number of a 911 caller that was generated in a police report is personal information and, if so, whether it is exempt from disclosure under section 38(b), in conjunction with section 14(1) of the *Municipal Freedom of Information and Protection of Privacy Act*. In this order, the adjudicator finds that the cell number is personal information and is exempt under section 38(b). She dismisses the appeal.

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

OVERVIEW:

[1] This order disposes of the issues raised as a result of an appeal of an access decision. The Toronto Police Service Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a transcript or tape recording of a 911 telephone call relating to a particular incident.

[2] The police located one record which was responsive to the request; an I/CAD Event Details Report (I/CAD Report), and issued a decision letter to the requester granting access, in part. The police denied access to some information, claiming the discretionary exemption in section 38(b), in conjunction with section 14(1) (personal privacy). The police also advised the requester that some of the information in the

report was not responsive to the request.

[3] The requester (now the appellant) filed an appeal of the police's decision to this office.

[4] During the mediation of the appeal, the appellant explained that she was seeking access to the name and contact information of the individual who made the 911 call. The appellant confirmed that she was not seeking access to any other information contained in the record.

[5] The police confirmed that there is no name for the 911 caller in the record. The police also confirmed that the only contact information in the record is a cell phone number.

[6] At the request of the appellant, the mediator made many attempts to contact the affected third party at the number that appears in the records, to seek consent for the disclosure of the information. The mediator was not successful in reaching the affected third party.

[7] The appeal then moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. I sought and received representations from the police and the appellant, which were shared in accordance with this office's *Practice Direction 7*. For the reasons that follow, I uphold the police's decision and dismiss the appeal.

RECORDS:

[8] The only information remaining at issue is the cell phone number located in an I/CAD Report.

ISSUES:

- A. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the discretionary exemption in 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:

Issue A: Does the record contain “personal information” as defined in section 2(1) and, if so, to whom does it relate?

[9] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the I/CAD Report contains “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,

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

(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) 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.

[11] 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.¹ To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.²

[12] The police submit that the record contains the personal information of a third party, namely their cell phone number. The police go on to state that, in this case, the third party acted as a Good Samaritan and called 911 to seek medical help on behalf of the appellant. Due to the emergency nature of the call, the third party did not provide a name or contact information to the 911 dispatcher. This cell phone number appears on the I/CAD Report because it was picked up by cell phone towers.

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

² Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[13] The appellant's representations do not address this issue.

[14] I find that the record contains the personal information of the appellant, which is not at issue because that information has already been disclosed to him. The sole information at issue is the cell phone number of a third party. Although this cell number is unlisted, I find that its disclosure would allow one to ascertain the identity of the individual to whom the number belongs by utilizing the search resources available to the public on the Internet, or by simply calling the number.³ Therefore, I find that this cell number qualifies as the personal information of an identifiable individual, falling within paragraph (d) of the definition of personal information in section 2(1) of the *Act*. I will go on to determine whether the exemption in section 38(b) applies to this cell number.

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

[15] 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 exemptions from this right.

[16] 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.

[17] 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;

[18] In applying the section 38(b) exemption, sections 14(2) and (3) of the *Act* help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 14(1)(f). Also, section 14(4) lists situations that would not be an unjustified invasion of personal privacy. 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.

³ See also Order MO-2771.

[19] If the records are not covered by a presumption in section 14(3), 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.⁴

[20] For records claimed to be exempt under section 38(b), that is, 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.⁵

[21] The police submit that the disclosure of the cell phone number of the 911 caller would be an unjustified invasion of that individual's personal privacy. The police further state that none of the exceptions in paragraphs 14(1)(a) to (e) apply, particularly the fact that the 911 caller did not provide consent to the disclosure of their personal information. The police go on to argue that the factors in section 14(2)(f) and (h), which weigh in favour of non-disclosure, apply in these circumstances. These sections state:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all relevant circumstances, including whether,

(f) the personal information is highly sensitive;

...

(h) the personal information has been supplied by the individual to whom the information relates in confidence;

[22] The police state:

As previously stated, the affected third party merely acted as a *Good Samaritan* when he/she dialed 911. The cellphone number (at issue) that appears on the record was generated automatically by the signals picked up by nearby cell towers and not provided to this institution voluntarily by the affected third party. It serves as a safeguard in case the call is disconnected or, if necessary, to confirm the location of the incident. This personal information was collected by the institution in confidence. The *Good Samaritan* would not have had any expectation that having made

⁴ Order P-239.

⁵ Order MO-2954.

this call, his/her personal information would subsequently be the subject of a Freedom of Information request and possibly disclosed in response to such a request.

[23] The appellant states that it is representing someone who had a serious fall, has no witness information, and the individual who made the 911 call is likely the only available witness. The appellant alludes to a possible civil action stating that witness evidence of the condition of the floor area is critical to liability, which is always *fought hard*.

[24] I find that none of the exceptions listed in sections 14(1)(a) through (e), the limitations in section 14(4), and the presumptions in section 14(3) apply in the circumstances of this appeal. Therefore, the only exception that could apply is section 14(1)(f), which allows disclosure of personal information if it would not be an unjustified invasion of personal privacy.

[25] If no section 14(3) presumption applies and the exception in section 14(4) does not apply, which is the case at hand, section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.⁶ The appellant appears to have raised the factor in section 14(2)(d), which weighs in favour of the disclosure of personal information. This factor applies where disclosure of the personal information is relevant to a fair determination of rights affecting the person who made the request. In Order P-312, the adjudicator set out a four-part test which must be met in order for section 21(2)(d) (the provincial equivalent to section 14(2)(d)) to apply, including that:

- The right in question is a legal right based on a statute or the common law;
- The right relates to an existing or contemplated proceeding;
- The personal information being sought has some significance to the determination of the right; and
- The personal information is necessary for the individual in question to prepare for the proceeding or to ensure an impartial hearing.

[26] I find that the appellant's representations concerning this factor are speculative, and that he has not provided sufficient evidence of an applicable legal right or of a particular proceeding relating to him, regardless of whether the 911 caller may be a valuable witness or not. Consequently, I give this factor little weight.

[27] In contrast, the police have raised the application of the factors in section

⁶ Order P-239.

14(2)(f) (highly sensitive) and (h) (supplied in confidence), which weigh against the disclosure of personal information. I find that the factor in section 14(2)(h) does not apply in these circumstances, as the cell number was not supplied in confidence to the police by the individual to whom it relates. The number was retrieved from a cell phone tower located near the incident giving rise to the 911 call and included in the I/CAD Report. However, given that the 911 caller is likely not aware that their cell number is contained in this report, I find that this cell phone number is highly sensitive personal information. I agree with the police's argument that a 911 caller who is acting in good faith as a Good Samaritan may not expect that their personal information would be collected and certainly would not expect it to be disclosed in response to a freedom of information request. I also find that such a disclosure would cause them significant personal distress. Therefore, I place considerable weight on the factor in section 14(2)(f).

[28] Having considered and weighed the factors in sections 14(2), I find that the factor in section 14(2)(f) favouring privacy protection and the risk that members of the public will be reluctant to step forward in the future if this type of personal information is disclosed, outweighs the factor in section 14(2)(d) favouring disclosure. Therefore, I conclude that disclosure of the 911 caller's cell number would constitute an unjustified invasion of their personal privacy and that it is, therefore, exempt under section 38(b) in conjunction with section 14(1), subject to my finding regarding the police's exercise of discretion.

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

[29] 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.

[30] 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, or it fails to take into account relevant considerations.

[31] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.⁷ This office may not, however, substitute its own discretion for that of the institution.⁸

⁷ Order MO-1573.

⁸ Section 43(2).

[32] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:⁹

- 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; and 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;
- whether the requester has a sympathetic or compelling need to receive the information;
- whether the requester is an individual or an organization;
- 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; and
- the historic practice of the institution with respect to similar information.

[33] The police submit that they properly exercised their discretion, taking into account all relevant factors and not taking into account irrelevant factors, as well as *scrupulously* weighing those factors. They state that they are aware of their role to make information available to the public while also protecting the personal privacy of individuals. The police go on to submit that they considered the impact of the disclosure of the 911 caller's personal information on the willingness of members of the public to call 911 in the future in the event of an emergency. They also submit that while they provided the appellant with as much access to the information contained the record as possible, they do not see any sympathetic or compelling need for the appellant to receive the 911 caller's cell phone number. The appellant's representations did not address this issue.

[34] I have carefully considered the police's representations, and I find that they took into account relevant factors weighing both for and against the disclosure of the personal information at issue, and did not take into account irrelevant considerations. In my view, the police's representations reveal that they considered the appellant's position and balanced it against the protection of the 911 caller's personal privacy in

⁹ Orders P-344 and MO-1573.

exercising their discretion not to disclose it to the appellant. I am also mindful that the police disclosed most of the appellant's personal information to him and withheld only the personal information of the 911 caller, which I have found to be exempt from disclosure under the *Act*.

[35] Under all the circumstances, therefore, I am satisfied that the police have appropriately exercised their discretion under section 38(b) to withhold the personal information that I have found to be exempt.

ORDER:

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

Original Signed by: _____
Cathy Hamilton
Adjudicator

_____ June 28, 2016