

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3423

Appeal MA15-96

Cobourg Police Services Board

March 29, 2017

Summary: The appellant made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to three specified incidents to the Cobourg Police Services Board (the police). The police located two responsive records, which were two occurrence summaries relating to two of the three incidents specified by the appellant. The police granted partial access to the responsive records, and relied on the discretionary personal privacy exemption at section 38(b) to withhold portions of the records that contained information relating to other identifiable individuals. During the course of mediation, the appellant narrowed the scope of his request to include only the names of the two individuals who contacted the police about him. In this order, the adjudicator upholds the police's decision.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (the definition of "personal information"), 2(2.1), 14 and 38(b).

Orders and Investigation Reports Considered: Orders MO-3310, MO-3342, MO-2923, PO-3093, and PO-2225.

BACKGROUND:

[1] The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Cobourg Police Services Board (the police) for access to records relating to three specified incidents. The police located two responsive records, which were two occurrence summaries relating to two of the three incidents specified by the appellant.

[2] As required by section 21 of the *Act*, the police attempted to notify two individuals whose privacy interests could be affected by disclosure of the records (the affected parties) of the request. The police also sought the affected parties' position on disclosure of the records. One of the affected parties did not consent to disclosure while the second affected party could not be contacted.

[3] The police then issued a decision to the appellant granting him partial access to the responsive records. The police relied on the discretionary personal privacy exemption at section 38(b) to withhold portions of the records that contained information relating to the affected parties.

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

[5] During the course of mediation, the appellant narrowed the scope of his request to include only the names of the two individuals who complained to the police about him.

[6] As this appeal was not resolved during mediation, it was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. The adjudicator initially assigned to this appeal invited the police and the affected parties, including the affected party that had not been previously contacted by the police, to provide representations on the issues in this appeal. She received representations from the police and the affected parties on the issues set out below.

[7] The police and the affected parties asked that portions of their representations not be shared with the appellant on the basis that they would reveal the identities of the affected parties. The adjudicator accepted that portions of the police's and the affected parties' representations satisfied the confidentiality criteria set out in *Practice Direction Number 7* of this office's *Code of Procedure* and should not be shared with the appellant. Accordingly, to assist the appellant, she provided only the non-confidential portions of these representations to him. Sometime afterwards, she received representations from the appellant.

[8] In this order, I find that the names of the affected parties fall within the definition of "personal information" as defined in section 2(1) of the *Act*. I also find that section 38(b) applies to the records at issue, and the police properly exercised their discretion in applying it.

RECORDS:

[9] The records at issue consist of two occurrence summaries. The names of the affected parties as they appear in the occurrence summaries is the only information at issue.

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 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?

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 whether section 38(b) of the *Act* may apply, it is first necessary to decide whether the record contains "personal information" and, if so, to whom it relates.

[11] Personal information 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;

[12] 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

[13] 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.

[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

[15] 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

[16] As each of the records contain a complaint relating to the appellant, including the appellant's name and other information about him, it contains the appellant's personal information.

Representations

[17] Although the police submit that the withheld information is the personal

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.

information of the affected parties, they state that the affected parties acted in a professional, official or business capacity. They also submit that the affected parties felt that harm may come to them if any part of their personal information was to be released.

[18] Both affected parties, through their counsel, submit that the withheld information is their personal information as it identifies their name and where they work, and reveals something of a personal nature about them.

[19] In his representations, the appellant does not address the issue of whether the names of the affected parties fall within the definition of "personal information" as defined in section 2(1) of the *Act*. However, he explains that he is seeking the names of the affected parties for the sole purpose of filing an identified application with another tribunal.

Analysis and findings

[20] In Order PO-2225, Assistant Commissioner Tom Mitchinson set out the following two-step analysis for determining whether information should be characterized as "personal" or "professional":

1. In what context do the names of the individuals appear? Is it in a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere?
2. Is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual? Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature?

[21] Consistent with the wording of section 2(2.1), step 1 of the contextual analysis means that as a general rule any individual's name that appears in a business, professional or official government context is not personal information. Step 2 then requires examining whether the information, if disclosed, would reveal something of a personal nature about the individual, in which case the information may still be personal information.

[22] I will now consider this appeal in light of the two step-analysis.

[23] Considering step one, in my view, the affected parties' names appear in a professional context. I conclude this based on the nature of the complaint and the context in which the complaint was made. The affected parties' complaint to the police falls within and was carried out as part of their employment responsibilities and at their place of employment. I cannot explain further the rationale for finding that the names appear in a professional context without disclosing the identity of the affected parties, which is the information in issue.

[24] Step two of the analysis in Order PO-2225 provides that even if the information appears in a professional context, the question is whether its disclosure would reveal something that is inherently personal in nature. In the police's representations, they assert that the affected parties felt harm may come to them if any of their information was released. The affected parties' submissions are quite lengthy and include various attachments. In their submissions, the affected parties also refer to other information relating to their interactions with the appellant, and include details about themselves and their dealings with the appellant. On my review of all the information provided to me, I am satisfied that disclosing the affected parties' names to the appellant in the circumstances of this appeal would reveal other personal information about the affected parties. Accordingly, I am satisfied that disclosure of the names would reveal information about the affected parties that is inherently personal in nature.

[25] Having considered the representations from the police and the affected parties on this issue, and for the reasons outlined above, I conclude that the affected parties' identities do qualify as "personal information" as that term is defined in section 2(1) of the *Act*. I find, due to step 2 of the contextual analysis approach, that disclosure of their names would reveal something of a personal nature about the affected parties.

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

[26] 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.

[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 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

[28] Section 38(b) states:

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

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

[29] Sections 14(1) to (4) provide guidance in determining whether disclosure would

⁴ See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 38(b).

be an unjustified invasion of personal privacy. 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). Also, if any of the 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). None of these paragraphs apply to the information at issue in this appeal.

[30] 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 must consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.⁵

[31] If any 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).

[32] In the circumstances, it appears that the presumption at paragraph (b) could apply. Section 14(3)(b) 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;

[33] 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.⁶ The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.⁷

[34] In their representations, the police submit that section 38(b) applies to the records at issue. They also submit that due to legal matters, the appellant was issued a trespass notice and removed from the occurrence address.

[35] In their representations, the affected parties submit that the discretionary personal privacy exemption at section 38(b) applies to the records at issue. They point out that the records are part of an investigation into the appellant's alleged trespassing offences. The affected parties also submit that the police exercised their discretion under section 38(b) properly and it should be upheld.

⁵ Order MO-2954.

⁶ Orders P-242 and MO-2235.

⁷ Orders MO-2213, PO-1849 and PO-2608.

Analysis and findings

[36] The police did not comment specifically on section 14(3)(b). Upon my review of the records at issue, it is apparent that the police attended a location to investigate incidents involving trespassing, a possible violation of law. No charges were laid.

[37] Accordingly, I find that the withheld personal information at issue “was compiled and is identifiable as part of an investigation into a possible violation of law”, and accordingly its disclosure is presumed to constitute an unjustified invasion of personal privacy. I find that section 14(3)(b) applies to the personal information at issue.

[38] While section 14(2) lists some factors that weigh in favour of disclosure, the appellant did not make submissions on the application of these factors to the personal information at issue and I find that none apply.

[39] With respect to the application of the exemption in section 38(b) to the information for which it is claimed, I have found above that the records at issue contain the personal information of the affected parties. On my review of the information and the context within the information was collected, I find that there are no factors favouring the disclosure of this personal information to the appellant. As a result, I find that disclosure of the information would constitute an unjustified invasion of the personal privacy of the affected parties, and that the information qualifies for exemption under section 38(b), subject to my finding on the police’s exercise of discretion.

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

[40] Section 38(b) is a discretionary exemption and permits the police 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 the present appeal, the manner in which the police applied the section 38(b) exemption indicates that they properly considered the appellant’s right to his own personal information and balanced this right against the affected parties’ right to privacy. I find that this was a proper consideration in the circumstances and I uphold the police’s application of section 38(b) to withhold the information at issue.

ORDER:

I uphold the police’s decision to not disclose the identities of the affected parties.

Original Signed by: _____
Lan An

_____ March 29, 2017

Adjudicator