Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3526

Appeal MA16-520

Waterloo Regional Police Services Board

November 22, 2017

Summary: The appellant sought access to records related to a specified occurrence involving him and another individual. The police located responsive records and issued a decision granting the appellant partial access to them. The police relied on the discretionary exemption in section 38(b) (invasion of privacy) to deny access to the portions they withheld. In this order the adjudicator upholds the police's decision to deny access to the withheld portions of the records 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(2)(d), 14(3)(b), and 38(b).

Order considered: MO-3390.

Cases considered: *R. v. Quesnelle* 2013 ONCA 180 and *R. v. Quesnelle* 2014 SCC 46.

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* or *MFIPPA*) for information relating to a specified occurrence, except for an identified letter.

[2] The police identified responsive records and granted partial access to them

relying on section 38(b) (personal privacy) to deny access to the portion they withheld.

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

[4] At mediation, the police clarified that a portion of the records that they had initially identified as non-responsive was actually responsive to the request. In addition, the police agreed with the Mediator's view that a portion of a page of the records related to the appellant only and they issued a supplementary decision letter disclosing that information to him. Accordingly, that information is no longer at issue in the appeal. The appellant advised that he continues to seek access to the remaining withheld responsive information.

[5] Mediation did not fully resolve the appeal and it was moved to the adjudication stage of the appeals 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 an individual whose interests may be affected by disclosure (the affected party). Only the police provided responding representations at that point. I then sent a Notice of Inquiry to the appellant setting out the facts and issues in the appeal as well as the non-confidential representations of the police. I invited the appellant to consider and comment upon Order MO-3390[1] in his representations. The appellant provided representations in response. Shortly thereafter, the affected party provided representations. I determined that the appellant's representations raised issues to which the police should be provided an opportunity to reply. Accordingly, the appellant's representations were shared with the police who then provided representations in reply. The appellant was then invited to comment upon the police's representations in sur-reply. The appellant did not provide sur-reply representations.

[7] In this order, I uphold the police's decision to deny access to the withheld responsive portions of the records and dismiss the appeal.

RECORDS:

[8] Remaining at issue in this appeal are the withheld responsive portions of an Occurrence Report and a police officer's notes.

ISSUES:

A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

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[1] Order MO-3390 dealt with a request for similar information and involved the same parties.

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

DISCUSSION:

A. Does the records 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), in part, 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,
> >
> > . . .
> >
> > (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,
> >
> > . . .
> >
> > (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.[2] 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

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[2] Order 11.

individual may be identified if the information is disclosed.[3]

[11] I have reviewed the records and find that they contain the personal information of the appellant and the affected party that falls within the scope of the definition of personal information in section 2(1) of the *Act.*

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

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

[13] Section 38 of the *Act* provides a number of exemptions from an individual's 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 in addition to that of the affected party and disclosure of the information would constitute an "unjustified invasion" of the affected party's personal privacy. Section 38(b) states:

> 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

[14] 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).

[15] 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.[4] 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) and the factor at section 14(2)(h) apply. The appellant's representations do not specifically cite any factor favouring disclosure but appear to raise the possible application of the factor at section 14(2)(d). Those sections

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[3] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).
[4] Order MO-2954.

read:

> 14(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,
>
> > (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; …
>
> 14(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; …

[16] 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
>
> (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
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> (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.[5]

[17] The factor 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

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[5] 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.).

expectation.[6]

[18] Even if no criminal proceedings were commenced against any individuals, the presumption at section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.[7]

[19] 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.[8] 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.[9]

Representations

[20] The police submit that the incident that is the subject of the request was classified as a "Domestic Dispute". They submit that:

> … Any information released to the appellant would violate the privacy of the affected party and could cause further issues or aggravate an already volatile situation between the parties.

[21] With respect to the application of the factor at section 14(2)(h), the police submit in their non-confidential representations that the expectation of confidentiality is reasonable in these circumstances, and that:

> … Victims, complainants and witnesses expect police to maintain confidentiality when they provide information. If police services did not maintain confidentiality, it would undermine a fundamental element of policing which is to maintain and enhance public trust. Without this, individuals would be wary of providing any details to the police. It is essential to the operation of the police that we are able to collect personal information during the course of law enforcement investigations without the fear of that information being inappropriately disclosed. …

[22] With respect to the application of section 14(3)(b), the police submit that:

> … The incident was investigated by the police and although no criminal charges resulted, a full investigation was conducted, during which the affected party's personal information was collected and used.

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[6] Order PO-1670.
[7] Orders P-242 and MO-2235.
[8] Orders M-444 and MO-1323.
[9] Orders MO-1323 and MO-1378.

[23] The police submit that, in the circumstances of this appeal, the absurd result principle does not apply:

> The appellant did not provide any information in relation to this incident … . As such, the appellant would have no knowledge of what information is contained in the record and therefore, the appellant is not entitled to receive information contained in the report.

[24] With respect to Order MO-3390, the police submit:

> The institution relies on the decision made in Order MO-3390, where the circumstances and nature of the appeal were very similar to this matter. It should be noted that Order MO-3390 relates to a request to this institution and, as such, the similarities with respect to the matters can be confirmed.
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> In both cases, the appellant made a request for information regarding allegations made by a complainant. … In both cases, the appellant was contacted and refused to cooperate with the police or provide a statement in response to the incident. …

[25] The affected party objected to the disclosure of any of her personal information.

[26] The appellant's representations do not address Order MO-3390 but explains why he seeks access to the information at issue. In his representations, he refers to *R. v. Quesnelle*[10] and submits that in that case the Ontario Court of Appeal held that a complainant or a witness has no reasonable expectation of privacy in information that they provide to police in the course of making a criminal complaint.

[27] The appellant submits:

> The Ontario Court of Appeal's reasoning for non-sexual offences makes good policy sense. Unless citizens have a right to know what complainants have accused them of, they can have no remedy in defamation, malicious prosecution, or public mischief charges against false complaints. It cannot be the law of Ontario that citizens have no remedies in these circumstances.
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> The [*MFIPPA*] disclosure provisions are the Ontario legislature's mechanism for permitting falsely accused people to obtain records

[10] 2013 ONCA 180. The appellant refers to paragraphs 33 and 34 of the decision and further submits that although the decision was overturned by the Supreme Court of Canada in *R. v. Quesnelle* 2014 SCC 46, it was on a narrow ground unrelated to his *MFIPPA* request.

documenting false accusations. *MFIPPA* disclosure is consistent with the Ontario Court of Appeal's decision in *R. v. Quesnelle*.

[28] In reply, the police submit that:

> With regard to the appellant's reference to *R. v. Quesnelle*, his submissions are not relevant to this appeal, as that matter references a decision with regard to Crown Disclosure obligations in a criminal proceeding. The decision references an accused's right to information in order to make full answer and defense as an individual who is criminally charged. As the appellant was not criminally charged, this submission has no relevance.
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> During the course of the Waterloo Regional Police Service investigation of the complainant's allegations, officers attempted to contact the appellant to share the nature of the complaint against him. This information would have been shared in accordance with the *Police Services Act*. … As the appellant refused to speak to police, those allegations were not disclosed to the appellant during the course of the investigation. As the Access to Information Unit is not an investigative Unit, the office does not have the same authority to release information as an officer would during the course of an active investigation.
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> …
>
> The appellant asserts that "unless citizens have a right to know what complainants have accused them of, they can have no remedy in defamation, malicious prosecution, or public mischief charges against false complaints. It cannot be the law of Ontario that citizens have no remedies in these circumstances." He further asserts that *MFIPPA* disclosure provisions are the "Ontario legislature's mechanism for permitting falsely accused people to obtain records documenting false accusations" and that "in order to bring an action for defamation, the plaintiff has to plead the exact words complained of."
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> In fact, the court process gives the appellant the opportunity to plead his understanding and/or the general intent and meaning of the defamation. Subsequently, after bringing a motion for production of records under the Rules of Civil Procedure, he can amend the pleading if necessary.
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> *MFIPPA* is not as described by the appellant, but is intended to make municipal governments more open and accountable to people, while at the same time protecting an individual's right to privacy. The institution maintains that the complainant's right to privacy in this matter carries more weight than the appellant's right to access.

> …
>
> The appellant has a means of obtaining the required information for a legitimate court matter, if required.

Analysis and findings

[29] There are two separate regimes for disclosure in the context of *Criminal Code* proceedings and under *MFIPPA*. My powers and process flow from the *Act*.

[30] I also 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 report was compiled and is identifiable as part of an investigation into a possible violation of law. The occurrence report at issue was created by the police as part of their investigation into a possible violation of law, namely the *Criminal Code*[11].

[31] With respect to section 14(2)(d), based on the reply representations of the police, to which the appellant did not respond although given the opportunity, I am not satisfied that the personal information is required in order to prepare for any potential defamation proceeding the appellant might bring or to ensure an impartial hearing of any defamation claim.

[32] 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 privacy[12]. 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.[13] 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.

[33] Regarding the appellant's arguments pertaining to the Ontario Court of Appeal's decision in *R. v. Quesnelle*, the Supreme Court of Canada provided a complete answer to the appellant's submissions in *R. v. Quesnelle*[14] where at paragraph 44 of the decision, after discussing the effect of third party disclosure on the expectation of

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[11] R.S.C., 1985, c. C-46.
[12] 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.
[13] See Order PO-1663 and *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.).
[14] 2014 SCC 46.

privacy, the Supreme Court of Canada wrote:

> Fundamentally, the privacy analysis turns on a normative question of whether we, as a society, should expect that police occurrence reports will be kept private. Given the sensitive nature of the information frequently contained in such reports, and the impact that their disclosure can have on the privacy interests of complainants and witnesses, it seems to me that there will generally be a reasonable expectation of privacy in police occurrence reports.

[34] 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: November 22, 2017
Steven Faughnan
Adjudicator