Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3459

Appeal MA16-95

Toronto Police Services Board

June 23, 2017

Summary: The appellant seeks access to records related to an investigation into certain allegations he made in 1998. The police located one responsive record and granted the appellant partial access to it. The police withheld portions of the record under the discretionary exemption in section 38(b) (personal privacy). The appellant appealed the police's exemption claim and raised the possible application of the public interest override to the record. In addition, the appellant claimed that additional responsive records exist, thereby raising the reasonableness of the police's search as an issue. The adjudicator upholds the police's decision to withhold the personal information at issue under section 38(b) of the *Act* and finds that the public interest override in section 16 does not apply. The adjudicator also upholds the police's search as reasonable and dismisses the appeal.

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(1), 14(2)(f) and (h), 14(3)(b), 17 and 38(b).

Orders and Investigation Reports Considered: Order MO-2854

OVERVIEW:

[1] The appellant made an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Toronto Police Services Board (the police). The appellant seeks access to all records relating to the investigation into his allegations that his son was sexually abused by a specified school principal.

[2] The police located one responsive record and issued a decision granting the

appellant partial access to it. The police denied the appellant access to portions of the record, claiming the application of the discretionary exemption in section 38(b) (personal privacy). The police also advised the appellant that the presumption in section 14(3)(b) applied to the record.

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

[4] During mediation, the appellant provided the mediator with a signed consent form from his son allowing the appellant to have access to his son's personal information. Upon receipt of the appellant's son's signed consent form, the police issued a supplemental decision granting the appellant further access to the record.

[5] In addition, the appellant raised the issue of reasonable search for records responsive to his request with the police. The appellant also claimed the application of the public interest override in section 16 of the *Act* to the records. As a result, reasonable search and the public interest override were added as issues in this appeal.

[6] Mediation did not resolve this appeal and it was transferred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. The adjudicator originally assigned to the appeal invited the police to provide representations in response to a Notice of Inquiry. The police submitted representations. The adjudicator then invited the appellant to submit representations in response to the police's representations, which were shared in accordance with Practice Direction Number 7 of the IPC's *Code of Procedure*. The appellant submitted representations.

[7] The appeal was then transferred to me.

[8] I note that the appellant makes submissions regarding the legitimacy of his allegations relating to the school principal. In addition, the appellant makes a number of allegations regarding possible foul play on the part of the police, the school and various physicians during the investigation. While I have considered all of the materials the appellant submitted, I cannot comment on the investigation itself or the conduct of the parties involved during the investigation.

[9] In the discussion that follows, I uphold the police's decision to withhold portions of the record and find its search for responsive records was reasonable.

RECORD:

[10] The record at issue is a four-page occurrence report.

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 in section 38(b) apply to the information at issue?

C. Did the police exercise their 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 personal privacy exemption?

E. Did the police conduct a reasonable search for records?

DISCUSSION:

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

[11] The discretionary exemption in section 38(b) of the *Act* applies to *personal information*. Consequently, it is necessary to determine whether the occurrence report 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

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] To qualify as personal information, the information must be about the individual in a *personal capacity* and it must be reasonable to expect that an individual may be identified if the information is disclosed.[2]

[12] The police submit that the records contain the names, addresses, telephone numbers, dates of birth, opinions and other identifying information about identifiable individuals, including the appellant.

[13] The appellant did not specifically address whether the records contain the *personal information* of identifiable individuals.

[14] The occurrence report at issue contains the names, telephone numbers, addresses, dates of birth, medical history, personal opinions, views about others, as well as other information of a personal nature of the appellant and various affected parties who would be identified if the information were disclosed. I find that this information qualifies as the personal information of the appellant and a number of affected parties under paragraphs (a), (b), (c), (d), (e), (g) and (h) of the definition of personal information in section 2(1) of the *Act*.

[15] Having found that the record contains the mixed personal information of the appellant and various affected parties, I will consider the appellant's right of access to the report under section 38(b) of the *Act*.

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

[16] Section 38 of the *Act* provides a number of exemptions from individuals' general right of access under section 36(1) to their own personal information held by an institution. Section 38(b) gives the police the discretion to refuse to disclose the appellant's personal information to him in this appeal if the record contains his personal information as well as that of the affected parties and disclosure of the information would constitute an *unjustified invasion* of the affected parties' personal privacy. Section 38(b) states:

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[1] Order 11.

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

> 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.

[17] Even if the personal information falls within the scope of section 38(b), the police may exercise their discretion to disclose the information to the appellant after weighing the appellant's right of access to his own personal information against the affected parties' right to protection of their privacy. Section 14(1) provides guidance in determining whether the unjustified invasion of personal privacy threshold is met. If the information fits within any of the paragraphs of sections 14(1) or 14(4), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b).

[18] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), this office will consider and weigh the factors and presumptions in sections 14(2) and 14(3) and balance the interests of the parties.[3] 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). In this appeal, the police assert that the presumption in section 14(3)(b) applies to the personal information at issue in the record. 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

[19] 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.[4]

[20] The police submit that section 14(3)(b) applies to the personal information that remains at issue. The police state that they conducted an investigation into the appellant's allegations regarding the sexual abuse of his son. The police state that they compiled personal information about identifiable individuals as part of their investigation into a possible violation of law. The police submit that the release of the personal information at issue would constitute an unjustified invasion of personal privacy.

[21] The appellant did not address whether the personal information contained in the records are exempt from disclosure under section 38(b), but asserts that it "must" be

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[3] Order MO-2954.
[4] Orders P-242 and MO-2235.

released to him.

[22] I agree with the police that the presumption against disclosure in section 14(3)(b) applies to the record. Upon review of the record, it is clear that the personal information contained in it was compiled and is identifiable as part of an investigation into a possible violation of law. The report was created by the police as part of their investigation into a possible violation of law relating to the appellant's son and his school principal. Therefore, section 14(3)(b) weighs in favour of non-disclosure of the record.

[23] The record contains the appellant's personal information. As such, I must consider and weigh any applicable factors in balancing the appellant's and affected parties' interests. Given the nature of the allegations and the roles or relationships between the parties involved, I find it reasonable to expect that certain parties would experience significant personal distress if the record were disclosed.[5] I also accept that an individual made a statement to the police in confidence and that both that individual and the police reasonably expected that information in their statement would be treated confidentially. Therefore, I find that the factors favouring non-disclosure in sections 14(2)(f) and (h) apply to the record.

[24] I have reviewed the remainder of the factors in section 14(2) and find that none apply.

[25] In addition, I have considered whether there is any possibility of severing the information at issue from the record to provide the appellant with further access to his own or his son's personal information. However, the appellant and his son's personal information is intertwined with the personal information of other identifiable individuals in a manner that does not permit reasonable severance.

[26] Finally, I have considered the possible application of the absurd result principle. The absurd result principle may apply in circumstances where denying access to information would yield manifestly absurd or unjust results. The absurd result principle has applied, for example, where the requester was present when the information was provided to the institution[6] or where the information is clearly within the requester's knowledge.[7]

[27] The appellant did not provide any evidence to demonstrate that any of the remaining information at issue is within his knowledge. However, it appears that some discrete portions of the records may have been provided to the appellant or are within his knowledge. However, while this may be the case, this alone does not establish that denying the appellant access on the basis of section 38(b) would yield manifestly absurd or unjust results, or be inconsistent with the purposes of the exemption. In the circumstances of this appeal, I find that denying the appellant access to the discrete

[5] Orders PO-2518, PO-2617, MO-2262 and MO-2344.
[6] Orders M-444 and MO-1323.
[7] Orders M-444 and P-1414.

portions of the record that he may be aware of would not yield manifestly absurd or unjust results. Accordingly, I find that the absurd result principle has no application in these circumstances.

[28] Therefore, the information at issue is exempt from section 38(b) because its disclosure would result in an unjustified invasion of the personal privacy of individuals other than the appellant, subject to my review of the police's exercise of discretion below.

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

[29] The section 38(b) exemption is discretionary and permits an institution to disclose the information subject to the exemption despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so. 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. In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[8] This office may not, however, substitute its own discretion for that of the institution.[9]

[30] The police submit that they exercised their discretion in a manner that adheres to the mandate and spirit of the *Act*. The police submit that they did not exercise their discretion in bad faith or for an improper purpose and they took into account all relevant considerations.

[31] The appellant did not make submissions with regard to the police's exercise of discretion. However, the appellant makes a number of allegations that the police acted in bad faith in their investigation into the alleged sexual assault of the appellant's son.

[32] Upon review of the parties' representations and the information at issue, I find that the police exercised their discretion under section 38(b) properly. I am satisfied that the police did not exercise their discretion in bad faith or for an improper purpose as there is no evidence before me that this is the case. Based on the manner in which they severed the record, it is clear that the police considered the principles that the appellant should be able to access his own and his son's personal information, as his son provided his consent, and that the affected parties should have their privacy protected. In addition, the police considered the specific interests protected by the presumption in section 14(3)(b) as well as the wording of the section 38(b) exemption. Accordingly, I find that the police took relevant factors into account and did not take into account irrelevant factors and I uphold their exercise of discretion to apply section 38(b) of the *Act* to the information at issue.

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[8] Order MO-1573.
[9] Section 43(2).

Issue D: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the personal privacy exemption?

[33] During mediation, the appellant raised the possible application of the public interest override in section 16 of the *Act* to the record. Section 16 states:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

Although section 38(b) is not listed, section 16 may apply to override section 38(b) because it may apply to override the application of section 14 of the *Act*.[10] If section 16 were to apply in this case, it would have the effect of overriding the application of section 38(b) and the appellant would have a right of access to the information at issue.[11]

[34] For section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[35] The *Act* is silent as to who bears the burden of proof in section 16. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 16 applies. To find otherwise would be to impose an onus which would seldom, if ever, be met by an appellant. Accordingly, the IPC will review the records with a view to determine whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.[12]

[36] 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.[13] 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.[14]

[37] The appellant did not directly claim that there is a public interest in the information at issue. However, the appellant makes a number of broad allegations regarding the police's conduct during the investigation and in response to his access request, suggesting a larger conspiracy.

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[10] See for example Order PO-2246, which deals with the equivalent sections of the provincial *Act*.
[11] Order MO-2854.
[12] Order P-244.
[13] Orders P-984 and PO-2607.
[14] Orders P-984 and PO-2556.

[38] The police submit that there is no public interest in the disclosure of the record. They submit that the record relates to an incident reported nearly 20 years ago in which the appellant alleged that his son was sexually assaulted. The police submit that they conducted a "lengthy investigation" and determined that the allegation was unfounded. Given these circumstances, the police submit that the information at issue is "of no interest to the public and clearly does not outweigh the purposes of section 38(b)."

[39] Based on my review of the record and parties' representations, I find that there is no compelling public interest in the disclosure of the record that clearly outweighs the purposes of the personal privacy exemption. In Order MO-2854, the adjudicator considered the application of the public interest override to police occurrence reports. Reviewing the circumstances of the appeal, the adjudicator stated as follows:

> In my view, disclosure of the remaining withheld portions of personal information in the records would not "serve the purpose of informing the citizenry about the activities of their government, 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", as required in Order P-984. There is no allegation that the experience of the appellant has occurred with any frequency at other bail hearings, or that the conduct of the police is somehow in question. Rather, in my view, the appellant seeks access to the severed portions of the records in order to pursue his own interests. While these are of importance to him, in my view, they are in the nature of a private, rather than a public interest.

[40] I adopt this analysis for the purposes of my review. Reviewing the circumstances of the appellant's request and appeal and his representations, I find that the appellant is pursuing access to the record for a predominantly personal reason.[15] While the appellant makes a number of allegations regarding the police's conduct during the investigation and in response to this access request, there is no evidence to suggest that these allegations are founded. Furthermore, based on my review of the record, I find that none of the personal information at issue would, if disclosed, "serve the purpose of informing the citizenry about the activities of their government, 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".[16]

[41] Overall, it appears that the appellant seeks access to the severed portions of the records in order to pursue his own interest in proving his allegations regarding the sexual abuse of his son. While this issue is clearly important to the appellant, in my view, it is in the nature of a private, rather than a public interest.

[42] Therefore, I find that there is not any public interest, compelling or otherwise, in the disclosure of the withheld information that I have found to qualify for exemption under section 38(b) of the *Act*. As a result, I find that section 16 has no application in

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[15] Order M-319.
[16] Order P-984.

this appeal.

Issue E: Did the police conduct a reasonable search for records?

[43] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution conducted a reasonable search for records as required by section 17.[17] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the police's decision. If I am not satisfied, I may order further searches.

[44] 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 show that it made a reasonable effort to identify and locate responsive records.[18] To be responsive, a record must be *reasonably related* to the request.[19]

[45] 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.[20]

[46] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it made a reasonable effort to identify and locate all of the responsive records within its custody or control.[21]

[47] 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.[22]

[48] The police submit that they conducted a reasonable search for records responsive to the appellant's request. They submit that the appellant's request was unambiguous and there was no need for clarification. The police submit that they took all appropriate action to provide a comprehensive response and the appellant was provided with the one responsive record.

[49] The police submit that the record indicates that the appellant had his son examined by numerous physicians, all of whom found no signs of sexual or physical abuse. The appellant then submitted a complaint to the College of Physicians and Surgeons of Ontario (the CPSO) regarding the improper and/or inadequate examination of his son. The police stated that this complaint was closed after the CPSO determined it was unfounded.

[50] The police note that they investigated the incident nearly 20 years ago. The

[17] Orders P-85, P-221 and PO-1954-I.
[18] Orders P-624 and PO-2559.
[19] Order PO-2554.
[20] Orders M-909, PO-2469 and PO-2592.
[21] Order MO-2185.
[22] Order MO-2246.

police state that the investigation revealed that there was no evidence to substantiate the appellant's allegation. However, the police submit that the appellant refuses "to accept the overwhelming evidence disproving his allegations." With the matter having been closed nearly 20 years ago, the police submit that there are no other responsive records.

[51] In his representations, the appellant makes a number of allegations regarding the police's conduct during the investigation and regarding the physicians that examined his son. As stated above, these issues are not before me and I will not comment on them. However, the appellant submits that the police hid or destroyed evidence proving his allegations as a part of a conspiracy or "cover up" of the crimes committed against his son. The appellant asserts that the police hid and destroyed evidence so that they could conclude the investigation.

[52] Based on my review of the parties' representations, I am satisfied that the police conducted a reasonable search for responsive records. As set out above, the *Act* does not require the police to prove with absolute certainty that additional records do not exist, but only to provide sufficient evidence to establish that they made a reasonable effort to locate responsive records. In my view, the police provided me with a detailed explanation of their investigation into the appellant's allegations and their search for responsive records.

[53] In addition, I find that the appellant has not provided evidence to demonstrate that there is a reasonable basis for his belief that additional responsive records should exist. While the appellant alleges that the police concealed or destroyed responsive records, he did not provide any evidence to substantiate these claims. Given the history of the appellant's relationship with the police and the outcome of the police's investigation, I am not satisfied that the appellant demonstrated that there is a reasonable basis for concluding that the police concealed or destroyed responsive records or that additional responsive records exist.

[54] In conclusion, I am satisfied that the police conducted a reasonable search for records that are responsive to the appellant's request.

ORDER:

I uphold the police's decision and dismiss the appeal.

Original Signed by: June 23, 2017

Justine Wai
Adjudicator