

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3631

Appeal MA16-678

Toronto Police Services Board

June 29, 2018

Summary: The appellant filed a request with the police for records relating to a particular police report related to a specified incident. The police granted partial access to the responsive records citing the discretionary personal privacy exemption at section 38(b) to withhold the remainder of the records. In this order, the adjudicator upholds the police's decision 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") 38(b), 14(3)(b), 14(2)(d) and (h).

Orders Considered: Order MO-2442.

BACKGROUND:

[1] A request was made to the Toronto Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a particular police report related to specific incident involving the requester.

[2] The police granted partial access to the responsive records denying access to portions of the records pursuant to the discretionary personal privacy exemption at section 38(b) of the *Act*. In addition, the police indicated that some information was removed from the records as it was not responsive to the request.

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

[4] During mediation, the appellant confirmed that the only information he is seeking from the records at issue is the first and last name of an affected party involved in the incident, found on pages 4 and 7 of the police notes. Accordingly, these portions of the records are all that remain at issue.

[5] As mediation did not resolve the dispute, this appeal was transferred to the adjudication stage, where an adjudicator conducts a written inquiry under the *Act*. As the adjudicator, I invited the parties to make representations in this appeal. Representations were received and shared in accordance with section 7 of the IPC's *Code of Procedure* and Practice Direction 7.

[6] In this order, I uphold the decision of the police and dismiss the appeal.

RECORDS:

[7] The record remaining at issue consists of pages 4 and 7 of the police notebook entries. The only information at issue is the first and last name of an affected party involved in the incident.

ISSUES:

- A. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the discretionary personal privacy exemption at section 38(b) apply to the information at issue?
- C. Did the institution exercise its discretion under section 38(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

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

[8] 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), which states, 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,
- (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,
- (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;

[9] 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

[10] 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 However, 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

[11] In its representations, the police submit that the record contains personal information as defined in paragraphs (a), (b) and (c) of the definition of that term in section 2(1). The police submit that the record contains the personal information of the appellant and another party, the suspect.

[12] The appellant does not dispute that the record contains personal information.

[13] After reviewing the record, it is clear that it contains the personal information of the appellant and an affected party, including the affected party's name, date of birth, address and phone number along with other personal information relating to the

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.

affected party. The information remaining at issue is the affected party's name, which is the affected party's personal information pursuant to subsection (h) of the definition, since disclosure of his name would reveal that he was involved in the incident.

[14] As I have found that the record contains the personal information of the appellant, along with another identifiable individual, I will go on to consider whether disclosure of this information at issue would constitute an unjustified invasion of personal privacy under section 38(b). The only personal information that the appellant is seeking is the first and last name of the affected party.

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

[15] Since I found that the record contains the personal information of the appellant, section 36(1) applies to this appeal. Section 36(1) of the *Act* give 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.

[16] 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.⁴

[17] Sections 14(1) to (4) provide guidance in determining whether disclosure of the information would be an unjustified invasion of personal privacy under section 38(b).

[18] In making this determination, this office will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.⁵ 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).

[19] 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.⁶ 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

⁴ See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 38(b).

⁵ Order MO-2954.

⁶ Order P-239.

that are relevant, even if they are not listed under section 14(2).⁷

Representations

[20] The police submit that none of the exceptions in section 14(1)(a) to (e) applies to the release of the personal information. They note that the mediator attempted to contact the affected party but was unsuccessful in obtaining his consent to the release of his personal information.

[21] The police submit that the presumption in section 14(3)(b) (investigation into a possible violation of law) applies in this instance. They submit that the police attended and conducted an investigation involving the appellant and during that investigation they obtained personal information about the person of interest as part of an investigation into a possible violation of law.

[22] The police also refer to the section 14(2) factors that support non-disclosure of the personal information of an affected party. They submit that section 14(2)(h) (information supplied in confidence) is a factor that is applicable in this appeal as the name of the affected party was supplied in confidence to the police. They submit that the nature of law enforcement institutions, in a great part, is to record information relating to unlawful activities, crime prevention activities or activities involving members of the public who require assistance and intervention by the police. They emphasize that an important principle in the *Act* is that personal information held by an institution should be protected from unauthorized disclosure.

[23] The appellant also provided representations in this appeal. He states that he is concerned for his safety as the affected party, whom he does not know, attacked him in the same building elevator on two occasions. The appellant noted that he contacted the police after the first incident, but the officers who attended did not charge the individual. The appellant refers to another incident, which also occurred on the elevator, where he states that he made a quick exit before the elevator door closed in order to avoid another attack. He contacted the police and one officer attended but no action was taken.

[24] The appellant requests that if the police cannot give him the first and last name of the attacker, that they give the name to the Ontario Court of Justice and he would not ask the court his name. He asks for an order to this effect so that he will be able to pursue a case against this individual in the court process.

[25] The appellant states that he attempted to take the affected party to court but this did not work because he did not have the attacker's first and last name.

⁷ Order P-99.

Analysis and finding

[26] The affected party's name appears in the handwritten police notes. It is evident from reviewing the notes, that the police attended in order to conduct an investigation and during that investigation they obtained personal information about the affected party as part of their investigation into a possible violation of law. Accordingly, the presumption at section 14(3)(b) applies to this personal information and weighs in favour of non-disclosure of the withheld portions of the records.

[27] The parties' representations raise the possible application of paragraphs 14(2)(d) and (h). The factor at section 14(2)(d), if it applies, would weigh in favour of disclosure, while the factor at section 14(2)(h) would weigh in favour of non-disclosure. These sections state:

(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;

Section 14(2)(d); fair determination of rights

[28] In determining whether disclosure of personal information constitutes an unjustified invasion of personal privacy, section 14(2)(d) requires the police to consider whether the personal information is relevant to a fair determination of rights affected the person who made the request.

[29] Previous orders of this office have found that, for the factor at 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 opposes to a non-legal right based solely on moral or ethical grounds;
2. The right is related to a proceeding which is either existing or contemplated, not one which has already been completed;
3. The personal information to which the appellant is seeking access has some bearing on or is significant to the determination of the right in question;

4. The personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.⁸

[30] The appellant refers to the factor at section 14(2)(d) as relevant in this appeal. He indicates a desire to start a civil action and suggests that he is unable to because he does not have the affected party's first and last name. Therefore, I find that he has satisfied the first two requirements. In addition, the personal information that he is seeking has some bearing on his right to sue because he needs to identify the defendant to the action. Therefore, I find that all of the requirements have been met.

[31] In prior orders, this office has found that the existence of disclosure processes available to parties under the *Rules of Civil Procedure*, or rules of a Tribunal, for that matter, reduces the weight that should be given to the section 14(2)(d) factor. In Order MO-2442, Adjudicator Cropley found that the decision of the police to refuse access to personal information of an affected party in a police report was not an improper exercise of discretion despite the appellant's stated purpose for requesting the information was to commence private prosecution. The adjudicator referred to Order MO-1436 where Adjudicator Maruno discussed the issue of alternate method of access in both civil and criminal proceedings, in that order Adjudicator Maruno stated:

Previous orders of this office have discussed alternative methods of obtaining access to personal information of an unidentified individual for the purpose of commencing or maintaining a civil action against the individual (Orders M-1146, PO-1728, P-689, and P-447). Adjudicator Laurel Cropley in Order M-1146 explained how a plaintiff can commence a civil action against an individual where the plaintiff does not know the defendant's address. She states:

... the registrar will issue a statement of claim without a defendant's address or with an "address unknown" notation

Once the claim is issued, the appellant, as plaintiff, could bring a motion under rule [30.10 of the Rules of Civil Procedure] for the production of the record in question from the Health Unit, in order to obtain the address.

In Order PO-1728, Senior Adjudicator David Goodis, agreed that "these principles could apply where the name as well as the address of the potential defendant is unknown, by use of a pseudonym such as 'John Doe' [see *Randeno v. Standevan* (1987), 61 O.R. (2d) 726 (H.C.), and

⁸ 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.).

Hogan v. Great Central Publishing Ltd. (1994), 16 O.R. (3d) 808 (Gen. Div.)”.

Based on the above, I am satisfied that the appellant would be able to commence his proposed civil action against the affected person as an unnamed defendant, by use of a pseudonym, and then use the civil court process to obtain the affected person’s name and address from the Police...

[32] In her order, Adjudicator Cropley was unconvinced that the appellant would not be able to avail herself of an alternate method of obtaining the information at issue and upheld the police’s decision not to disclose the affected party’s personal information.

[33] Similarly, in this appeal, I give this factor little weight since the appellant could get the information he seeks through the court process itself, if he wishes to pursue such a court process.

Section 14(2)(h): information supplied in confidence

[34] In determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, section 14(2)(h) requires the police to consider whether the personal information was supplied in confidence.

[35] The police point to the factor at section 14(2)(h) (supplied in confidence) as relevant in this appeal and note that the affected party did not consent to release his personal information in the record.

[36] In the circumstances of this appeal, I find that it is reasonable to conclude that the affected party expected some level of confidentiality regarding, at least, the use of his own personal information when giving his information to the police. Therefore, I find that section 14(2)(h) factor applies to the personal information of the affected party that appears in the record and I give this factor significant weight.

[37] I have found that the presumption in section 14(3)(b) and the factor in 14(2)(h) weigh in favour of a finding that disclosure of the information at issue would be an unjustified invasion of the affected party’s personal privacy. I have found that the factor at section 14(2)(d) weighs against such a finding, but I give that factor little weight. Weighing the factors and presumption, and balancing the interests of the parties, I find that disclosure of the information at issue would be an unjustified invasion of personal privacy, and section 38(b) applies.

[38] Subject to my review of the police’s exercise of discretion, I find that the discretionary exemption in section 38(b) applies to exempt the affected party’s personal information.

[39] Finally, in his representations, the appellant suggests that the police be required

to give the name of the affected party to the Ontario Court of Justice and he would not ask the court his name. This remedy is not within my jurisdiction. Moreover, in my discussion above, I have alluded to other ways in which the appellant may commence his action against the individual whose identity he seeks.

C: Did the institution exercise its discretion under section 38(b)? If so, should this office uphold the exercise of discretion?

[40] 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, the Commissioner may determine whether the institution failed to do so.

[41] In addition, the Commissioner 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
- it fails to take into account relevant considerations

[42] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.⁹ This office may not, however, substitute its own discretion for that of the institution.¹⁰

[43] The police contend that in exercising their discretion, they took into account all relevant and irrelevant considerations and that it did not exercise their discretion in bad faith or for an improper purpose. They note that section 38(b) permits an institution to refuse to disclose the personal information of an individual other than the requester if disclosure would represent an unjustified invasion of the privacy of the individual. The police submit that in exercising their discretion, they considered section 28 of the *Act* which introduces safeguards to the collection of personal information. The police note that in this case, the balance between right of access and the protection of privacy must be given in favour of protecting the privacy of the other involved party.

[44] The appellant did not speak to the police's exercise of discretion in his representations.

Finding

[45] In this appeal, I am satisfied that the police properly exercised their discretion in choosing to withhold part of the record that contained the affected party's personal

⁹ Order MO-1573.

¹⁰ Section 43(2).

information under section 38(b). The police's representations demonstrate that they took relevant factors into account when exercising their discretion and did not consider irrelevant factors. The police indicate that in making their decision on access, they took into account the appellant's right of access to his own information, that the information was collected in the course of an investigation into a possible law enforcement matter, and the belief that the affected party gave their personal information with an expectation of confidentiality.

[46] I uphold the police's claim of section 38(b) in this appeal and I also uphold their exercise of discretion.

ORDER:

The appeal is dismissed.

Original Signed by: _____
Alec Fadel
Adjudicator

_____ June 29, 2018