

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-3403

Appeal MA15-519

York Regional Police Services Board

January 30, 2017

**Summary:** The appellant submitted a request for police records relating to a complaint he filed against an individual he alleged assaulted him. The police granted the appellant partial access to the records. The police claim that disclosure of the withheld portions would constitute an unjustified invasion of personal privacy under section 38(b) taking into consideration the presumption under section 14(3)(b). The appellant appealed the police's decision to this office and claims that the factors at sections 14(2)(a) and (d) favouring disclosure apply. In this order, the adjudicator upholds the police's access decision and dismisses the appeal.

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

### OVERVIEW:

[1] The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the York Regional Police Services Board (the police) for records relating to an alleged assault the appellant reported to the police.

[2] The police granted the appellant partial access to an occurrence report and the handwritten notes of two police officers. The police claim that disclosure of the withheld information would constitute an unjustified invasion of personal privacy under section 38(b) in conjunction with section 14(3)(b).

[3] The appellant appealed the police's decision to this office and a mediator

explored settlement with the parties. During mediation, the appellant confirmed that he was only seeking access to the withheld information about the individual who he alleged assaulted him (the affected party).

[4] No further mediation was possible and the file was transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. During adjudication the parties provided written representations to this office and the appellant narrowed the scope of his request to the affected party's address and telephone number.

[5] In this order, I find that disclosure of the affected party's address and telephone number to the appellant would constitute an unjustified invasion of personal privacy under section 38(b) and uphold the police's decision.

## **RECORDS:**

[6] The records at issue are the withheld portions of the occurrence report and officer's notebook entries, which describe the affected party's address and telephone number.

## **ISSUES:**

- A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Would disclosure of the information at issue constitute an unjustified invasion of personal privacy under section 38(b)?
- C. Did the police properly exercise their discretion in applying section 38(b)?

## **DISCUSSION:**

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

[7] 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.

[8] To qualify as personal information, the information must be about the individual in a personal capacity.

[9] To qualify as personal information, it must be reasonable to expect that an

individual may be identified if the information is disclosed.<sup>1</sup>

[10] The police submit that the records contain the personal information of the appellant along with other individuals. The police advised that they investigated an assault complaint made by the appellant and during the course of their investigation obtained information including the names, date of birth, addresses, telephone numbers and driver licence numbers of several individuals.

[11] The appellant agrees that the records contain the personal information of himself and others but advises that he is only seeking the address and telephone number of the affected party.

[12] I have reviewed the records and find that they contain the personal information of the appellant and other identifiable individuals, including the affected party. This includes information relating to their age, sex, marital or family status (paragraph (a) of the definition of "personal information" at section 2(1)); any identifying number (paragraph (c)); address and telephone number (paragraph (d)) which appears with their names (paragraph (h)).

[13] As I have found that the records contain the "personal information" of the appellant along with another identifiable individuals, I will determine whether disclosure of the affected party's address and telephone number would constitute an unjustified invasion of personal privacy under section 38(b).

**B. Would disclosure of the information at issue constitute an unjustified invasion of personal privacy under section 38(b)?**

[14] Section 38(b) states:

A head may refuse to disclose to the individual to whom the information relates personal information,

if disclosure would constitute an unjustified invasion of another individual's personal privacy.

[15] Because of the wording of section 38(b), the correct interpretation of "personal information" in the preamble is that it includes the personal information of other individuals found in records which also contain the requester's personal information.

[16] In other words, where a record contains personal information of both the requester and another individual, and the disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

[17] In the circumstances of this appeal, I must determine whether disclosing the

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<sup>1</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

affected party's address and telephone number to the appellant would constitute an unjustified invasion of their personal privacy under section 38(b).

[18] Sections 14(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Section 14(2) provides some criteria for the police to consider in making this determination; section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. The parties have not claimed that any of the exclusions in section 14(4) apply and I am satisfied that none apply.

[19] If the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy under section 38(b). The police take the position that none of these paragraphs apply. The appellant submits that the paragraphs (a) and (b) could apply. Paragraphs (a) and (b) state:

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;

(b) access to the personal information may promote public health and safety;

[20] The appellant takes the position that additional efforts from this office should be made to obtain a "direct response" from the affected party as to whether he consents to the release of his information to the appellant. In making this argument, the appellant acknowledges that the mediator contacted the affected party. However, the appellant is not satisfied with the mediator's advice that she was unable to obtain consent. I have reviewed the file and am satisfied that the affected party was contacted by this office and that this individual is not prepared to provide consent to the appellant. To reveal more information about this office's communication with the affected party would reveal information of a personal nature about this individual. Accordingly, I am satisfied that the exception at paragraph (a) in section 14(1) does not apply in the circumstances of this appeal.

[21] In support of his position that the exception at paragraph (b) in section 14(1) applies, the appellant provided copies of doctor's notes and prescriptions relating to medical care he advises he required after the alleged assault. Despite the sympathetic nature of this type of evidence, it does not establish that disclosure of the affected party's address and telephone number may promote public health and safety. In my view, there is insufficient evidence to conclude that there is a connection between proof of past medical care the appellant received and public health and safety concerns. For this reason, I find that the exception at paragraph (b) in section 14(1) also does not apply.

**14(3)(b): investigation into a violation of law**

[22] The police take the position that the personal information in the records were compiled and is identifiable as part of an investigation into a possible violation of law and that disclosure would constitute an unjustified invasion of personal privacy taking into consideration the presumption at section 14(3)(b). This section states:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

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

[23] The police submit that the information at issue was obtained as a result of their investigation into a possible violation of law. The appellant's evidence supports the police's submission that the records were compiled as part of their investigation into the alleged assault.

[24] Having regard to the submissions of the parties and the records themselves, I am satisfied that the personal information at issue was collected as part of the police's investigation into a possible violation of law, namely a *Criminal Code* offence.

[25] As the presumption only requires that there be an investigation into a possible violation of law, it applies even if no proceedings were commenced against the affected party.<sup>2</sup>

[26] Having regard to the above, I find that the presumption at section 14(3)(b) applies in the circumstances of this appeal.

**Sections 14(2)(a) and (d)**

[27] The appellant submits that the factors favouring disclosure at sections 14(2)(a) and (d) apply. These sections state:

(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,

(a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;

(d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

**Section 14(2)(a)**

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<sup>2</sup> Orders P-242 and MO-2235.

[28] Section 14(2)(a) contemplates disclosure in order to subject the activities of the government (as opposed to the views or actions of private individuals) to public scrutiny.<sup>3</sup>

[29] In support of his position that disclosure would subject the activities of the police to public scrutiny, the appellant outlined his concerns about the attending officer's investigation. The appellant believes that the attending officer did not thoroughly investigate his complaint and as a result no charges were laid against the individual who he alleges assaulted him. The appellant states that he expected the police "to take this matter much more seriously than they did".

[30] In my view, the appellant's evidence fails to demonstrate that disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny. The portions of the records disclosed to the appellant describe the steps the police took to respond to his complaint. The only information withheld relates to individuals, not the police or their activities.

[31] Accordingly, I find that this factor has no application in this appeal.

*Section 14(2)(d)*

[32] For section 14(2)(d) to apply, the appellant must establish that:

1. the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and
2. the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
3. the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
4. the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing<sup>4</sup>

[33] The appellant also submits that disclosure of the affected party's address and telephone number is relevant to his fair determination of rights and submits that he has a right to police records in addition to a right to know that "the police have put effort into [the] investigation".

[34] In order for section 14(2)(d) to be given any consideration, the appellant must establish that all four parts of the test have been met. Accordingly, any rights the

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<sup>3</sup> Order P-1134.

<sup>4</sup> Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).

appellant claims he has to the information must relate to an existing or contemplated proceeding and there must be evidence that disclosure of the information at issue has some bearing on or is significant to the rights in question and is required to prepare for the proceeding or to ensure an impartial hearing. Given that the appellant's evidence did not establish that there is an existing or contemplated legal proceeding, I find that the factor in section 14(2)(d) has no application in this appeal.

### *Summary*

[35] I find that the presumption at section 14(3)(b) applies in the circumstances of this appeal. Given that the factors at section 14(2)(a) and (d) do not apply and no other factors favouring disclosure have been established, I find that disclosure of the personal information of the affected party to the appellant would constitute an unjustified invasion of personal privacy under section 38(b), subject to my assessment of whether the police exercised their discretion properly.

### **C. Did the police properly exercise their discretion under section 38(b)?**

[36] 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.

[37] 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.

[38] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>5</sup> This office may not, however, substitute its own discretion for that of the institution.<sup>6</sup>

[39] The police submit that they properly exercised its discretion and took into consideration relevant considerations. In support of its position, the police states:

When determining whether or not to release the personal information of the affected party to the appellant the police looked to the purpose of the [Act] which states that individuals should have a right of access to their own personal information and that the privacy of individuals should be protected. All personal information of the appellant was released to him.

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<sup>5</sup> Order MO-1573.

<sup>6</sup> Section 43(2).

The only information not released to the appellant was personal identifiers of [other individuals].

[40] The appellant takes the position that the police's decision failed to take into account relevant considerations.

[41] I have carefully reviewed the representations of the parties and am satisfied that the police properly exercised their discretion. I am also satisfied that the police did not exercise their discretion in bad faith or for an improper purpose. In making my decision, I note that the police considered that one of the purposes of the *Act* includes the principle that requesters should have a right of access to their own information. However, in my view, the nature of the personal information at issue, the fact that it was compiled as part of the police's investigation into a possible violation of law, and sensitivity of the information outweighs this principle.

[42] Accordingly, I find that the police properly exercised their discretion to withhold the personal information I found exempt under section 38(b).

**ORDER:**

The police's decision is upheld and the appeal is dismissed.

Original Signed By: \_\_\_\_\_  
Jennifer James  
Adjudicator

\_\_\_\_\_ January 30, 2017