

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-3468

Appeal MA16-235

Durham Regional Police Services Board

July 11, 2017

**Summary:** The appellant made a request to the police under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to a specific incident. The police denied access to the record in full, pursuant to the discretionary personal privacy exemption at section 38(b) of the *Act*. In this order, the adjudicator upholds the police's decision in part. She orders the portion of the record relating only to the appellant to be disclosed.

**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") and 38(b).

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

### BACKGROUND:

[1] The Durham Regional Police Services Board (the police) received a request, pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for access to a particular incident report.

[2] The police identified a record responsive to the request and issued a decision to deny access to the record, in full, pursuant to the discretionary personal privacy exemption at section 38(b) of the *Act*.

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

[4] As this appeal was not resolved during mediation, it was moved to the adjudication stage, where an adjudicator conducts an inquiry under the *Act*. I sought and received representations from the police and the appellant. The police's representations were shared with the appellant in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction Number 7*.

[5] In this order, I uphold the police's decision in part. I order the portion of the record relating only to the appellant to be disclosed.

## **RECORDS:**

[6] The record at issue in this appeal is a general occurrence hardcopy 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 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:**

### **Preliminary issue – identity of the appellant**

[7] In their representations, the police take the position that there is insufficient evidence to show that the individual named in the record is the appellant. The police point out that although the individual named in the record has the same name as the appellant, the year of birth identified by the appellant in his request form is different from the year of birth identified in the record. I note, however, that in another form provided by the appellant to the police (the Authorization for the Release of Personal Information form), the birth date, including the year of date, matches the date in the record.

[8] During the course of this inquiry, the appellant provided both the police and this office with a copy of his driver's licence to confirm his date of birth. That date matches the date of birth identified in the record. In these circumstances, I am satisfied that the listed subject and the appellant is the same person. They share the same birthdate and the same name. I will conduct my analysis below on the basis that the appellant is the individual identified in one portion of the record.

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

[9] In order to determine whether section 38(b) of the *Act* applies, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates.

[10] "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;

[11] 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.<sup>1</sup>

[12] 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.

[13] 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.<sup>2</sup>

[14] 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.<sup>3</sup>

[15] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.<sup>4</sup>

[16] In their representations, the police assert that the record contains personal information. The appellant does not address the issue of personal information.

[17] On my review of the record at issue, I find that a portion of page 1 of the record contains the personal information of the appellant including his name and date of birth, and his name in connection to the record (paragraph (h) of the definition). Also contained on that page is general information about the nature of the offence and the status of the investigation.

[18] The other portions of page 1, and the remaining pages of the record, also contain the personal information of a number of other identifiable individuals including information containing their name, sex, date of birth, ethnic origin, home address of these individuals, or their names in connection with other personal information about them. In addition, some of the information relates to individuals in their professional

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<sup>1</sup> Order 11.

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

<sup>3</sup> Orders P-1409, R-980015, PO-2225 and MO-2344.

<sup>4</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

capacity, but I am satisfied that, given the nature of the offence referenced in the record, disclosure of that information may reveal something of a personal nature about identifiable individuals.

[19] Accordingly, I find that the record contains the personal information of the appellant and other identifiable individuals.

[20] However, as noted above, a portion of page 1 contains the personal information of only the appellant, and general information about the nature of the offence and the status of the investigation. I am satisfied that the portion of page 1 which contains this information does not contain the personal information of any identifiable individuals other than the appellant. As no other exemptions have been claimed for this information, I will order that it be disclosed to the appellant.

[21] I will now review whether the remaining portions of the record qualify for exemption under section 38(b) of the Act.

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

[22] Since I found that the record contains the personal information of the appellant and other individuals, 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.

[23] 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.<sup>5</sup>

[24] 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).

[25] 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.<sup>6</sup> 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).

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<sup>5</sup> See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 38(b).

<sup>6</sup> Order MO-2954.

[26] 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.<sup>7</sup> 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).<sup>8</sup>

[27] In their representations, the police assert that the presumption under section 14(3)(b) applies as the record was prepared and compiled as part of an investigation into a possible violation of law, specifically the offence of fraud, as listed in the *Criminal Code of Canada*. The police assert that, therefore, the release of such information would constitute an unjustified invasion of personal privacy.

[28] Although the appellant provided representations, his representations did not directly address this issue.

### ***Analysis and findings***

[29] I note that the information at issue does not fit within the exceptions set out in section 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.

[30] 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.<sup>9</sup> The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.<sup>10</sup>

[31] Section 14(3)(b) does not apply if the records were created after the completion of an investigation into a possible violation of law.<sup>11</sup>

[32] As mentioned above, the police assert, and I accept, that the presumption at section 14(3)(b) applies in this circumstance. The record concerns an investigation relating to an identified offence. The personal information was compiled and is identifiable as part of the 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

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<sup>7</sup> Order P-239.

<sup>8</sup> Order P-99.

<sup>9</sup> Orders P-242 and MO-2235.

<sup>10</sup> Orders MO-2213, PO-1849 and PO-2608.

<sup>11</sup> Orders M-734, M-841, M-1086, PO-1819 and PO-2019.

of law for the presumption at section 14(3)(b) to apply.<sup>12</sup> Section 14(3)(b) therefore weighs in favour of non-disclosure of the portions containing other individual's personal information.

[33] As mentioned above, the appellant has not made any representations on this issue. 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 individuals' personal information would constitute an unjustified invasion of their personal privacy. Accordingly, I find that their 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.

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

[34] 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.

[35] 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.

[36] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>13</sup> This office may not, however, substitute its own discretion for that of the institution.<sup>14</sup>

[37] In their representations, the police assert that they did not exercise their discretion in bad faith or for an improper purpose, but only to protect the privacy of the subject listed in the record.

[38] Although the appellant provided representations, his representations did not directly address this issue.

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<sup>12</sup> Orders P-242 and MO-2235.

<sup>13</sup> Order MO-1573.

<sup>14</sup> Section 43(2).

***Analysis and findings***

[39] Based on my review of the police's representations in its entirety, 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.

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

**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 his personal information in accordance with page 1 of the highlighted record. To be clear, only the highlighted information should be disclosed.
2. I order the police to make the disclosure referred to in paragraph 1 of this order by **August 16, 2017** but not before **August 11, 2017**.
3. I reserve the right to require the police to provide me with a copy of the record disclosed to the appellant.

Original Signed by: \_\_\_\_\_  
Lan An  
Adjudicator

\_\_\_\_\_ July 11, 2017