

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3401

Appeal MA16-220-2

Toronto Police Services Board

January 23, 2017

Summary: The appellant made a request to the police under the *Municipal Freedom of Information Act* (the *Act*) for records relating to a specific incident in which he was involved. The police provided partial access to them, withholding some information under the discretionary personal privacy exemption in section 38(b) of the *Act*. The police also found some information in the records to be non-responsive to the request and withheld it on that basis. The adjudicator upholds the police's decisions in part.

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"), 38(b), and 17(1).

Orders and Investigation Reports Considered: Orders MO-3063, MO-3245, MO-3342, and MO-3399.

BACKGROUND:

[1] The appellant made an access request to the Toronto Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following:

I am requesting all personal information regarding the attached (a) criminal false allegation that was made about me by my ex-wife. This

criminal false allegation was made in order to "force him (me) to settle" (recording).

I understand that names and phone numbers may be redacted but I ask that all other information remain unredacted. I am humbly requesting all police reports relating to this incident, all incident reports, memorandum book notes, officer notes, witness statements and phone records. Thank you.

[2] The police failed to issue a decision in response to this request within the 30-day time limit specified under section 19 of the *Act*. As a result, the requester appealed to this office and file MA16-220 was opened to address the appeal as a deemed refusal issue.

[3] A Notice of Inquiry was sent to the police on April 22, 2016. The police proceeded to issue an access decision on April 25, 2016 and accordingly, that appeal was closed at intake.

[4] In their access decision, the police granted partial access to the two records responsive to the appellant's request. The police withheld portions of the records, claiming the discretionary personal privacy exemption in section 38(b) of the *Act* for records relating to two identifiable individuals other than the appellant (the affected party and another individual (the individual)). The police also advised the requester that certain information was withheld as it was not responsive to the request because it pertains to other incidents prior to and after the incident in question.

[5] The appellant appealed the police's decision to this office.

[6] During the mediation stage, the appellant advised the mediator that he believes that further records responsive to his request exist. The police proceeded to conduct another search for responsive records. At the conclusion of the search, the police located an occurrence report and issued a revised decision granting partial access to that record, relying on the same exemption set out above. The police also advised the appellant that certain information was withheld as it was not responsive to the request.

[7] The appellant advised the mediator that he wishes to pursue access to all of the information that the police withheld, and that he continues to be of the view that further records exist. Consequently, the responsiveness of the records and reasonable search were added as issues in this appeal.

[8] As this appeal was not resolved during mediation, it was moved to the adjudication stage. The adjudicator initially assigned to this appeal invited the police, an affected party, and the appellant to provide representations on the issues in this appeal. She received representations from the police but not from the affected party or the appellant.

[9] In this order, I uphold the police's decisions that the individual's personal information is exempt from disclosure under section 38(b). However, I order that the police disclose some information about the affected party since that information is not "personal information."

RECORDS:

[10] The records at issue consist of three records (an I/CAD Event Details Report, an officer's notes, and an occurrence report).

ISSUES:

- A. Are any portions of the records non-responsive to the request?
- B. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- C. Does the discretionary exemption at section 38(b) apply to the information at issue?
- D. Did the institution exercise its discretion under section 38(b)? If so, should this office uphold the exercise of discretion?
- E. Did the institution conduct a reasonable search for records?

DISCUSSION:

A: Are any portions of the records non-responsive to the request?

[11] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

- (1) A person seeking access to a record shall,
 - (a) make a request in writing to the institution that the person believes has custody or control of the record;
 - (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

...

(2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[12] Although the police provided representations, their representations did not specifically address the issue of whether any of the information in the records is non-responsive to the request.

Analysis and findings

[13] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.¹

[14] To be considered responsive to the request, records must "reasonably relate" to the request.²

[15] I note that, in both their decisions, the police stated that portions of the records were non-responsive to the request.

[16] Specifically, in their initial decision, the police stated the following:

Please note that access is being provided to certain portions of police officer memorandum books which are responsive to your request. Since police officers record all significant events which occur during their tour of duty, there are other areas of such books which are neither relevant nor responsive to your request. Such non-responsive areas have been totally severed from the copy provided to you.

[17] In their revised decision, the police stated that some information has been removed from the occurrence report as it does not pertain to the appellant's request.

[18] As mentioned above, two records pertain to the police's initial decision. These records are an I/CAD Event Details Report, and an officer's notes (or memorandum books).

[19] On my review of the records, I find that the portions of the officer's notes identified as non-responsive to the request are not responsive to the request. This information is not reasonably related to the request, but concerns other matters, specifically other incidents occurring prior to and after the incident in question.

[20] With regards to the occurrence report, the police's decision identified some

¹ Orders P-134 and P-880.

² Orders P-880 and PO-2661.

information as not responsive. However, the police did not specifically identify the non-responsive parts. Having carefully reviewed this record, I find that the whole record is reasonably related to the appellant's request, and is responsive. Accordingly, I will consider whether this information is exempt under section 38(b).

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

[21] The police claim that certain information in the records is exempt pursuant to the personal privacy exemption at section 38(b).

[22] In order to determine whether this section 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;

[23] 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.³

[24] 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.

[25] 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.⁴

[26] 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.⁵

[27] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁶

[28] In their representations, the police submit that the records contain personal information relating to another individual and the affected party, as contemplated by the definition of "personal information" as set out in section 2(1) of the *Act*.

[29] They submit that the personal information includes the names of the affected party and the other individual together with other personal information relating to them (paragraph (h)) including ethnicity, age, sex, and marital status (paragraph (a)), as well as their addresses and telephone numbers (paragraph (d)).

³ Order 11.

⁴ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁵ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁶ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

Analysis and findings

[30] I find the records at issue contain information about the appellant, the affected party and another individual. The police have disclosed much of the appellant's personal information to him.

[31] As mentioned above, the general rule is that information associated with an individual in a professional, official or business capacity will not be considered to be 'about' the individual, and thus is not considered to be personal information. With that in mind, I find that the information about the affected party's name and telephone numbers are not personal information as he was present at the incident in his professional capacity. However, I agree with the police that the affected party's date of birth is personal information as set out in section 2(1) of the *Act*. Accordingly, I will order that all information pertaining to the affected party (excluding his date of birth) in the records be released to the appellant.

[32] As mentioned in the police's representations, there is another individual, the complainant, mentioned in the records. After reviewing the withheld portions of the records, I find that they contain the personal information of this individual. The records include the individual's age, gender, date of birth, marital status, home address, and telephone numbers.

[33] I find that the remaining withheld portions are not personal information as defined in paragraphs 2(1)(a) to (h) or sections 2(2.1) and (2.2) of the *Act*. They are simply numbers or information which do not relate to an identifiable individual. This includes the information that I found to be responsive to the request, contained in the occurrence report.

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

[34] Since I found that the records contain the personal information of the appellant, the other individual, and the affected party, section 36(1) of the *Act* applies to the appellant's access request. 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.

[35] 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.⁷

[36] 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).

[37] 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.⁸ However, if the information fits within any of paragraphs (a) to (e) of section 14(1) or within 14(4), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b).

[38] 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. Also, 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.⁹ 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).¹⁰

[39] The police submit that the presumption under section 14(3)(b) applies as they compiled the personal information about the individual as part of an investigation into a possible violation of law. The police submit that, therefore, the release of such information would constitute an unjustified invasion of personal privacy. The police also submit that section 14(3)(b) applies even when criminal proceedings are not commenced, as there only has to be an investigation into a 'possible' violation of law.

Analysis and findings

[40] I note that the information at issue does not fit within the exceptions set out in sections 14(1)(a) to (e) nor section 14(4) of the *Act*. As such, I will turn to discuss whether any of the presumptions under section 14(3) apply and whether any of the section 14(2) factors apply.

[41] 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.¹¹ The presumption can also apply to records created as

⁷ See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 38(b).

⁸ Order MO-2954.

⁹ Order P-239.

¹⁰ Order P-99.

¹¹ Orders P-242 and MO-2235.

part of a law enforcement investigation where charges are subsequently withdrawn.¹²

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

[43] The presumption can apply to a variety of investigations, including those relating to by-law enforcement¹⁴ and violations of environmental laws or occupational health and safety laws.¹⁵

[44] As mentioned above, the police submit, and I accept, that the presumption at section 14(3)(b) applies in this circumstance. The records concern an incident relating to property. The personal information was compiled and is identifiable as part of a police investigation into a possible violation of the *Criminal Code of Canada*, which did not appear to 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.¹⁶ Section 14(3)(b) therefore weighs in favour of non-disclosure of the withheld portions of the records.

[45] As mentioned above, the appellant has not made any representations. As such, given the application of the presumption in section 14(3)(b), and the fact that no factors favouring disclosure in section 14(2) were established, and balancing all the interests, I am satisfied that the disclosure of the individual's personal information would constitute an unjustified invasion of his/her personal privacy. Accordingly, I find that this personal information is exempt from disclosure under section 38(b) of the *Act*, subject to my finding on the police's exercise of discretion below.

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

[46] 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.

[47] 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

¹² Orders MO-2213, PO-1849 and PO-2608.

¹³ Orders M-734, M-841, M-1086, PO-1819 and PO-2019.

¹⁴ Order MO-2147.

¹⁵ Orders PO-1706 and PO-2716.

¹⁶ Orders P-242 and MO-2235.

- it fails to take into account relevant considerations.

[48] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁷ This office may not, however, substitute its own discretion for that of the institution.¹⁸

[49] The police submit that they exercised their discretion under section 38(b). They considered the following factors:

- the purposes of the *Act*
- 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 is an individual or an organization
- the relationship between the requester and any affected persons

[50] They also submit that they did not exercise their discretion in bad faith or for an improper purpose.

Analysis and findings

[51] Based on my review of the entirety of the police's representations, I find that they exercised their discretion under section 38(b) in a proper manner, taking into account relevant considerations and not taking into account irrelevant considerations.

[52] Accordingly, I uphold the police's exercise of discretion and find that the individual's personal information is exempt under section 38(b).

E: Did the institution conduct a reasonable search for records?

[53] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.¹⁹ If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[54] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to

¹⁷ Order MO-1573.

¹⁸ Section 43(2).

¹⁹ Orders P-85, P-221 and PO-1954-I.

show that it has made a reasonable effort to identify and locate responsive records.²⁰ To be responsive, a record must be "reasonably related" to the request.²¹

[55] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.²²

[56] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.²³

[57] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.²⁴

[58] In this case, the appellant told the mediator that he believes that further records exist, specifically an occurrence report. The mediator raised this issue with the police. Upon further search, the police located an occurrence report, which was partially disclosed to the appellant.

[59] In their representations, the police acknowledged that a reasonable search was not initially conducted as revealed in the course of the mediation stage of this appeal. In support of their representations, the police attached an affidavit sworn by an analyst, whose job includes dealing with requests for information under the *Act*. The affidavit referred to the scope of the appellant's initial request and noted that a couple of weeks after receiving the request the analyst conducted a complete search of all relevant Toronto Police Services databases which yielded inconclusive results as the search focus was not clearly identifiable due to insufficient information in the request. This was communicated to the appellant, who narrowed the timeframe of the incident to September 26 to 28, 2008, which enabled the police to locate the responsive records (the I/CAD Event Details Report and the officer's notes).

[60] Subsequently, the analyst noted that she was informed that an appeal was launched by the appellant with the IPC. The analyst noted that the mediator informed her that the appellant believed there were additional responsive records. Shortly afterwards, the analyst conducted another search of the Legacy Data Systems database and located an occurrence report which had been erroneously missed in the initial search, due to incomplete search criteria. The analyst promptly provided a redacted copy of the occurrence report to the appellant.

²⁰ Orders P-624 and PO-2559.

²¹ Order PO-2554.

²² Orders M-909, PO-2469 and PO-2592.

²³ Order MO-2185.

²⁴ Order MO-2246.

Analysis and findings

[61] Based on my review of the police's representations and evidence, and in the absence of representation from the appellant, I find that the police have conducted a reasonable search for responsive records. I find that the appellant has not provided me with a reasonable basis for concluding that additional records exist. As stated above, the *Act* does not require the police to prove with absolute certainty that further records do not exist. In the circumstances, I am satisfied that the police provided sufficient evidence to demonstrate that they made a reasonable effort to address the appellant's request and locate all records reasonably related to the request. Therefore, I uphold the police's search for responsive records.

ORDER:

1. I uphold the police's decision, in part. I order the police to disclose to the appellant the information that I have found is not personal information, in accordance with the highlighted records I have enclosed with the police's copy of the order. To be clear, only the highlighted information should be disclosed to the appellant.
2. I order that the police make the disclosure referred to in paragraph 1 of this order by **February 28, 2017** but not before **February 23, 2017**.
3. I reserve the right to require the police to provide me with a copy of the information disclosed to the appellant.

Original Signed by: _____
Lan An
Adjudicator

_____ January 23, 2017