

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-3346

Appeal MA14-510

The Greater/Grand Sudbury Police Services Board

August 11, 2016

**Summary:** The police received a request for access to all records relating to the requester. They granted partial access to them, withholding portions pursuant to the discretionary personal privacy exemptions at section 38(a), read in conjunction with the law enforcement exemption at section 8(1)(c) and, section 38(b) of the *Act*. In this order, the adjudicator upholds the police's decision to deny access to the portions of the records remaining at issue and dismisses the appeal.

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

### OVERVIEW:

[1] The Greater Sudbury Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to "any and all records...that name, describe or discuss [the requester], in any way."

[2] The police granted partial access to the responsive records. They withheld portions of them pursuant to the discretionary personal privacy exemptions at section 38(a), read in conjunction with the law enforcement exemptions at sections 8(1)(c) and 8(2)(a), and section 38(b), taking into consideration the presumption against disclosure at section 14(3)(b) for records compiled as part of an investigation into a possible violation of law. The police attached an index of records to the decision letter.

[3] The requester, now the appellant, appealed the police's decision.

[4] During mediation, the police identified additional records responsive to the appellant's request and issued a supplementary access decision disclosing 5 additional pages, in part, withholding portions pursuant to section 38(a), read in conjunction with sections 8(1)(c) and 8(2)(a), and section 38(b), again taking into consideration the presumption at section 14(3)(b) of the *Act*.

[5] Also during mediation, three affected parties identified in the records provided their consent to disclose the information relating to them. As a result, the police issued a second supplementary decision disclosing additional information on pages 44, 45, 46, 54, 55, 56, 57(b), 57(c), 58, 59, 60, 61 and 62. The police attached a revised index of records to that decision.

[6] The appellant advised that he is not seeking access to the dates of birth or addresses of identifiable individuals. However, he confirmed that he continues to seek access to some of the information that was withheld. Specifically, he seeks access to information that has been withheld from pages 4, 5, 8 to 14, 16 to 19, 21 to 33, 35, 44, to 48, 50, 56, and 57(c).

[7] The police advised that they are no longer relying on section 38(a), read in conjunction with section 8(2)(a) of the *Act* to deny access to some of the information contained in the records. However, they advised that for those portions, they are now claiming that section 38(a), read in conjunction with section 8(1)(c) applies. Section 8(2)(a) is therefore no longer at issue in this appeal.

[8] As a mediated resolution could not be reached, the file was transferred to the adjudication stage of the appeal process for an adjudicator to conduct an inquiry. During my inquiry into this appeal, I sought and received representations from both parties on the facts and issues on appeal. The representations that I received from the parties were shared in accordance with this office's procedure on sharing, as set out in *Practice Direction 7*.

[9] In his representations, the appellant confirmed that he does not seek access to police codes or other information used for "operational reasons." The police submit, and on my review I have confirmed, that this is the only type of information that has been withheld under section 38(a), read in conjunction with section 8(1)(c). Accordingly, section 38(a) is no longer at issue and I will not be considering it in this order.

[10] In this order I find that the police properly applied section 38(b) to sever portions of the records and properly exercised their discretion not to disclose those portions to the appellant. I uphold their decision and dismiss the appeal.

## **RECORDS:**

[11] The records at issue include occurrence reports, occurrence summaries, witness

statements and other police documents. Portions of the following pages of records remain at issue:

- Pages 4, 5, 8 to 14, 16 to 19, 21 to 33, 35, 44 to 48, 50, 56 and 57(c).

## **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?

## **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.<sup>1</sup> Where the record contains the requester's own personal information, access to the record is addressed under Part II of the *Act* and the discretionary exemptions at sections 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 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) as follows:

"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,

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<sup>1</sup> Order M-352.

(c) any identifying number, symbol or other particular assigned to the individual,

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

(e) the personal opinions or views of the individual except if they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(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.<sup>2</sup>

[15] Section 2(2.1) also relates 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.

[16] 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>3</sup> 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>4</sup>

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

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<sup>2</sup> Order 11.

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

<sup>4</sup> Orders P-1409, R-980015, PO-2225 and MO-2344.

### ***Representations***

[18] The police submit that the records contain information that qualifies as “personal information” within the meaning of the definition of that term in section 2(1) of the *Act*. They submit that pages 4, 5, 8 to 14, 16 to 19, 23, 25 to 33, 47, 48, 50, 56, and 57(c) contain the personal information of individuals other than the requester, including their names, addresses, telephone numbers and identifying numbers, as well as circumstances surrounding their involvement with the police. The police also submit that the disclosure of the names of these individuals would reveal personal information about them, including their views or opinions.

[19] The police also acknowledge that there is information contained in pages 44 to 46 and page 56 that amounts to information about an individual in their professional, official or business capacity.

[20] The appellant specifically states that he does not seek access to any individuals’ addresses or contact information. However, he states that he does seek access to information about individuals who made statements about him, including the content of those statements.

### ***Analysis and finding***

[21] Having considered the records at issue in this appeal, I find that all of them contain the personal information of the appellant. I also find that portions of the records remaining at issue also contain the personal information of individuals other than the appellant.

[22] All of the records contain the appellant’s personal information, including his age and sex (paragraph (a)), his medical, criminal or educational history (paragraph (b)), identifying numbers assigned to him (paragraph (c)), his address and telephone number (paragraph (d)), the view or opinions of other individuals about him (paragraph (g)), and his name, where it appears with other personal information about him (paragraph (h)).

[23] The records also contain the personal information of other identifiable individuals, including their race, age, sex or marital or family status (paragraph (a)), identifying numbers assigned to them (paragraph (c)), their addresses and telephone numbers (paragraph (d)), and their names, where they appear with other personal information about them (paragraph (h)).

[24] Although the police submit that portions of the records include information about individuals in their professional capacity, the majority of this information has been disclosed to the appellant. The small amount of information remaining at issue that relates to the individuals whose professional information is found in the records amounts to their “personal information” including their age, home addresses and telephone numbers and information relating to their employment history as contemplated by paragraph (b) of the definition of personal information.

[25] In sum, I find that the records at issue contain the “personal information” of the appellant as well as other identifiable individuals, within the meaning of the definition of that term at section 2(1) of the *Act*. Therefore, I must consider whether the information at issue is exempt pursuant to the discretionary personal privacy exemption at section 38(b) of the *Act*.

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

[26] Section 36(1) 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.

[27] 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 another 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.<sup>5</sup>

[28] Sections 14(1) to (4) are considered in determining whether the unjustified invasion of personal privacy threshold in section 38(b) is met. The exceptions in sections 14(1)(a) to (e) are relatively straightforward. None of them apply in the context of this appeal. The exception in section 14(1)(f) (where “disclosure does not constitute an unjustified invasion of personal privacy”), which applies in this appeal, is more complex and requires a consideration of additional parts of section 14.

[29] 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. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Finally, section 14(4) identifies information whose disclosure is not an unjustified invasion of personal privacy. None of the paragraphs in section 14(4) are applicable in the circumstances of this appeal.

[30] For records claimed to be exempt under section 38(b) (that is, records that contain the requester’s own 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.<sup>6</sup>

*Absurd result*

[31] 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

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<sup>6</sup> Order MO-2954.

exemption.<sup>7</sup>

[32] The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement<sup>8</sup>
- the requester was present when the information was provided to the institution<sup>9</sup>
- the information is clearly within the requester's knowledge<sup>10</sup>

[33] However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.<sup>11</sup>

### ***Representations***

[34] The police submit that the discretionary exemption at section 38(b) applies to the records because all of them contain the personal information of the appellant, as well as the personal information of other identifiable individuals. The police further submit all of the information was compiled and is identifiable as part of an investigation into a possible violation of law as contemplated by the presumption at section 14(3)(b), as the records relate to police investigations into a number of possible violations of law including violations of the *Highway Traffic Act*, the *Criminal Code of Canada*, and the *Mental Health Act*.

[35] With respect to the possible application of the absurd result principle, the police make the following submissions:

[A number of specifically identified pages] dealt with a criminal investigation and ultimate laying of charges and the disposition of same through court proceedings, wherein the appellant was obviously present as the victim, but save and except for his own statement to police, all reports identifying the accused and witnesses is clearly outside the requester's knowledge and the absurd result principle would not apply.

Further, records wherein [one identifiable individual] is referenced...in many instances the version of events to police were provided separately by each party, and therefore information gleaned by police not clearly within the requester's knowledge, and therefore we contend once again the absurd result principle would not apply.

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<sup>7</sup> Orders M-444 and MO-1323.

<sup>8</sup> Orders M-444 and M-451.

<sup>9</sup> Orders M-444 and P-1414.

<sup>10</sup> Orders MO-1196, PO-1679 and MO-1755.

<sup>11</sup> Orders M-757, MO-133 and MO-1378.

As well, records where in the appellant initiated a complaint and as a result the personal information of others recorded by police, such as name and date of birth, to the remarks field of the Occurrence Summary (page 5), and the complaint itself ultimately cancelled by the appellant resulting in no further records; and as well, the police occurrence wherein the only involvement of the appellant to same is a reference to him by the investigating officer (pages 47, 50), we again do contend that the absurd result principle would not apply.

[36] The appellant does not dispute the police's position that the records were compiled and are identifiable as investigations into possible violations of law but states that he wants the police to "fully disclose in writing the thing for which they were investigating [him]."

### ***Analysis and findings***

[37] In considering whether disclosure of the information for which section 38(b) has been claimed would result in an unjustified invasion of an identifiable individual's personal privacy, I considered, and weighed, the factors and presumptions set out in sections 14(2) and (3) of the *Act*.

#### *Section 14(3)(b) – investigation into a possible violation of law*

[38] From my review of the records for which section 38(b) has been claimed, it is clear that the information that they contain was compiled as part of investigations into possible violations of law as contemplated by the presumption against disclosure at section 14(3)(b). This is the only presumption that the police have claimed and the only presumption that is applicable in the circumstances of this appeal.

[39] Under section 14(3)(b), if the records are found to have been compiled as part of an investigation into a possible violation of law, the disclosure of personal information contained within them is presumed to amount to an unjustified invasion of the personal privacy of the individual to whom the personal information relates.

[40] 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>12</sup> The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.<sup>13</sup>

[41] The records at issue in this appeal consist of occurrence summaries and reports relating to a number of complaints filed with the police, the majority of which were initiated by the appellant. From my review, I find that all of the information contained in the records, including the portions which have been withheld under section 38(b), detail those complaints and the police's investigation into the incidents that gave rise to the

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<sup>12</sup> Orders P-242 and MO-2235.

<sup>13</sup> Orders MO-2213, PO-1849 and PO-2608.



complaints. In my view, this information was clearly compiled and is identifiable as part of investigations into possible violations of law under a number of different pieces of legislation, particularly, the *Highway Traffic Act* and the *Criminal Code of Canada*. Accordingly, I find that the presumption at section 14(3)(b) applies to all of the personal information that has been severed by the police pursuant to the exemption at section 38(b) and its disclosure would constitute a presumed unjustified invasion of the personal privacy of the various identifiable individuals, to whom it relates.

*Section 14(2)(h) – information supplied in confidence*

[42] Section 14(2) provides factors for the police to consider in making a determination on whether the disclosure of personal information would result in an unjustified invasion of an individual's 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).<sup>14</sup> Some of these criteria weigh in favour of disclosure, while others weigh in favour of privacy protection.

[43] The police have not specifically raised the possible application of any of the factors listed in section 14(2) or any other relevant factors. The appellant has also not submitted any representations on the relevance of any factors. On my review of the information before me, the consideration weighing against disclosure listed at section 14(2)(h) may 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.

[44] The factor at section 14(2)(h) weighs in favour of privacy protection, that is, weighs in favour of non-disclosure of the information to anyone other than the individual who supplied information. For it to apply, both the individual supplying the information and the recipient must have had an expectation that the information would be treated confidentially and that expectation must be reasonable in the circumstances. Thus, section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.<sup>15</sup>

[45] As previously mentioned, much of the information in the records has already been disclosed to the appellant and the remaining information consists of the personal information of individuals other than the appellant, either on its own intermingled in such a way with other information that the personal information cannot be severed. In my view, the context and surrounding circumstances of the complaints that form the subject matter of the records at issue are such that any personal information that was

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<sup>14</sup> Order P-99

<sup>15</sup> Order PO-1670.

supplied to the police by individuals in the context of these law enforcement matters would have been so supplied with a reasonable expectation of confidentiality. Accordingly, in this appeal, I find that the factor at section 14(2)(h) is a relevant consideration that weighs in favour of protecting the privacy of the individuals who supplied the information, and not disclosing their personal information to the appellant.

### *Summary*

[46] As noted above, for information claimed to be exempt under section 38(b), this office will consider, and weigh, the factors and presumptions in sections 14(2) and (3), and balance the interests of the parties. In this case, I have considered 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 apply in the circumstances of this appeal and support a conclusion that disclosure of the information at issue would result in the unjustified invasion of the personal privacy of individuals other than the appellant. I have also found that there is insufficient evidence to support a conclusion that any factors weighing in favour of the disclosure of the personal information at issue to the appellant, apply.

[47] Additionally, having reviewed the records and considered the evidence of the parties, I find that there is no evidence before me to support a conclusion that the absurd result principle applies to the particular information at issue in this case.

[48] As a result, I find that the disclosure of the information that remains 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.

### ***Exercise of discretion***

[49] Section 38(b) is a discretionary exemption which 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.

[50] 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.

[51] In any of these cases this office may send the matter back to the institution for an exercise of discretion based on proper consideration.<sup>16</sup> This office may not, however,

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<sup>16</sup> Order MO-1573.

substitute its own discretion for that of the institution.<sup>17</sup>

[52] The police submit that when exercising its discretion under sections 38(b) not to disclose the information that it withheld, they weighed the appellant's need for the information against the law enforcement considerations. Specifically, in relation to information that was withheld under section 38(b), the police submit that it considered the relationship between the appellant and the affected parties, the nature of the information, and the extent to which it is significant or sensitive of the affected party to whom it relates.

[53] Considering the circumstances, I am satisfied that the police exercised their discretion in good faith and for a proper purpose, taking into account all relevant factors. The police disclosed information relating solely to the appellant, to him. The information that they severed is solely related to or inextricably intertwined with the personal information of identifiable individuals other than the appellant. I accept that the police did not err in exercising their discretion to deny the appellant access to the information that I have found subject to the discretionary personal privacy exemption at section 38(b).

**ORDER:**

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

Original signed by: \_\_\_\_\_  
Catherine Corban  
Adjudicator

\_\_\_\_\_ August 11, 2016

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<sup>17</sup> Section 43(2).