Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3596

Appeal MA16-733

Toronto Police Services Board

April 25, 2018

Summary: The Toronto Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* for access to police records for a specific occurrence. The police denied access to the responsive police officers' notes in part, citing the discretionary personal privacy exemption in section 38(b). This order finds the information not exempt by reason of the absurd result principle under that exemption and the adjudicator orders disclosure of the information at issue.

This order also upholds the police's search for responsive records.

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(3)(b), 14(2)(d) and (h), and 17(1).

OVERVIEW:

[1] The Toronto Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for access to police reports, police officer's notes and witness statements for a specific occurrence.

[2] The police located the responsive records and issued a decision granting partial access to the memorandum book notes. The police claimed the application of the discretionary personal privacy exemption in section 38(b) of the *Act* in relation to these

records.

[3] The police advised that an occurrence report was not generated for this request. The police also noted that some information had been removed, as it was not responsive to the request.

[4] The requester, now the appellant, appealed that decision.

[5] During the mediation process, the police confirmed that no additional records exist, as there were no occurrence reports or separate witness statements created.

[6] The mediator contacted two affected persons mentioned in the officer notes and they did not consent to disclose their information.

[7] The appellant[1] advised that she wished to continue with the appeal. She contends that additional records ought to exist such as occurrence reports and witness statements.

[8] In addition, the appellant advised that she is not seeking access to the information in the records marked as non-responsive.

[9] Accordingly, the file was referred to the adjudication stage, where an adjudicator conducts an inquiry. I sought the representations of the police and the affected persons initially. The affected persons did not provide representations.

[10] The police provided representations, which I shared with the appellant. The appellant provided representations in response.

[11] In this order, I find that the information at issue is not exempt under section 38(b) by reason of the absurd result principle. I also find that the police's search for responsive records was reasonable and I uphold their search.

RECORDS:

[12] At issue is the responsive information severed from police officers' notebook entries.

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] The appellant communicated with this office through her representative.

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

C. Did the institution conduct a reasonable search for records?

DISCUSSION:

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

[13] 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;

[14] 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]

[15] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[3]

[16] 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]

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

[18] The police state that the records at issue were created in connection to a police response to a 911 call and that they contain the personal information of several identifiable individuals, including their name, telephone number and address.

[19] The appellant did not directly address this issue in her representations.

Analysis/Findings

[20] At issue is the information severed from police officers' notes. This information includes the names, address, telephone number and family status of the affected persons in their personal capacity in accordance with paragraphs (a), (d) and (h) of the definition of personal information in section 2(1).

[21] The records also contain the personal information of the appellant.

[22] Therefore, I will determine whether the exemption in section 38(b) applies to the information severed from the records.

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[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.).

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

[23] 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.

[24] 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. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.

[25] Sections 14(1) to (4) provide guidance in determining whether disclosure of the information would be an unjustified invasion of personal privacy.

[26] If the information fits within any of paragraphs (a) to (e) of section 14(1) or paragraphs (a) to (c) of section 14(4), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). The information does not fit within these paragraphs.

[27] 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 (3) and balance the interests of the parties.[6]

[28] 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).

[29] The police rely on the presumption in section 14(3)(b), which reads:

> 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.

[30] The police state that they were requested to attend a specific location, as a result of a medical call and that the records were compiled as part of an investigation into whether a violation of a *Criminal Code* offence had occurred.

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[6] Order MO-2954.

[31] The appellant did not provide representations on the presumptions in section 14(3).

[32] Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.[7] The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.[8]

[33] Based on my review of the records and the parties' representations, I agree that the records were compiled as part of a law enforcement investigation concerning an investigation into a possible violation of law.

[34] 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]

[35] 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]

[36] The police state that in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy, several factors in section 14(2) were considered. They state that the information supplied to police was supplied in confidence and there is a reasonable expectation by the individuals who supplied the information that their personal information would be treated with same manner it was supplied.

[37] The police appear to be relying on the factor favouring privacy protection in section 14(2)(h), which reads:

> 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,
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> > the personal information has been supplied by the individual to whom the information relates in confidence.

[38] This factor 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

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[7] Orders P-242 and MO-2235.
[8] Orders MO-2213, PO-1849 and PO-2608.
[9] Order P-239.
[10] Order P-99.

objective assessment of the reasonableness of any confidentiality expectation.[11]

[39] Based on my review of the information at issue in the records, much of which was either supplied by the appellant or would be in the appellant's knowledge, and in the absence of representations from the affected persons, I do not have sufficient evidence to determine that the factor in section 14(2)(h) applies.

[40] The appellant states that she is entitled to disclosure as the records contain factual information necessary for a fair determination of her rights.

[41] The appellant appears to be relying on the factor favouring disclosure in section 14(2)(d), which reads:

> 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,
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> > the personal information is relevant to a fair determination of rights affecting the person who made the request.

[42] 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 hearing[12]

[43] As the appellant has not provided me with any information as to what legal right she is asserting or whether there are any existing or contemplated litigation proceedings, therefore, I find that this factor does not apply.

[44] Based on my review of the records, I find that no factors in section 14(2) apply in this appeal.

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[11] Order PO-1670.
[12] 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.).

[45] As noted above, 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 (3) and balance the interests of the parties.[13]

[46] As the presumption in section 14(3)(b) applies and no factors in section 14(2) apply, and after considering the interest of the parties, I find that, subject to my review of the absurd result principle and the police's exercise of discretion,[14] the information at issue is exempt under section 38(b).

Absurd result

[47] Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may not be exempt under sections 14(1) or 38(b), because to withhold the information would be absurd and inconsistent with the purpose of the exemption.[15]

[48] The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement[16]
- the requester was present when the information was provided to the institution[17]
- the information is clearly within the requester's knowledge[18]

[49] 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.[19]

[50] The police did not provide representations on the absurd result principle.

[51] The appellant did provide representations on the absurd result principle. As well, she provided details about the incidents set out in the records.

[52] The records are police officers' notes about an incident in which the appellant was involved in. At issue is the responsive information severed from the records about the affected persons who did not provide representations in this appeal.

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[13] Order MO-2954.
[14] It is only necessary for me to consider the police's exercise of discretion in withholding the information at issue if I find that the absurd result principle does not apply to allow disclosure of the information at issue.
[15] Orders M-444 and MO-1323.
[16] Orders M-444 and M-451.
[17] Orders M-444 and P-1414.
[18] Orders MO-1196, PO-1679 and MO-1755.
[19] Orders M-757, MO-1323 and MO-1378.

[53] It is apparent to me from my review of the records and the parties' representations that the appellant is aware of the information in the records, as she was present and was involved in the incident at issue that took place at the affected persons' residence. As well, the appellant either provided the information at issue to the police or the information is clearly within her knowledge.

[54] Therefore, I find that the absurd result principle applies and the information at issue in the records is not exempt under section 38(b) and I will order it disclosed.

C. Did the institution conduct a reasonable search for records?

[55] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.[20] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[56] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[21] To be responsive, a record must be "reasonably related" to the request.[22]

[57] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[23]

[58] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[24]

[59] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[25]

[60] The institution was asked to provide a written summary of all steps taken in response to the request. In particular, it was asked:

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[20] Orders P-85, P-221 and PO-1954-I.
[21] Orders P-624 and PO-2559.
[22] Order PO-2554.
[23] Orders M-909, PO-2469 and PO-2592.
[24] Order MO-2185.
[25] Order MO-2246.

1. Did the institution contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.

2. If the institution did not contact the requester to clarify the request, did it:

    a. choose to respond literally to the request?

    b. choose to define the scope of the request unilaterally? If so, did the institution outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did the institution inform the requester of this decision? Did the institution explain to the requester why it was narrowing the scope of the request?

3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.

4. Is it possible that such records existed but no longer exist? If so, please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

5. Do responsive records exist which are not in the institution's possession? Did the institution search for those records? Please explain.

[61] The police state that they attended for a 'see ambulance' call and the responsive records included the memorandum notebook notes of the attending officers as an occurrence report was not generated for this event.

[62] The police state that its record management database allows for a search done by name, address or the incident number and that a search was done using each one of these variables and an occurrence report was not located.

[63] As well, the police state that a review of the memorandum notebook notes did not indicate an occurrence report was generated. They advise that the appellant stated to the attending officers that she did not want to provide a statement or lay charges, and therefore an occurrence report would not be necessary.

[64] The appellant states that she did not receive all of the information about the incident set out in the records, including the complete police officers' notes and the witness statements of other individuals.

Analysis/Findings

[65] Based on my review of the records in this appeal and the parties' representations, I find that the police conducted a reasonable search for responsive records.

[66] I find that the appellant has not provided a reasonable basis for me to conclude that additional records, including the records she cites in her representations, exist.

[67] Therefore, I am upholding the police's search for responsive records as reasonable.

ORDER:

1. I order the police to disclose the responsive information remaining at issue in the records to the appellant by **May 30, 2018** but not before **May 25, 2018**.

2. I uphold the police's search for responsive records.

Original Signed by: April 25, 2018
Diane Smith
Adjudicator