

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3593

Appeal MA16-592

Toronto Police Services Board

April 20, 2018

Summary: The appellant made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Toronto Police Services Board (the police) for information in officers' notes, reports and witness statements relating to two incidents. The appellant appealed the police's decision to withhold some information as not responsive to his request and some withheld on the basis that disclosing it would be an unjustified invasion of personal privacy under section 38(b) of the *Act*. This order upholds the police's decision in part. Some information withheld as not responsive, and some information withheld under section 38(b) that is solely the appellant's personal information is ordered 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"), 38(b), 14.

Orders and Investigation Reports Considered: Order M-352, MO-3418, MO-2830.

OVERVIEW:

[1] The appellant made requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Toronto Police Services Board (the police) for information including officers' notes, reports and witness statements relating to incidents on two specified dates. I characterize the incidents as neighbour disputes.

[2] The police granted partial access to the records. The police withheld some information citing sections 38(b), 14(1)(f) and 14(3)(b) of the *Act* and other information

on the basis that it was not responsive to the appellant's request.

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

[4] During mediation, a mediator sought affected parties' consent to disclosing the requested records, but no affected parties consented.

[5] The appellant advised that he was not interested in information about incidents contained in the records that did not involve him. The information withheld as not responsive on pages 9, 10, 11, 12, 13, 17, 18, 20, 21, 24, 27 and 28 of the records is therefore not at issue.

[6] As mediation did not resolve all of the remaining issues, the appeal moved to the adjudication stage, where I conducted an inquiry. I began the inquiry by inviting the police to provide representations on issues set out in a Notice of Inquiry.

[7] The police's representations disclosed information they had previously withheld on pages 3 and 7 of the records. The police included copies of the decision letter and the two pages that it sent to the appellant with their representations. The police continued to withhold two words on page 7 citing section 38(b), 14(1)(f) and 14(3)(b) and a street number portion of an address on page 3 citing section 14(1)(f) and 14(3)(b).

[8] I shared the police's representations with the appellant in accordance with *IPC Practice Direction 7*. The appellant provided representations responding to the police's representations and the issues in a Notice of Inquiry.

[9] This order upholds the police's decision regarding the withheld information at issue, except for some information withheld as not responsive on pages 1 and 2 of the records, and some information withheld under section 38(b) on page 5 of the records that is solely the appellant's personal information.

RECORDS:

[10] The records at issue comprise information in police reports and officers' notes at pages 1-7, 9, 11-16, 18, 19, 21-23, 25, 26 and 28.

[11] The police withheld some information on pages 1 and 2 of the records on the basis that it is not responsive to the appellant's request.

[12] Pages 4-7, 9, 11-16, 18, 19, 21-23, 25, 26 and 28 contain information withheld under section 38(b) of the *Act*, in conjunction with sections 14(1)(f) and 14(3)(b). A street number is withheld on page 3 of the records citing sections 14(1)(f) and 14(3)(b).

ISSUES:

- A. What is the scope of the request? What records are responsive to the request?
- B. Do the records at issue contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- C. Does the personal privacy exemption in section 38(b) apply to the information at issue?
- D. Did the police exercise its discretion under section 38(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

SCOPE OF THE REQUEST/RESPONSIVENESS OF RECORDS

A. What is the scope of the request? What records are responsive to the request?

[13] The police withheld some small snippets of information in a police I/CAD Events Details Report at pages 1-2 as not responsive to the appellant's request. The withheld information includes descriptions in the "Action" field of the Report and a priority code number assigned to one of the incidents. The police disclosed the majority of the Report to the appellant.

[14] The police's representations do not explain why they withheld information on pages 1-2 as not responsive. Rather, the police submit that the I/CAD Event Details Report is responsive to the request.

[15] The appellant does not address the information withheld on pages 1 and 2 in his representations.

[16] I agree with the police's submission that the Report is responsive to the request. The Report "reasonably relates" to the request.¹

[17] As the police did not provide any explanation or basis for withholding the information on pages 1-2 as not responsive, and no basis for withholding the information is apparent from the record itself, I order the information withheld on pages 1-2 disclosed.

[18] I will now consider the remaining information the police withheld.

¹ Orders P-880 and PO-2661.

PERSONAL INFORMATION

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

[19] Under the *Act*, different exemptions may apply depending on whether a record at issue contains the personal information of the requester (the appellant in this appeal).²

[20] Section 2(1) defines "personal information" as recorded information about an identifiable individual. Section 2(1) contains a list of examples of personal information, but the examples are not exhaustive, so information not listed in section 2(1) may still be personal information.³

[21] Where records contain the appellant's own information, access to those records is considered under Part II of the *Act*, and the appellant has a right of access under that Part of the *Act* to entire records (or the withheld portions of records) that contain the appellant's own personal information, subject to applicable exemptions in the *Act*. Where the records contain personal information belonging only to individuals other than the appellant, access to the records is considered under Part I of the *Act* and the exemptions found at sections 6 to 15 may apply.⁴

[22] The correct approach is to review the entire record, not only the portions remaining at issue, to determine whether the record contains the requester's personal information.

[23] Therefore, in order to determine which sections of the *Act* may apply, it is necessary to determine whether each record contains "personal information," as defined in section 2(1) of the *Act*, and to whom it relates.

Representations

[24] The police submit that they created the records at issue after receiving 911 calls. They submit that the records contain personal information of several affected parties including names, addresses, dates of birth and personal opinions. They do not address whether the records contain personal information of the appellant.

[25] The appellant submits that the records at issue contain his personal information. He accepts that personal identifiers of others may exist in the withheld information.

² See Order M-352.

³ Order 11.

⁴ The "record-by-record" approach for dealing with requests for records of personal information is set out in Order M-352.

Analysis and findings

[26] I have reviewed the records within the scope of the appellant's request. The records contain personal information of the appellant and affected parties. The affected parties include a complainant, witnesses and others police spoke to about the two incidents the appellant's request relates to. The personal information includes addresses, dates of birth, names, phone numbers and other identifying information.

[27] The police have disclosed to the appellant the personal information in the records that is solely his, including his name, contact information and opinions about him, with one exception. The exception is an opinion about the appellant on the third-to-last line of page 5 of the records. This is solely the personal information of the appellant.

[28] The remaining information is the personal information of the affected parties, contained in records of the appellant's personal information.

[29] I will now consider whether the section 38(b) exemption applies to the information the police withheld.

C. Does the personal privacy exemption in section 38(b) apply to the information at issue?

[30] 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.

[31] Under section 38(b), where a record contains personal information of both the appellant 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 appellant. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the appellant.

[32] In contrast, under section 14(1), where a record contains personal information of another individual but *not* the requester, the institution is prohibited from disclosing that information unless one of the exceptions in sections 14(1)(a) to (e) applies, or unless disclosure would not be an unjustified invasion of personal privacy [section 14(1)(f)].

[33] Under Issue B, I found that the withheld portion on page 5 contains only the personal information of the appellant. While the police claim section 38(b) for withholding this information, this exemption cannot apply to a severance containing only the personal information of the appellant. As the police have claimed no other basis for withholding this information, I will order it disclosed to the appellant. I have highlighted the information in a copy of page 5 that accompanies the police's copy of

this order.

[34] On page 3 of the records, the police withheld the street number portion of an affected party's address, citing only section 14(1)(f) and 14(3)(b) (personal privacy). The withheld information appears in a General Occurrence Report that contains personal information of the appellant and other affected parties. As noted above, the correct approach is to review an entire record, not only the portions remaining at issue, to determine whether it contains the requester's personal information. Applying this approach, because the withheld information on page 3 is part of a record containing the appellant's personal information, section 38(b) is the appropriate personal privacy exemption. The police cannot withhold information in this record relying on section 14 alone.⁵

[35] I will now consider whether the section 38(b) exemption applies to the remaining information. Sections 14(1) to (4) provide guidance in determining whether the exemption applies.

Section 14(4)

[36] If any of paragraphs (a) to (c) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). The police submit that section 14(4) is not relevant to this appeal and the appellant does not address section 14(4). I am satisfied that section 14(4) does not arise in this appeal.

Section 14(1)

[37] If the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b).

[38] For section 14(1)(a) (consent) to apply, the consenting party must provide a written consent to the disclosure of his or her personal information in the context of an access request.⁶ The affected parties whose personal information appears in the records did not consent to disclosure of the withheld information that relates to them, so section 14(1)(a) does not apply.

[39] The police submit that none of the other disclosure criteria in sections 14(1)(b) to (e) apply and the appellant does not address them. From my review of the records,

⁵ I note that the police withheld the information on page 3 on the basis that disclosure would be an unreasonable invasion of an affected party's personal privacy (citing section 14(1)(f) and 14(3)(b)). It withheld the same information elsewhere in the responsive records citing section 38(b) in concert with section 14(1)(f) and 14(3)(b). A section 38(b) analysis considers the same section 14 factors the police cite in support of their decision to withhold the information on page 3.

⁶ See Order PO-1723.

section 14(1)(b) to (e) do not apply.

[40] I will therefore proceed to determine whether disclosing the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), after considering and weighing the factors and presumptions in sections 14(2) and (3), and balancing the interests of the parties.⁷

Section 14(3)(b): investigation into possible violation of law

[41] 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).

[42] The appellant does not address section 14(3). The police submit that the presumption listed at section 14(3)(b) applies, which states:

A 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;

[43] This presumption requires only that there be an investigation into a possible violation of law.⁸ Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) can still apply.

[44] The police submit that they were asked to attend both incidents because of a dispute. They say that for one of the incidents the appellant called because he feared being assaulted. The police submit that all of the records were compiled as part of an investigation into possible *Criminal Code* offences.

[45] From my review of the records, I am satisfied that they were compiled as part of police investigations. The police collected the information through contact with the appellant and other affected parties as part of investigating the appellant and an affected party's allegations, which raised the possibility of criminal activity. The police ultimately did not pursue any criminal charges, but this does not affect the application of section 14(3)(b). The records, being officers' notes and summary reports, were created because of the police's investigation. Therefore, I find the presumption at section 14(3)(b) applies to all of the records at issue.

⁷ Order MO-2954.

⁸ Orders P-242 and MO-2235.

Section 14(2) factors

[46] 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.⁹ 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).¹⁰

[47] The police cite section 14(2)(h) as a relevant factor. The appellant addresses this factor and several others, which I will consider after discussing section 14(2)(h).

Section 14(2)(h): confidentiality

[48] 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 was reasonable in the circumstances. Section 14(2)(h) therefore requires an objective assessment of the reasonableness of any confidentiality expectation.¹¹

[49] The appellant submits that section 14(2)(h) is not a relevant factor because he knows the identity of his neighbours.

[50] The police cite in support of section 14(2)(h) being a relevant factor my statement in Order MO-3418:¹²

I accept the police's submission that section 14(2)(h) is a factor that weighs in favour of withholding the information at issue in this appeal. Particularly in the context of a dispute between neighbouring landowners as is in issue here, I am satisfied that information provided to police by an individual is given with an expectation that the police will generally keep at least the source of the information in confidence. Here, where disclosing information would generally also disclose its source, it follows that the information supplied to police was supplied in confidence, even though there is no evidence that any explicit confidentiality assurance was provided by police.

[51] In Order MO-2830, Adjudicator Colin Bhattacharjee stated that whether an individual supplied his or her personal information to the police in confidence during an investigation is contingent on the particular facts, and such a determination must be

⁹ Order P-239.

¹⁰ Order P-99.

¹¹ Order PO-1670.

¹² At paragraph 33.

made on a case-by-case basis. This approach has been adopted in subsequent orders.¹³

[52] Having reviewed the records, I find that section 14(2)(h) applies to the majority of the withheld information. Much of the personal information of the affected parties was supplied to the police in confidence, particularly the information provided by affected parties who were spoken with by the police about the incidents. While the appellant might know the identity of his neighbours, he does not necessarily know the identity of all of the affected parties the police spoke to, and he certainly does not know everything the affected parties said to the police. I accept that section 14(2)(h) does not apply to the personal information of affected parties that was supplied to the police by the appellant himself.

[53] Accordingly, section 14(2)(h) is a factor that weighs in favour of withholding the information supplied by the affected parties at issue in this appeal. In the context, I am satisfied that the information provided to police by the affected parties was provided with an expectation that the police would keep the information confidential, even though there is no direct evidence that any explicit confidentiality assurance was provided by police.¹⁴

14(2)(a): public scrutiny

[54] This section contemplates disclosure in order to subject the activities of the government (as opposed to the views or actions of private individuals) to public scrutiny.¹⁵

[55] The appellant asserts this factor applies because it is desirable to ascertain how the police responded to his complaint.

[56] I find this factor does not apply because disclosing the personal information at issue will not subject the police's actions to public scrutiny.¹⁶ The police have disclosed officers' notebook entries and reports sufficient for the appellant to know how the police responded to his complaint. As the withheld information is predominantly about affected parties, disclosing it would do little to cast light on the actions of the police.

14(2)(b): public health and safety

[57] The appellant submits that disclosure may promote safety by permitting others to understand how the police responded to a safety issue.

[58] I find this submission tenuous and lacking in support. The appellant has not

¹³ See, for example, Order MO-3393.

¹⁴ My finding is consistent with the statements of Karakatsnis J. in *R. v Quesnelle*, 2014 SCC 46, [2014] 2 SCR 390 that there is generally a reasonable expectation of privacy in information provided to police.

¹⁵ Order P-1134.

¹⁶ Order M-84, Order P-347, Order 170.

established a link between disclosure of the information and the purpose of section 14(2)(b) to promote public health and safety.

14(2)(d): fair determination of rights

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
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 hearing¹⁷

[59] The appellant's brief submission on section 14(2)(d) does not address or establish any of these four elements for this factor to apply. I am satisfied that it is not a relevant factor.

14(2)(f): highly sensitive

[60] This is a factor that, if applicable, would weigh against disclosure of information. To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.¹⁸ The appellant submits this factor does not apply. The police do not raise it and there is no evidence that it is a relevant factor.

14(2)(g): inaccurate or unreliable

[61] The appellant raises section 14(2)(g) as a factor in favour of disclosure, suggesting that the information is likely to be reliable. However this factor is intended to weigh against disclosure where the information is unlikely to be accurate or reliable, leading to potential negative consequences for the individual the information is about. Section 14(2)(g) is not intended to assist a requester in arguing that information should be disclosed.¹⁹ I accept, however, that the accuracy of the information could be considered as an unlisted factor that weighs in favour of disclosure, if relevant in the

¹⁷ 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.).

¹⁸ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

¹⁹ Order PO-2271.

context. However, nothing suggests that the information at issue is more or less accurate than any other record of the type at issue. Accordingly I do not consider the accuracy or inaccuracy of the information at issue, including section 14(2)(g), is a factor to weigh in this appeal.

[62] I am satisfied that no other section 14(2) or unlisted factors arise from my review of the parties' representations and the records.

Does the "absurd result" principle apply?

[63] According to this principle, where the appellant originally supplied the information, or the appellant 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.²⁰

[64] The police do not address the absurd result principle, I assume because they believe they have disclosed all of the appellant's personal information to him.

[65] The appellant raises the absurd result principle indirectly. He submits that he already knows the addresses and physical features of those involved in the incidents, so that it cannot be an unjustified invasion of personal privacy to disclose this information to him.

[66] The absurd result principle has been applied in cases where the information is clearly within the requester's knowledge.²¹ I accept that the appellant knows some information withheld in the records, including some affected parties' addresses, because some of the affected parties live near the appellant. However, disclosing this information to the appellant would confirm the affected parties' identity to the appellant. In some cases this would identify the affected parties with statements that have been disclosed to the appellant with the identifying information of the affected party who made the statements withheld. In this context, it is not absurd to withhold the information the appellant knows in the records such as address information, because disclosing it would definitively identify affected parties and information about them.

Is disclosure an unjustified invasion of personal privacy?

[67] I have found above that the presumption at section 14(3)(b) applies, because the records were compiled as part of an investigation into a possible violation of law. In addition, some of the information withheld under section 38(b) was provided confidentially within the meaning of section 14(2)(h), a factor that also weighs against disclosure. The affected parties did not consent to disclosure of their personal

²⁰ Orders M-444 and MO-1323.

²¹ Orders MO-1196, PO-1679 and MO-1755.

information. It would not be an “absurd result” to withhold the information at issue. The factors in favour of disclosure do not outweigh the presumption and the factors against disclosure. Disclosing the information withheld under section 38(b) would therefore be an unjustified invasion of personal privacy. The information at issue is exempt from disclosure, subject to my finding regarding the police’s exercise of discretion.

D. Did the police exercise its discretion under section 38(b)? If so, should this office uphold the exercise of discretion?

[68] 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, I may determine whether the institution failed to do so.

[69] In addition, I 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; or it fails to take into account relevant considerations.

[70] In either case I may send the matter back to the institution for an exercise of discretion based on proper considerations.²² I may not substitute the institution’s exercise of discretion for my own.²³

[71] The appellant submits that the police’s submissions regarding its exercise of discretion contain “boilerplate” language that does not explain how it weighed the various factors sufficient to provide adequate reasons for its decisions.

[72] I accept the police’s representations do not refer to specific factors that informed their decision to withhold the information at issue. However, their earlier representations do discuss and apply the factors and presumptions they considered.

[73] More importantly, it is apparent from my review of the records that the police severed and disclosed information in the records to the appellant. The manner in which the police did so demonstrates that the police turned their mind to the factors relevant to the request under appeal before exercising their discretion.

[74] Accordingly, I am satisfied that the police properly exercised their discretion in withholding personal information from the appellant after considering relevant factors. I am satisfied that the police did not base their exercise of discretion on irrelevant factors. There is no evidence that the police acted in bad faith.

²² Order MO-1573.

²³ Section 43(2).

ORDER:

1. I order the police to disclose to the appellant by **May 28, 2018** but not before **May 23, 2018**:
 - a. The information on page 1 and 2 of the records it held as not responsive.
 - b. The highlighted information in the copy of page 5 of the records accompanying the police's copy of this order.
2. I otherwise uphold the police's decision to withhold the information at issue under section 38(b) of the *Act*.

Original Signed by: _____
Hamish Flanagan
Adjudicator

_____ April 20, 2018