

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-3399

Appeal MA16-61

North Bay Police Services Board

January 11, 2017

**Summary:** The appellant requested a copy of an occurrence report concerning an incident that occurred at his child's school. The police located responsive records and issued a decision granting the appellant partial access to them. The police relied on the discretionary exemption in section 38(b) (invasion of privacy) to deny access to the portions they withheld. The police's decision to deny access to the withheld portions of the records is upheld and the appeal is dismissed.

**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(3)(b), 16 and 38(b).

**Orders and Investigation Reports Considered:** MO-1524-I, MO-2309, R-980015.

### BACKGROUND:

[1] The requester, on behalf of himself and his child, who is a minor, made an access request to the North Bay Police Service (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for all records, including: officer's notes, all reports, statements and photos, related to a specific occurrence. The requester noted that he is the complainant in the matter that is the subject of the records. The requester also provided an authorization for release of personal information signed by the child's mother.

[2] The police conducted a search for responsive records and granted partial access to them. The police claim that access to the withheld information was denied pursuant to sections 8(1)(l) (facilitate commission of an unlawful act), and 14(1) (personal privacy), with reference to 14(2)(f) and 14(3)(b) of the *Act*.

[3] The requester (now the appellant) appealed the police's decision to this office and a mediator was assigned to the appeal.

[4] During mediation, the mediator spoke to both the police and the appellant. The appellant advised the mediator that he was not seeking access to the police code and statistical information withheld pursuant to section 8(1)(l) of the *Act*. Accordingly, that information is no longer at issue in this appeal.

[5] Also, during the mediation, the mediator raised the possible application of section 38(b), in conjunction with section 14(1) of the *Act*. The police agreed and section 38(b) was included in the circumstance of this appeal.

[6] The mediator noted that the information withheld in the records related to the appellant and six individuals other than the appellant (the affected parties).<sup>1</sup> The police confirmed that the affected parties had not been notified of the appellant's request.

[7] The appellant advised the mediator that he wished to pursue access to the affected parties' information withheld in the records, including the statements which they had provided to the police. The mediator contacted the affected parties to inquire if they would consent to the release of their information contained in the records. Five of the affected parties declined their consent to the disclosure of their information and the remaining affected party did not respond.

[8] As no further mediation was possible, the file was transferred to the adjudication stage of the appeals process in which an adjudicator conducts an inquiry under the *Act*. As the adjudicator, I invited all parties to make representations in this appeal. The police relied on their initial decision to only disclose part of the record and did not make representations in this appeal. Four of the affected parties made representations and the appellant also made representations in this appeal. Representations were shared in accordance with section 7 of this office's *Code of Procedure and Practice Direction 7*.

[9] In this order, I find that the withheld portions of the records contain the affected parties' personal information and I uphold the police's decision except for those portions that I have determined are the personal information of the appellant, his child or his spouse.

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<sup>1</sup> This does not include the child's mother, whose personal information was disclosed.

## **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 mandatory exemption at section 14(1) or the discretionary exemption at 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?
- D. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 38(b) exemption?

## **DISCUSSION:**

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

[10] 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,
- (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;

[11] 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>

[12] 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>

[13] 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>

[14] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.<sup>5</sup>

[15] The police referred to their initial decision where they withheld portions of the record citing paragraphs (a), (c), (d) and (g) of the definition of "personal information" in section 2(1) of the *Act*.

[16] In his representations, the appellant submits that the information in the record is not personal information as it relates to the parties' professional duties/responsibilities. He submits that he is not seeking records relating to the affected parties' employment file. He states that employees of the school board (and the board itself) are subject to the *Act* when conducting all matters related to business and the execution of their duties in whatever capacity they hold. He submits that their names, title, current

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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.

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

location, work phone numbers, email addresses, reports, notes and general observations and subsequent opinions concerning the incident, "are clearly professional and not personal in nature."

[17] The appellant refers to MO-1524-I to support that the information in the record is not personal. He also relied on MO-2309 where Adjudicator Diane Smith wrote "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."

[18] The affected parties who made representations in this appeal state that the record contains their personal information including age, employment history, home address, telephone numbers along with their name. None of the affected parties who provided representations consented to the release of their personal information. One affected party stated that although some of the information in the record relates to events that occurred in their professional, official or business capacity, it is still personal information because it reveals something of a personal nature about them, and, in particular the information involves an evaluation of their performance as an employee for the school board and relates to an investigation into their conduct. It is also argued that the information in the record relate to activities that extend beyond the routine day-to-day responsibilities and many orders are referred to in support of this position.

[19] Further, the affected parties submit that it is reasonable to expect that they may be identified if the information is disclosed. They argue that there were a limited number of individuals involved in the incident and it would not be difficult for the appellant to deduce who provided the information.

### ***Finding***

[20] After reviewing the withheld portion of the record, I find that it contains the personal information of the affected parties. The records include their dates of birth, ages, gender, home addresses and telephone numbers and personal views and opinions that do not relate to another individual.

[21] Although the appellant refers to MO-2309, to support that the information in the record is not personal, in fact, in her analysis Adjudicator Smith stated that:

Although the personal information in the record is about these individuals in their professional capacity, I find that this information relates to an investigation into or assessment of the performance or alleged improper conduct of these individuals. As such, the characterization of this information changes and becomes personal information as it relates to these individuals in their personal, rather than (sic) their professional, capacities [PO-2271].

[22] Adjudicator Smith found that the information in the records before her was, in fact, personal information. I do not find that this order supports that the information in the records at issue is not personal. The type of information in the records at issue is similar to that described by Adjudicator Smith, being information that relates to an investigation into or assessment of the performance or alleged improper conduct of the individuals involved. I agree with Adjudicator Smith's reasoning and find that the information in the records at issue is personal.

[23] In MO-1524-I, relied upon by the appellant, Adjudicator Laurel Cropley discussed the distinction between personal and professional information. In that case the appellant was seeking copies of investigative reports and other documentation relating to an incident that occurred at his place of employment. Adjudicator Cropley stated:

One staff member of the Centre was more involved in the overall matter than other representatives of the Centre. Although in some cases, he is clearly responding to the Police in his supervisory capacity, such as when providing the Police with certain information or documentation relating to the staffing of the Centre, in other cases, he provides the Police with his own personal perspective with respect to the events at the time and the appellant. In these cases, his interaction with the Police is similar to the other staff of the Centre who gave statements to the Police as witnesses. In this capacity, the information about or provided by him is personal in nature. Similarly, the information about staff who were interviewed by the Police as witnesses or were referred to by the witnesses is information about these individuals in their personal capacity since such activity would clearly fall outside the scope of their normal employment responsibilities.

[24] Further, in Reconsideration Order R-980015, also referenced by the appellant, Adjudicator Donald Hale commented on the difference between personal information compared to information provided in the course of employment that is not considered personal. In that case it was found that the records did not contain the personal opinions of affected parties, "[r]ather, as evidenced by the contents of the records themselves, each of these individuals is giving voice to the views of the organization which he/she represents." Adjudicator Hale found that the affected parties could not be said to be communicating their personal opinions on the subjects in the records and found that the information was not personal.

[25] After reviewing the records at issue, I do not find that the affected parties were giving voice to the organization they worked for but instead they communicated to the police their own personal opinions and views regarding the specified incident. This is considered personal information under the *Act*.

[26] I have reviewed the records and find that they contain the personal information

of the appellant,<sup>6</sup> his wife, as well as the information of the affected parties that fall within the scope of the definition of personal information in section 2(1) of the *Act*. I do not agree with the appellant that the information in the record is “clearly professional” as it relates to their professional duties. In fact, in my review of the records, I find that the affected parties’ professional information found in the records has already been disclosed to the appellant. The remainder of the records contains the personal information of the affected parties including statements by them concerning an incident which they witnessed and/or were involved in. These statement contains their views and opinions about the incident. This is personal information and not professional and I rely on the abovementioned orders to make this finding.

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

[27] Since I found that the record contains the personal information of both the appellant and the affected parties, section 36(1) applies to this appeal. 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.

[28] 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.<sup>7</sup>

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

[30] 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.<sup>8</sup> 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). If the information fits within any of paragraphs (a) to (h) of section 14(3), disclosure of the information is presumed to be an unjustified invasion of personal privacy.

[31] Section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal

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<sup>6</sup> This includes the personal information of both the appellant and his minor child.

<sup>7</sup> See below in the “Exercise of Discretion” section for a more detailed discussion of the institution’s discretion under section 38(b).

<sup>8</sup> Order MO-2954.

privacy.<sup>9</sup> Some of the factors listed in section 14(2), if present, weigh in favour of disclosure, while others weigh in favour of non-disclosure. The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2).<sup>10</sup>

[32] The police submit that the presumption at section 14(3)(b) of the *Act* applies to the information and also rely on the factor at section 14(2)(f) (highly sensitive) to support non-disclosure of the remainder of the record.

[33] In his representations on this issue, the appellant submits that section 14(1) does not apply to the records as they "solely pertain to the duties and functions of their [affected parties] employment." He also submits that section 14(3)(b) should not apply as, although this was an initial investigation of an assault, "it is evident from the records provided thus far the focus quickly shifted to the parent's parenting choices and their [child's] behavior, not a criminal act." The appellant also alludes to the fact that the CAS was present during the time the police attended and therefore "[i]nterviews and documents shared from that point were not conducted with a view to criminal charges." He also states that criminal charges were not laid in this instance and that a considerable amount of time had passed since the case was deemed closed by the police.

[34] 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,
  - (a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;
- (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,
  - (f) the personal information is highly sensitive;
- (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;

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<sup>9</sup> Order P-239.

<sup>10</sup> Order P-99.



[35] 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 withheld portions of the record.

### ***Section 14(3) presumption***

[36] 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>11</sup> The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.<sup>12</sup>

[37] Section 14(3)(b) does not apply if the records were created after the completion of an investigation into a possible violation of law.<sup>13</sup>

[38] The police submit, and I accept, that the presumption at section 14(3)(b) applies in these circumstances. The record is an occurrence report concerning an incident that occurred at a school. The record was compiled as part of a police investigation into a possible violation of the *Criminal Code of Canada*, which did not result in charges being laid. Although no charges were laid, there need only have been an investigation into a possible violation of law for the presumption at section 14(3)(b) to apply.<sup>14</sup> Section 14(3)(b) therefore weighs in favour of non-disclosure of the withheld portions of the record.

[39] I do not accept the appellant's assertion that section 14(3)(b) is not applicable because the investigation quickly shifted and there were no criminal charges brought. Also the fact that the investigation is now closed is not a factor to consider in determining if section 14(3)(b) applies.

### ***Section 14(2) factors***

[40] The appellant does not point to any section 14(2) factors that support disclosure of the record in his representations. He stated that the police's reliance on section 14(2)(f) is not relevant as the information in the record is not personal in nature but professionally based.

[41] Having found that section 14(3)(b) applies and in the absence of factors favouring disclosure, in the circumstances, it is not necessary for me to also consider whether section 14(2)(f) might also apply.

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<sup>11</sup> Orders P-242 and MO-2235.

<sup>12</sup> Orders MO-2213, PO-1849 and PO-2608.

<sup>13</sup> Orders M-734, M-841, M-1086, PO-1819 and PO-2019.

<sup>14</sup> Orders P-242 and MO-2235

## ***Finding***

[42] Given the application of the presumption in section 14(3)(b), and the fact that no factors favouring disclosure were established, and balancing all the interests, I am satisfied that the disclosure of the remaining withheld personal information would constitute an unjustified invasion of another individual's personal privacy. Accordingly, I find that this personal information is exempt from disclosure under section 38(b) of the *Act*. I am also satisfied after reviewing the undisclosed portions of the records that they cannot be reasonably severed, without revealing information that is exempt under section 38(b) or resulting in disconnected snippets of information being revealed.

[43] Information in the records that relate to the appellant, his wife and child have already been provided to the appellant by the police. In my review, I find that except for two instances, the withheld records contain mixed personal information or the personal information of other individuals. In two instances, however, my review finds additional personal information relating to the appellant that cannot be withheld under section 38(b) and I order it to be disclosed.

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

[44] 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.

[45] 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.

[46] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>15</sup> This office may not, however, substitute its own discretion for that of the institution.<sup>16</sup>

[47] I have considered the circumstances surrounding this appeal and the police's representations and I am satisfied that the police have properly exercised their discretion with respect to section 38(b) of the *Act*. I am satisfied that they did not

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<sup>15</sup> Order MO-1573.

<sup>16</sup> Section 43(2).

exercise their discretion in bad faith or for an improper purpose. The police considered the purposes of the *Act* and have given due regard to the nature and sensitivity of the information in the specific circumstances of this appeal and I have upheld their decision with respect to the information they have claimed is exempt. Accordingly, I find that the police took relevant factors into account and I uphold their exercise of discretion in this appeal.

**D: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 14(1) or 38(b) exemptions?**

[48] In his representations, the appellant raised the issue of the public interest. He submits that the police erred in relying on section 14(1) in not releasing further records. He notes that the school board is an entity established to serve and nurture youth in the area and when one of its educational assistances causes harm to a child, "it is in the best interest of the community to know the circumstances surrounding the incident." Further, he suggests that disclosure to the public would ensure that steps would be taken to safeguard against further such acts and strengthen the public trust in the institution.

[49] The police did not provide representations on the public interest override.

[50] I am not convinced by the appellant's argument that the public interest override should apply.

[51] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act's* central purpose of shedding light on the operations of government. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.

[52] A public interest does not exist where the interests being advanced are essentially private in nature.<sup>17</sup> Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.<sup>18</sup>

[53] I find that the appellant has not established that there is a compelling public interest in disclosure of the withheld portions of the record at issue in this appeal. I am not convinced that there is a strong relationship between this record and the *Act's* central purpose of shedding light on the operations of government. In addition, I find that the appellant has a private, not a public, interest in obtaining the record at issue,

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<sup>17</sup> Orders P-12, P-347, and P-1439.

<sup>18</sup> Order MO-1564.

and disclosing the withheld portion would not raise issues of a more general application.

[54] Although the appellant may have a compelling private interest in seeking access to some of the withheld information in the record, I find that there is no compelling public interest in disclosure, as required by section 16. Therefore, I find that the public interest override in section 16 does not apply to the withheld portion of the record.

**ORDER:**

1. I uphold the police's decision to withhold information under section 38(b), in part.
2. I order the police to provide the appellant with a copy of pages 11 and 13 as set out in the highlighted copy of those pages provided with the police's copy of the order, and I order it to do so by **February 15, 2017 but not before February 10, 2017**. To be clear, highlighted portions of the records should be disclosed.
3. In order to verify compliance with order provision 2, I reserve the right to require the police to provide me with a copy of the pages disclosed to the appellant.

Original Signed by: \_\_\_\_\_

Alec Fadel  
Adjudicator

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January 11, 2017