

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3472

Appeal MA16-415

Brantford Police Services Board

July 18, 2017

Summary: The police received a request under the *Municipal Freedom of Information and Protection of Privacy Act* for access to information about the requester. The police located a two-page witness statement and denied access to it pursuant to the discretionary personal privacy exemptions at section 38(a), read in conjunction with the law enforcement exemption at section 8(1)(c), and section 38(b) of the *Act*. The requester appealed. In this order, the adjudicator upholds the police's decision to withhold portions of the responsive records pursuant to section 38(b).

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(2)(d), (h), 14(3)(b), and 38(b).

OVERVIEW:

[1] The Brantford Police Services Board (the police) received a request under the *Act* for information about the requester. Specifically, the requester sought access to:

...any information about myself that would make me unsuitable to be an Associate Family with Community Living Brant. I also want to know who the information was given to from Community Living Brant.

[2] The police responded to the appellant's request by issuing a decision letter advising that it was refusing to confirm or deny the existence of responsive records pursuant to section 8(3) of the *Act*.

[3] The requester, now the appellant, appealed the police's decision to refuse to confirm or to deny the existence of responsive records.

[4] During mediation, the police advised that they were no longer refusing to confirm or deny the existence of responsive records under section 8(3) of the *Act*. Following notification of a number of affected parties, the police issued a revised decision granting partial access to a two-page witness statement that is responsive to the request. The police claimed that the discretionary law enforcement exemption at section 8(1)(c) and the mandatory personal privacy exemption at section 14(1) apply to exempt the withheld portions from disclosure.

[5] Also during mediation, it was also determined that the discretionary exemptions at sections 38(a) (discretion to refuse a requester's own information) and section 38(b) (personal privacy) might apply as the record at issue appears to contain both the appellant's personal information and that of other identifiable individuals. As a result, these sections were both added as issues on appeal.

[6] As a mediated resolution could not be reached, the appeal was transferred to the adjudication stage of the appeal process for an adjudicator to conduct an inquiry. I began my inquiry into this appeal by sending Notice of Inquiry setting out the facts and issues on appeal to the police, initially. The police provided representations.

[7] I also invited four affected parties to provide their comments on the disclosure of the information that relates to them. All four affected parties provided representations. None of the affected parties consented to the disclosure of their own personal information.

[8] I also sent the Notice of Inquiry to the appellant, together with the non-confidential portions of the representations of the police and two of the affected parties (who submitted representations jointly). The representations were severed in accordance with the principles set out in this office's *Practice Direction Number 7*. The appellant provided representations in response. I decided that it was not necessary for me to share the appellant's representations with the police.

[9] In this order I find that the exemption at section 38(b) applies to the information at issue and I uphold the police's decision not to disclose it.

RECORDS:

[10] The record at issue in this appeal is a two-page witness statement.

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?

DISCUSSION:

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

[11] Under the *Act*, different exemptions may apply depending on whether a record at issue contains or does not contain the personal information of the requester.¹ Where the records contain the requester’s own personal information, access to the records is addressed under Part II of the *Act* and the discretionary exemptions at section 38 may apply. Where the records contain the personal information of individuals other than the requester but do not contain the personal information of the requester access to the records is addressed under Part I of the *Act* and the mandatory exemption at section 14(1) may apply.

[12] Accordingly, 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. That term is defined in section 2(1) of the *Act*:

“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

¹ Order M-352.

replies to that correspondence that would reveal the contents of the original correspondence,

(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.² To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.

[14] Section 2(2.1) also relates to the definition of personal information:

(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.

[15] 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.³ 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.⁴

Representations

[16] The police submit that they initiated an investigation into a "historical assault" that was reported to them and during the course of that investigation, personal information was obtained. The police submit that in the records, the personal information of the appellant is mixed with that of two affected parties. Specifically, the police submit that the information includes several individuals' names together with other personal information about them within the meaning of paragraph (f) of the definition of "personal information" in section 2(1). The police submit that the disclosure of the personal information that has been severed from the record would render the affected parties identifiable.

[17] The two affected parties who provided representations submit that the record contains the names of a number of identifiable individuals, together with other personal information about them (paragraph (f) of the definition of "personal information").

[18] The appellant does not dispute that the record might contain the personal information of other identifiable individuals.

² Order 11.

³ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

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

Analysis and findings

[19] Having reviewed the responsive record, I find that it contains the personal information of the appellant as well as that of other identifiable individuals. Specifically, the record contains their names, together with other personal information about them within the meaning of paragraph (h) of the definition of personal information found in section 2(1) of the *Act*.

[20] Accordingly, I find that the records at issue contain the “personal information” of the appellant and other identifiable individuals’ within the meaning of that term.

[21] I also note, from my review of the records, that the police have disclosed to the appellant information that can be described as professional information such as that contemplated in section 2(2.1) of the *Act*. I am satisfied that any information that might relate to any of the affected parties that has been withheld does not qualify as their professional information as it would also reveal something of a personal nature about these individuals or is so inextricably intertwined with the personal information of other individuals that it constitutes personal information.

[22] As described above, in circumstances where the records contain the personal information of the appellant, together with that of other identifiable individuals, Part II of the *Act* applies. Therefore, in this case, I must consider whether the information is exempt under any of the discretionary personal privacy exemptions at section 38 of the *Act*.

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

[23] 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.

[24] Under section 38(b), where a record contains the personal information of both the requester and another individual, and disclosure of the information would be an “unjustified invasion” of another 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.⁵

[25] Sections 14(1) to (4) are considered in determining whether the unjustified invasion of personal privacy threshold in section 38(b) is met.

[26] 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. Section 14(3) lists the types of information whose disclosure is presumed to

⁵ See below in the “Exercise of Discretion” section for a more detailed discussion of the institution’s discretion under section 38(b).

constitute an unjustified invasion of personal privacy. Finally, section 14(4) identifies information whose disclosure is not an unjustified invasion of personal privacy. None of the paragraphs in section 14(4) are applicable in the circumstances of this appeal.

Representations

[27] The police submit that the disclosure of the severed information would result in an unjustified invasion of personal privacy of the individuals to whom the personal information relates as a result of the application of the presumption against disclosure at section 14(3)(b). That section states that 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.

[28] The police explain that the affected parties did not contact the police. They submit that the information contained in the record at issue was "collected as the [community living agency] is mandated to contact police whenever the assault allegation has occurred." They submit that "[r]eleasing the personal information of the affected parties to the appellant would be an unjustified invasion of personal privacy as the personal information was obtained as part of an investigation into a possible violation of law."

[29] In her representations, the appellant does not specifically address the possible application of section 38(b) or the presumption against disclosure set out in section 14(3)(b). She does however, submit that the information should be disclosed to her as the accusations were false. She submits that even though the investigation was dropped and no charges were laid, her reputation has been "tainted" and she has been "disgraced, ostracized and humiliated even after [the police] informed [the agency] that the investigation was completed."

Analysis and finding

[30] The police have claimed that the discretionary exemption at section 38(b) applies to the disclosure of the information that has been severed from the records as disclosure would amount to the unjustified invasion of the personal privacy of the individuals to whom it relates. For the following reasons, I accept the police's position and find that its disclosure would amount to an unjustified invasion of the personal privacy of identifiable individuals under section 38(b).

Presumption against disclosure: section 14(3)(b)

[31] As noted above, section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. The police submit that the presumption at section 14(3)(b) is relevant in the circumstances of this appeal.

[32] 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

[33] From my review of the records at issue, and considering the information that has been severed from them, I accept that the witness statement was clearly compiled by the police in the course of their investigation into incidents that were reported to them. Based on its nature and content, in my view, this information at issue was clearly compiled as part of an investigation into a possible violation of law. As previously noted, the fact that no charges were laid is not a bar to the application of the presumption. Accordingly, I find that all of the personal information that has been severed from the record falls under section 14(3)(b) of the *Act* and its disclosure constitutes a presumed unjustified invasion of the personal privacy of individuals other than the appellant.

Factors weighing for or against disclosure: sections 14(2)(d) and 14(2)(h)

[34] The police do not make any representations on whether any of the factors either for or against disclosure set out in section 14(2) apply in the circumstances of this appeal. From my review however, it appears that the factor weighing against disclosure at section 14(2)(h) might be relevant as the personal information has been supplied by the individual to whom it relates in confidence. Additionally, while the appellant's representations do not specifically address the possible application of any of the factors in section 14(2), the portion of her representations where she submits that she has been falsely accused and therefore should have a right to that information, appears to suggest that the factor weighing in favour of disclosure in section 14(2)(d) might be relevant as to a fair determination of her rights. Those sections read:

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,

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

...

(h) the personal information has been supplied by the individual to whom the information relates in confidence.

[35] 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

⁶ Orders P-242 and MO-2235.

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

(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.⁸

[36] In my view, the appellant's representations do not establish that the personal information is relevant or required for a fair determination of her rights, and there is no specific evidence before me to demonstrate that the requirements for the application of section 14(2)(d) have been met. Accordingly, I find that the factor favouring disclosure at section 14(2)(d) does not apply in the circumstances of this appeal.

[37] The factor weighing against disclosure at section 14(2)(h) applies if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Thus, section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.⁹

[38] In my view, considering the nature, context, and surrounding circumstances of the complaint taken to the police that forms the subject matter of the records, I accept that a reasonable person would expect that the information that the identifiable individuals supplied to the police in the context of a possible law enforcement matter would be subject to a degree of confidentiality. Additionally, from my review of the content of the specific information that has been severed it is clear that the individuals who supplied the information to the police expected confidentiality with respect to what was communicated. Accordingly, in this appeal, I find that the factor in section 14(2)(h) is a relevant consideration that weighs in favour of protecting the privacy of the individuals other than the appellant and of withholding their personal information.

Summary conclusion

[39] As noted above, for records claimed to be exempt under section 38(b), this office will consider and weigh the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties in determining whether the disclosure of the personal information in the records would amount to an unjustified invasion of personal privacy.¹⁰

[40] In this appeal, I have found the presumption at section 14(3)(b) and the factor

⁸ 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.).

⁹ Order PO-1670.

¹⁰ Order MO-2954

at section 14(2)(h) to be relevant to the circumstances before me. Specifically, I have found that the presumption against disclosure at section 14(3)(b) applies to the personal information that has been withheld as it was compiled as part of an investigation into a possible violation of law. Accordingly, the disclosure of that information is presumed to amount to an unjustified invasion of the personal privacy of identifiable individuals other than the appellant. I have also found that the factor weighing against disclosure at section 14(2)(h) is a relevant consideration as I accept that the individuals who provided that personal information to the police had a reasonably-held expectation of confidence with respect to the disclosure of that information. However, I have been provided with insufficient evidence to support a conclusion that any factors or criteria weighing in favour of the disclosure of the personal information of individuals other than the appellant might apply.

[41] Having considered the factors, presumptions and exceptions set out in sections 14(2), (3) and (4) I conclude that the disclosure of the information that remains at issue would amount to an unjustified invasion of the personal privacy of identifiable individuals other than the appellant. I have also considered the possible application of the absurd result principle¹¹ and find that there is no evidence before me to suggest that it applies in this appeal.

[42] Finally, as section 38(b) is a discretionary exemption, I have considered whether the police properly exercised their discretion not to disclose the information that they withheld. I have considered the limited amount of specific information that was withheld. I have also considered the police's representations on their exercise of discretion outlining their balancing of the procedural rights available to the appellant against the nature of the information provided by the identifiable individuals. Taking all this into consideration, I accept that the police exercised their discretion not to disclose the information they withheld in good faith and not for an improper purpose.

[43] Therefore, I find that the information at issue in the record is properly exempt under section 38(b) of the *Act* and I uphold the police's decision not to disclose it.

ORDER:

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

Original signed by _____
Catherine Corban
Adjudicator

July 18, 2017 _____

¹¹ Orders M-444 and MO-1323.