

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3520

Appeal MA16-664

Waterloo Regional Police Services Board

November 10, 2017

Summary: At issue in this appeal is the appellant's request for access to the withheld portions of an Occurrence Details Report and police officers' notes relating to an identified occurrence. The police relied on section 38(b) (personal privacy) of the *Act* to deny access to the portions they withheld. In this order the adjudicator upholds the decision of the police to deny access to the withheld information 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 14(2)(a), 14(3)(b) and 38(b).

Orders Considered: P-242 and MO-2785.

OVERVIEW:

[1] The Waterloo Regional Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to any and all records related to an identified occurrence report. These records included, but were not limited to, "[named officers'] notes, reports, recordings, emails, faxes, records from police computer databases, etc."

[2] The police identified responsive records and granted partial access to them, relying on sections 38(b) (personal privacy) and 52(3) (employment or labour relations) of the *Act* to deny access to the portion they withheld. The letter further advised that:

Some information has been removed as it does not pertain to your request and relates to other investigations being conducted by the officer. These portions of the records are marked "Not Responsive."

[3] The requester (now the appellant) appealed the access decision.

[4] At mediation, the appellant confirmed that he was not seeking access to the information the police identified as being subject to section 52(3) of the *Act* or to the information the police identified as being not responsive to the request. Accordingly, that information and the application of section 52(3) of the *Act* are no longer at issue in the appeal.

[5] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*.

[6] I commenced my inquiry by sending a Notice of Inquiry setting out the facts and issues in the appeal to the police and a party whose interests may be affected by disclosure (the affected party). Only the police provided representations in response. The police asked that portions of their representations be withheld due to confidentiality concerns. I then sent a Notice of Inquiry to the appellant along with the police's non-confidential representations. The appellant provided responding representations which were shared with the police for reply. The police provided reply representations, portions of which they asked to be withheld due to confidentiality concerns.

[7] In this order, I uphold the decision of the police to deny access to the withheld information and dismiss the appeal.

RECORDS:

[8] At issue in this appeal are an Occurrence Details Report along with two police officer's notes.

ISSUES:

- A. Do the Occurrence Details Report and Police Officers' Notes 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: Do the Occurrence Details Report and Police Officers' Notes contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[9] 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) 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;

[10] 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

[11] Sections (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.

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

[13] The police submit that, notwithstanding the context in which the records were created, the withheld information qualifies as the personal information of an identified individual other than the appellant.

[14] In his representations, the appellant sets out the circumstances which resulted in the creation of the records and takes the position that they relate to a civil matter, rather than a criminal one.

Analysis and finding

[15] I have reviewed the records at issue and find that they contain the personal information of the appellant as well as another identifiable individual that falls within the scope of the definition of “personal information” at section 2(1) of the *Act*. In that regard, notwithstanding the context in which the records were created, I find that the withheld information reveals something of a personal nature about the identifiable individual and thereby qualifies as his personal information.

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.

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

[16] Having found that the records contain the mixed personal information of the appellant and another identifiable individual, I will consider the appellant's right to access the remaining withheld information under section 38(b) of the *Act*.

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

[17] 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. 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.

[18] Section 38(b) reads:

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

[19] Section 14 of the *Act* 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).

[20] 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.⁵ 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 factor at section 14(2)(h) and the presumption in section 14(3)(b) apply. The appellant does not specifically refer to any specific factor favouring disclosure but the tenor of his representations appear to raise the possible application of the factor at section 14(2)(a). Those sections read:

(2) 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,

⁵ Order MO-2954.

(a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;

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

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

(b) 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;

[21] Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may not be exempt under section 38(b), because to withhold the information would be absurd and inconsistent with the purpose of the exemption.⁶ However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.⁷

The police's representations

[22] The police submit:

... The personal information was compiled for the investigation of unwanted contact. In this instance there were no grounds for charges of harassment, a Criminal Code offence, however the officer collected the information in order to determine whether or not a violation of law had occurred. Although no criminal proceedings were commenced against the subject, "[t]he presumption only requires that there be an investigation into a possible violation of law" [Order P-242]. The records clearly indicate that a report was being made to be kept on file in the event that the situation escalated, indicating they could be used again in subsequent investigations should the matter continue.

The appellant's representations

[23] The appellant takes issue with the manner in which the police became involved in what he characterizes as a non-criminal matter. He submits that this arose out of a commercial matter and any allegations of harassment that led to the improper

⁶ Orders M-444 and MO-1323.

⁷ Orders MO-1323 and MO-1378.

involvement of the police were unfounded. He further states that when the complainant was identified in a telephone call with an identified police officer any personal privacy was waived. He submits that as the individual was identified, it would be absurd to withhold the information at issue and, in any event, the records can be severed by removing the individual's personal information such as his date of birth and address while the remaining information can be disclosed to him.

The police's reply representations

[24] In reply the police disagree that personal privacy was waived when the individual's name was disclosed in a telephone call with the appellant.

[25] They submit:

Police records and the conduct of officers investigating potential violations of law are governed in part by the *Police Services Act*⁸ and [the *Act*] which contain several provisions regarding the sharing of information. In this case, the institution was able to share certain details which would be considered the personal information of the affected party during the course of the investigation undertaken by [identified police officer]. In his communication with the appellant, the [identified police officer] shared the name of the affected party in order that he may advise the appellant to cease contact with the affected party. In this case, some sharing of information was necessary for the execution of his duties. ...

The appellant further asserts that the redaction of this information would be absurd and makes reference to seeking access to statements made by the affected party. The provisions of [the *Act*] allow for certain exemptions to be applied only when the facts support it, as was the case during the ongoing investigation. This investigation is now closed and any further release of the affected party's information would be a violation of their privacy. The mandatory personal privacy exemptions prohibit the further release of the affected party's personal information.

In MO-2785, it was determined that "without specific information confirming that the appellant was present and heard these conversations, I accept the position of the police that withholding this information would not result in an absurdity". This finding is very relevant in this case as the appellant was certainly not present for the collection of the affected party's information and is not aware of the specific statements made by the affected party and as such it is not absurd to withhold this information.

⁸ RSO 1990, c P.15.

Analysis and finding

[26] I agree with the position of the police that the presumption against disclosure in section 14(3)(b) applies in this appeal because the personal information in the Occurrence Detail Report and Police Officers' Notes was compiled and is identifiable as part of an investigation into a possible violation of the *Criminal Code*⁹. The presumption only requires that there be an investigation into a possible violation of law¹⁰, which I find occurred in this case.

[27] Section 14(2)(a) contemplates disclosure in order to subject the activities of the government (as opposed to the views or actions of private individuals) to public scrutiny.¹¹ Simple adherence to established internal procedures will often be inadequate, and institutions should consider the broader interests of public accountability in considering whether disclosure is desirable for the purpose outlined in section 14(2)(a).¹²

[28] In Order P-1014, an order dealing with the provincial equivalent of section 14(2)(a), Adjudicator John Higgins concluded that public policy supported "proper disclosure" in proceedings such as the workplace harassment investigation at the centre of that appeal, and that the support was grounded in a desire to promote adherence to the principles of natural justice. Adjudicator Higgins agreed with the appellant in that appeal that "an appropriate degree of disclosure to the parties" involved in such investigations was a matter of considerable importance. However, on the facts of that appeal, the adjudicator concluded that "the interest of a party to a given proceeding in disclosure of information about that proceeding is essentially a private one." Accordingly, because the appellant in that matter wished to review the records for himself to try to assure himself that "justice was done in this particular investigation, in which he was personally involved," Adjudicator Higgins found that the provincial equivalent of section 14(2)(a) did not apply.

[29] Although the records in the current appeal are not related to an investigation into a complaint of workplace harassment, in my view, the analysis of Adjudicator Higgins provides some guidance in the matter before me. In this regard, I am not satisfied that the appellant's motives in seeking access to the records are more than private in nature to satisfy him that the conduct of the police in relation to him and its investigation of the matters involving him were appropriate. In my view, the disclosure of the withheld information at issue would not result in greater scrutiny of the police. As in Order P-1014, this is a private interest, and I therefore find that section 14(2)(a) is not a relevant consideration. Accordingly, I find that the factor in section 14(2)(a) does not apply to the information in the records that remains at issue.

⁹ R.S.C., 1985, c. C-46.

¹⁰ Orders P-242 and MO-2235.

¹¹ Order P-1134.

¹² Order P-256.

[30] Given the application of the presumption in section 14(3)(b), and the fact that no factors favouring disclosure were established, and balancing all the interests, I am satisfied that the disclosure of the remaining withheld personal information would constitute an unjustified invasion of another individual's personal privacy¹³. Accordingly, I find that this personal information is exempt from disclosure under section 38(b) of the *Act*. I am also satisfied that the undisclosed portions of the records cannot be reasonably severed, without revealing information that is exempt under section 38(b) or resulting in disconnected snippets of information being revealed.¹⁴ I am also satisfied that it is clear that the appellant is not aware of the exact information that I have found to qualify for exemption and, in any event, disclosure of this personal information would be inconsistent with the purpose of the section 38(b) exemption. Accordingly, in all the circumstances, I find that the absurd result principle does not apply.

[31] Finally, I have considered the circumstances surrounding this appeal and I am satisfied that the police have not erred in the exercise of their discretion with respect to section 38(b) of the *Act* regarding the withheld information that will remain undisclosed as a result of this order. I am satisfied that they did not exercise their discretion in bad faith or for an improper purpose. The police considered the purposes of the *Act* and have given due regard to the nature of the information in the specific circumstances of this appeal. Accordingly, I find that the police took relevant factors into account and I uphold their exercise of discretion in this appeal.

ORDER:

I uphold the decision of the police and dismiss the appeal.

Original Signed by: _____
Steven Faughnan
Adjudicator

November 10, 2017

¹³ As I have found that the presumption applies it is not necessary for me to consider whether the factor favouring non-disclosure at section 14(2)(h) might also apply.

¹⁴ See Order PO-1663 and *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.).