

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3484

Appeal MA16-393

Port Hope Police Services Board

August 16, 2017

Summary: The appellant seeks access to an email relating to an incident that he was involved in. The police denied the appellant access to the record, in full. The relevant exemptions claimed are sections 38(a) (discretion to refuse requester's own information), read with sections 7(1) (advice or recommendations) and 8(2)(a) (law enforcement report), and 38(b) (personal privacy). In this order, the adjudicator finds that the exemptions claimed do not apply to the record and orders the police to disclose it to the appellant, in full, with the exception of certain personal information that was removed from the scope of 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) ("personal information"), 7(1), 8(2)(a) and 38(a).

OVERVIEW:

[1] The appellant made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Port Hope Police Services Board (the police) for access to an email concerning the appellant sent by a named police officer during a specified time period.

[2] The police located one responsive record and denied the appellant access to it. The police advised the appellant that it withheld the record under the discretionary exemptions in sections 7(1) (advice or recommendations), 8(1)(a) (law enforcement matter) and (e) (endanger life or safety), 8(2)(a) (law enforcement report), 11(d) (economic and other interests), 13 (danger to health or safety) and 38(b) (personal privacy) of the *Act*.

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

[4] During mediation, the appellant advised the mediator that he does not seek access to the personal information of another individual (a civilian) that was contained in the record. Consequently, the personal information of that individual is not at issue. In addition, the police issued a revised decision to the appellant denying him access to the record in its entirety, but claimed fewer exemptions than in their original decision.

[5] At the conclusion of mediation, the remaining exemptions at issue were the discretionary exemptions in sections 7(1) and 8(2)(a) of the *Act*.

[6] Mediation did not resolve the appeal and the appeal was then transferred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. The adjudicator originally assigned to this appeal began her inquiry by inviting the police to provide representations in response to a Notice of Inquiry. In their representations, the police submit that the record contains the personal information of three individuals, one of whom is a police officer (the affected party).

[7] Because the record may contain the appellant's personal information, the adjudicator added the possible application of the discretionary exemptions in sections 38(a) and (b) of the *Act* as an issue in the appeal. The adjudicator then provided the police and affected party an opportunity to submit representations in response to the new issues. The police submitted representations. The affected party did not submit representations.

[8] The adjudicator then invited the appellant to make submissions 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.

[9] The appeal was then transferred to me to complete the order. In the discussion that follows, I find that the email at issue is not exempt from disclosure and order the police to disclose it to the appellant with the exception of the personal information that is not at issue.

RECORD:

[10] The sole record at issue is a one-page email.

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(a) in conjunction with the section 7(1) exemption apply to the information at issue?

- C. Does the discretionary exemption at section 38(a) in conjunction with the section 8(2)(a) exemption 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 does or does not contain the personal information of the requester.¹ Where a record contains the requester's own information, access is addressed under Part II of the *Act* and the exemptions at section 38 may apply. Where a record contains the personal information of individuals other than the requester, access is addressed under Part I of the *Act* and the exemptions found at sections 6 to 15 may apply.

[12] To determine which sections of the *Act* may apply, it is necessary to first determine whether the email 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,

¹ Order M-352.

(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.²

[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* an individual.³

[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.⁴

[15] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁵

[16] The police submit that the record contains personal information relating to the officer who wrote the document (the affected party), the appellant and a third party.

[17] With regard to the affected party, the police submit that the record is a piece of correspondence they sent to the institution that is implicitly of a private or confidential nature. Accordingly, the police submit that the information contains the personal information relating to the affected party under section 2(1)(f) of the *Act*. The police submit that the affected party sent the email to the uniform members of the police. The police submit that the email was not sent to all members of the police. As such, the police submit that "the document was sent in a somewhat confidential manner."

[18] The police state that the information relating to the affected party could be viewed as relating to them in a professional, official or business capacity. Regardless, the police submit that because the record was sent in a confidential manner, it constitutes the personal information of the affected party.

[19] Although notified, the affected party did not submit representations on whether the record contains personal information relating to them.

² Order 11.

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

⁴ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁵ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[20] Based on my review of the email, I find that it contains *personal information* as that term is defined in section 2(1) of the *Act*. Specifically, I find that the email contains the appellant's personal information including the opinions or views of individuals as they relate to him (paragraph (g)) and his name, along with other personal information about him (paragraph (h)). As the email relates to an incident that the appellant was involved in, I find that the record can be considered to contain his personal information within the meaning of that term in section 2(1) of the *Act*.

[21] In addition, I find the record contains the personal information of another identifiable individual, specifically the third party whose personal information was removed from the scope of this appeal during mediation. The personal information consists of this individual's race, national or ethnic origin (paragraph (a)), the views or opinions of another individual about them (paragraph (g)) and their name, along with other personal information about them (paragraph (h)). Since the appellant removed information relating to this individual from the scope of the appeal, I will not consider it further in this order.

[22] With regard to the affected party, I find that the record does not contain their personal information. As the police concede in their representations, the information relating to the affected party relates to them in a professional, official or business capacity. The information relating to the affected party does not relate to them in a personal capacity and would not, if disclosed, reveal something of a personal nature about them. The affected party was called in their professional capacity to the scene of the incident that is the subject of this request and the email was prepared in response to their attendance at the incident. Further, the email is clearly of a professional nature between the affected party and other members of the police. As stated above, information associated with an individual in a professional, official or business capacity will not be considered to be *about* an individual.⁶

[23] I note that the police submit that the record contains the affected party's personal information based "on the fact that the personal information is a record sent in a confidential manner." However, the fact that a record was sent in a "confidential manner" does not mean that the record itself contains personal information within the meaning of section 2(1) of the *Act*. If I were to adopt the police's interpretation of *personal information*, it would be difficult to see how any record that was sent in a "confidential manner" in any context (i.e. corporate agreements, proposals in response to requests for proposals, etc.) would not be found to contain personal information within the meaning of paragraph 2(1)(f).

[24] In order for me to find that the record contains *personal information* within the meaning of section 2(1), it must be "recorded information *about* an identifiable individual" (emphasis added). The information at issue in this appeal does not relate to the affected party in a personal capacity; rather, it contains their summary of an incident involving the appellant and a third party. The affected party's involvement in the incident was entirely in their professional capacity. Therefore, I find that the record

⁶ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

does not contain personal information relating to the affected party as that term is defined in section 2(1) of the *Act*. Given this finding, I do not need to consider whether the personal privacy exemption in section 38(b) applies to the information relating to the affected party.

[25] I will now consider whether the record qualifies for exemption under section 38(a) of the *Act* because the record contains the personal information of the appellant.

Issue B: Does the discretionary exemption at section 38(a) in conjunction with the section 7(1) exemption 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. Section 38(a) gives the police the discretion to withhold the appellant's personal information from him if the record contains information that would be exempt under sections 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 of the *Act*. In this appeal, the police submit that section 38(a), read in conjunction with sections 7(1) and 8(2)(a), applies to exempt the entire record from disclosure.

[27] Section 7(1) of the *Act* reads as follows:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of an officer or employee of an institution or consultant retained by an institution.

The purpose of section 7 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.⁷

[28] *Advice* and *recommendations* have distinct meanings. *Recommendations* refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised and can be express or inferred.

[29] *Advice* has a broader meaning than *recommendations*. It includes *policy options*, which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made and the public servant's identification and consideration of alternative decisions that could be made. *Advice* includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.⁸

[30] *Advice* involves an evaluative analysis of information. Neither the terms *advice* or *recommendations* extends to *objective information* or factual material.

[31] *Advice* or *recommendations* may be revealed in two ways:

⁷ *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43. ("John Doe")

⁸ *Ibid.* at paras 26 and 27.

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.⁹

[32] The police submit that the record at issue contains inferred recommendations that were provided by a public servant to the institution. In the confidential portions of their representations, the police identified two specific portions of the email that contain what they submit constitute inferred recommendations. The police identified the recommendation that they argue can be inferred from the email.

[33] The appellant did not specifically address whether the record contains information that would be exempt from disclosure under section 38(a), read with section 7(1), of the *Act*.

[34] Based on my review of the record, I find that it is not exempt from disclosure under section 38(a), read with section 7(1). The email at issue contains a summary of an incident involving the appellant and it appears that the author sent it as an update to his fellow officers rather than to provide advice or recommendations within the meaning of section 7(1). It does not contain the evaluative analysis of information required by section 7(1). Further, while the email contains the author's recounting and opinion regarding the appellant and the incident, the information does not appear to relate to the deliberative process of the police's decision-making so as to qualify for exemption under section 7(1). The information contained in the record does not provide considerations to be taken into account by the police in its decision making. Finally, I find that the police did not provide me with sufficient evidence to demonstrate that the information was prepared to serve as the basis for their decision on a preferred course of action or between various courses of action.¹⁰

[35] I do not agree with the police's claim that the record contains inferred recommendations regarding a particular course of action or various courses of action to be taken in relation to the appellant. Rather, the email at issue contains the author's summary of the incident and his opinion regarding the appellant. I find that the record does not contain the inferred recommendation that the police suggest nor did the police provide me with evidence to support their claim. Upon review of the record and the police's representations, I find that the police did not provide me with evidence to identify the specific advice or recommendations in the records or to understand how this information is sufficiently connected to the police's decision-making process to qualify for exemption.

[36] Therefore, I find that the record does not qualify for exempt under section 38(a), read with section 7(1).

⁹ Order P-1054.

¹⁰ *John Doe*, *supra* note 7 at para. 47.

Issue C: Does the discretionary exemption at section 38(a) in conjunction with the section 8(2)(a) exemption apply to the information at issue?

[37] The police claim that the record is exempt from disclosure under section 38(a), in conjunction with section 8(2)(a). Section 8(2)(a) of the *Act* states:

A head may refuse to disclose a record,

that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law.

[38] In order for a record to qualify for exemption under section 8(2)(a) of the *Act*, the police must satisfy each part of the following three-part test:

1. the record must be a report; and
2. the report must have been prepared in the course of law enforcement, inspections or investigations; and
3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.¹¹

The word *report* means "a formal statement or account of the results of the collation and consideration of information." Generally, results would not include mere observations or recordings of fact.¹² The title of a document does not determine whether it is a report, although it may be relevant to the issue.¹³

[39] The term *law enforcement* is defined in section 2(1) as meaning the following:

(a) policing

(b) investigations or inspections that could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or

(c) the conduct of proceedings referred to in clause (b)

[40] The police submit that the record is a report. The police submit that the email contains a summary of the facts, the investigator's findings of the facts, a conclusion and an inferred recommended course of action. The police submit that the report was prepared in the course of law enforcement as the author was at the scene in their capacity as a police officer to ensure the safety of individuals at the scene. The police assert that "ensuring the safety of the public is certainly part of law enforcement." Finally, the police submit that the record was prepared by an agency with the function

¹¹ Orders P-200 and P-324.

¹² Orders P-200, MO-1238 and MO-1337-I.

¹³ Order MO-1337-I.

of enforcing and regulating compliance with the law.

[41] The appellant submits that the record is not a report within the meaning of section 8(2)(a).

[42] Based on my review of the record, I find that it is not a *report* within the meaning of section 8(2)(a) of the *Act*. The record is an email that summarizes an incident involving the appellant and a third party. The author of the email includes their opinions regarding the incident and the appellant, but I find that these opinions cannot be considered the "results of the collation and consideration of information" as required by section 8(2)(a). Overall, I find that the record contains general observations and commentary that are more in the nature of recordings of fact than formal, evaluative accounts of investigations. Accordingly, I find that the record does not meet the definition of a *report* under section 8(2)(a) and I conclude that the record does not qualify for exemption under section 8(2)(a).

[43] In conclusion, I find that none of the discretionary exemptions claimed by the police apply to withhold the record from disclosure. Further, I find that none of the mandatory exemptions apply. Therefore, I will order the police to disclose the record to the appellant, in full, with the exception of the personal information of the third party.

ORDER:

I order the police to disclose the record to the appellant, in full, with the exception of the personal information of the third party by **September 21, 2017** but not before **September 15, 2017**.

Original Signed by: _____

Justine Wai
Adjudicator

August 16, 2017