

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3418

Appeal MA16-236

London Police Services Board

March 10, 2017

Summary: The appellant was involved in a dispute regarding a development on a neighbouring property. The appellant appealed a London Police Services Board decision to withhold the names of individuals who had communications with police officers regarding the dispute on three specific dates and the contents of those communications. Disclosing the withheld information at issue would be an unjustified invasion of personal privacy under section 38(b) of the *Act*. The police's exercise of its discretion to withhold the information is upheld.

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

Cases Considered: *R v Quesnelle*, 2014 SCC 46 (CanLII).

OVERVIEW:

[1] The appellant was involved in a dispute with a neighbouring landowner regarding a property development. The appellant made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the London Police Services Board (the police) for access to incident reports for three specified dates related to the dispute.

[2] After providing the affected parties whose information is contained in the records the opportunity to provide representations on whether to disclose the records, the police issued a decision granting partial access to the responsive records. The police

withheld some of the information, relying on the discretionary personal privacy exemption at section 38(b) of the *Act*, and the discretionary exemption at section 38(a) in conjunction with the sections 8(1)(c), 8(1)(d) and 8(1)(l) (law enforcement) exemptions in the *Act*. The police also withheld some information in the records on the basis that it was not responsive to the request.

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

[4] During mediation, the appellant narrowed his request to seek only the names of the affected parties and the communications between them and police for the specified dates.

[5] The affected parties declined to consent to disclose their information to the appellant. As no further mediation was possible, the appeal proceeded to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*.

[6] The inquiry began by inviting and receiving representations from the police on the issues set out in a Notice of Inquiry. In their representations, the police withdrew their claim that section 8(1)(d) in conjunction with section 38(a) applied to the information at issue.

[7] I shared the non-confidential representations of the police with the appellant in accordance with this office's *Practice Direction Number 7: Sharing of representations*. I invited and received representations from the appellant in response to the police's representations and the issues set out in the Notice of Inquiry.

[8] In this order, I find that disclosing the withheld information would be an unjustified invasion of the personal privacy of others under section 38(b) of the *Act*. I uphold the police's exercise of its discretion to withhold the names of the affected parties and any communications between them and the police on the dates specified in the appellant's request.

RECORDS:

[9] The information at issue is contained in occurrence reports and police officer's notebook entries. In accordance with the appellant's narrowed request, the information comprises the names of the affected parties and communications between them and the police in the requested records. Withheld information within the narrowed scope of the appellant's appeal appears on pages 3, 11, 12, 16, 22, 27 and 31 of the records.

ISSUES:

- A. Is the information at issue "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the discretionary exemption at section 38(b) apply to the information at issue?
- C. Did the police exercise its discretion under section 38(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A: Is the information at issue "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[10] The police say the section 38(b) exemption, which provides that the police may withhold an individual's personal information if disclosure would be an unjustified invasion of another individual's personal privacy, applies to the withheld information at issue.

[11] The section 38(b) exemption can only apply to information that qualifies as "personal information," as defined in section 2(1) of the *Act*. Therefore, the first two issues in this appeal are whether the withheld information at issue is personal information and if so, to whom it belongs.

[12] Section 2(1) states:

"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;

[13] 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.¹

[14] 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.² However, 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.³

Parties' representations

[15] The police submit that it is clear that the records at issue contain the personal information of identifiable individuals, including the appellant. They say that information includes addresses, telephone numbers, dates of birth, gender, places of employment, vehicle information and statements of individuals involved in its investigations.

[16] The appellant accepts that certain personal information of others such as dates of birth, addresses and phone numbers can be withheld. As noted above, the appellant's narrowed request is for access to the names of individuals who spoke with the police about him and the contents of those discussions as recorded in the police reports. The appellant does not however address whether the information within his narrowed request is personal information, and if so, to whom it belongs.

¹ Order 11.

² Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

³ Orders P-1409, R-980015, PO-2225 and MO-2344.

Findings

[17] I have reviewed the withheld information that falls within the scope of the appellant's request for names of affected parties and their discussions with police. I find this information is personal information because it is recorded information about identifiable individuals, primarily information that falls into paragraphs (e) and (h) of the definition of personal information. The information is personal information of the affected parties and in some cases, also of the appellant. While some of the information that falls within the scope of the appellant's narrowed request is the appellant's personal information, I am satisfied that none is solely the appellant's personal information. Accordingly, it is necessary to consider whether section 38(b) applies to the information the appellant seeks.

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

General principles

[18] 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.⁴

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

Section 14(4)

[20] If any of paragraphs (a) to (c) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b).

[21] The police submit section 14(4) has no application and it is not raised by the appellant. From my review of the records I agree that no section 14(4) factors arise.

Section 14(1)

[22] If the information falls 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).

⁴ See Issue C below for a more detailed discussion of the police's exercise of discretion under section 38(b).

[23] For section 14(1)(a) (consent) to apply, the consenting party must provide a written consent to the disclosure of his or her personal information in the context of an access request.⁵ No individual whose personal information appears in the records has consented to the disclosure of the information at issue to the appellant.

[24] The police say none of the other disclosure criteria in section 14(1) apply. The appellant does not address section 14(1) and from my review of the records none of the factors arise.

[25] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), I will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.⁶

Section 14(3)(b): investigation into possible violation of law

[26] If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 38(b). The police submit that the presumption listed at section 14(3)(b) applies. It 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;

[27] This presumption requires only that there be an investigation into a possible violation of law.⁷ Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) can still apply.

[28] The police say that the record requested relates to a complaint, and that although no charges were laid, whether charges are laid or not, the police respond to calls for service and conduct investigations. They refer to various violations of the *Criminal Code of Canada*⁸ that could have arisen from the circumstances.

[29] I am satisfied that the information at issue was compiled and is identifiable as part of a police investigation into possible violations of the *Criminal Code*. I find, therefore, that the presumption at section 14(3)(b) applies to the information at issue.

⁵ See Order PO-1723.

⁶ Order MO-2954.

⁷ Orders P-242 and MO-2235.

⁸ R.S.C., 1985, c. C-46.

[30] Section 14(2) factors

[31] Section 14(2) also 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

[32] The police have raised the application of section 14(2)(h). This factor applies if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation was reasonable in the circumstances. Section 14(2)(h) therefore requires an objective assessment of the reasonableness of any confidentiality expectation.¹¹

[33] The police say that when an individual gives personal information to the police, there is an expectation that the information will be held in confidence, so section 14(2)(h) is therefore a factor in favour of withholding the information.

[34] I accept the police's submission that section 14(2)(h) is a factor that weighs in favour of withholding the information at issue in this appeal. Particularly in the context of a dispute between neighbouring landowners as is in issue here, I am satisfied that information provided to police by an individual is given with an expectation that the police will generally keep at least the source of the information in confidence. Here, where disclosing information would generally also disclose its source, it follows that the information supplied to police was supplied in confidence, even though there is no evidence that any explicit confidentiality assurance was provided by police.¹²

[35] I therefore find that section 14(2)(h) is a factor that weighs against disclosure of the information.

[36] The parties did not raise any other section 14(2) factors or any unlisted factors, and I am satisfied that no other factors arise from my review of the representations and the records.

Does the "absurd result" principle apply?

[37] According to this principle, 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

⁹ Order P-239.

¹⁰ Order P-99.

¹¹ Order PO-1670.

¹² My finding is consistent with the statements of Karakatsnis J. in *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390 that there is generally a reasonable expectation of privacy in information provided to police.

inconsistent with the purpose of the exemption.¹³

[38] The police submit that the absurd result principle does not apply because the appellant was not present when information was provided by affected parties, and would not know specifically what they shared with the police. I accept that the absurd result principle does not arise in the circumstances here for the reasons the police outline.

Is disclosure an unjustified invasion of personal privacy?

[39] I have found above that the presumption at section 14(3)(b) applies because the records were compiled as part of an investigation into a possible violation of law. In addition, the information at issue was provided confidentially within the meaning of section 14(2)(h), a factor that also weighs against disclosure. There are no factors in favour of disclosure. It would not be an "absurd result" to withhold the information at issue. As a result, I find, that the disclosure of the information at issue would be an unjustified invasion of personal privacy. The information at issue is exempt from disclosure under section 38(b), subject to my finding regarding the police's exercise of discretion.

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

[40] 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.

[41] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example, it does so in bad faith or for an improper purpose; it takes into account irrelevant considerations; or it fails to take into account relevant considerations.

[42] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁴ I may not, however, substitute my own discretion for that of the institution.¹⁵

[43] The appellant did not provide representations on the police's exercise of discretion.

[44] The police's representations refer to several factors that informed their decision

¹³ Orders M-444 and MO-1323.

¹⁴ Order MO-1573.

¹⁵ Section 43(2).

to withhold the information at issue, including that disclosing the information could hinder police operations and the confidence of the public in assisting in police investigations if the information was disclosed. They also cite the affected parties' desire to have their privacy protected and that the personal information relates to incidents which involved high emotions and therefore the potential for violence.

[45] I note also that the police state in their representations that they do not object to disclosing the appellant's own statement or information to him, and this is supported by the police's actions in severing and disclosing information in the records to the appellant.

[46] Accordingly, I am satisfied that the police properly exercised their discretion in withholding personal information from the appellant after considering relevant factors. I am satisfied that the police did not base their exercise of discretion on irrelevant factors. There is no evidence that the police acted in bad faith.

ORDER:

[47] I uphold the police's decision to withhold the the names of the affected parties and communications between the affected parties and the police in the requested records under section 38(b) and dismiss the appeal.

Original Signed by: _____
Hamish Flanagan
Adjudicator

_____ March 10, 2017