

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3653

Appeal MA17-501

Halton Regional Police Services Board

August 23, 2018

Summary: The appellant made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Halton Regional Police Services Board (the police) for records relating to an alleged theft of her dog. The police found responsive records and granted partial access to them, withholding some information on the basis of the personal privacy (sections 38(b) and 14) exemptions in the *Act*. The appellant appealed the police's decision to withhold the names of the individuals with whom they communicated during the course of their investigation, as well as the contents of those communications. In this order, the adjudicator finds that the withheld information is personal information and that disclosure would constitute an unjustified invasion of personal privacy under section 38(b). The police's exercise of discretion to withhold the information is upheld.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1), 14(1), 14(2), 14(3)(b) and 38(b).

Orders Considered: Order M-1146, MO-2321, MO-2235, MO-2980 and PO-2285.

OVERVIEW:

[1] This appeal arises from an investigation into an alleged theft of a rescued dog. The appellant provided a dog in her care to a prospective adopter. When that adopter could not care for the dog, the adopter surrendered the dog to another rescue, from where the dog was eventually successfully adopted. When the appellant learned of the dog's surrender and subsequent adoption, she contacted the Halton Regional Police Service, reported the dog stolen, and provided the name and address of the original

adopter. The police conducted an investigation.

[2] When the investigation was complete, the appellant submitted a request to the Halton Regional Police Services Board (the "police") under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for:

All details pertaining to the incident report [specified number] including OPP statements, regarding my dog [specified name] that was wrongfully dropped off at an unregistered pet sanctuary at [specified address and name] and sold twice. My request includes contact information for the people that have [named dog] so I can proceed against them in small claims court. [Named dog] is microchipped to me as the owner."

[3] The police issued a decision granting the appellant partial access to a police occurrence report, a general record and supplementary occurrence report.¹ In their decision, the police advised the appellant that:

"...we have processed a copy of the police occurrence report with only your personal information; therefore some information has been removed, as disclosure would constitute an unjustified invasion of another individual's personal privacy..."

[4] The police denied access to parts of the responsive records, claiming application of the exemption in section 38(a), read with sections 8(1)(e) and (l) (law enforcement), as well as the exemption in section 38(b) (personal privacy).

[5] The appellant appealed the police's decision. At mediation, the appellant narrowed her appeal to disclosure of the following:

- i. the name and address of the individual who currently has possession of the dog; and,
- ii. the contents of a witness statement provided by an individual to the police that was severed from the records disclosed by the police to the appellant.

[6] As a result, the application of the law enforcement exemption in section 38(a), read with sections 8(1)(e) and (l), was and is no longer an issue in this appeal.

[7] However, the police advised during mediation that they were relying on section 38(b) to withhold those portions of the records that made up the narrowed request.

[8] Mediation did not resolve the outstanding issues and the appellant asked for this appeal to move to the adjudication stage, where an inquiry is conducted.

¹ With respect to the request for OPP records, the police advised the requester that those were outside their jurisdiction and must be obtained directly from the OPP. Only the records of the Halton Regional Police Services Board are the subject of this order.

[9] As part of the inquiry, I invited and received representations from the police and the affected parties. The affected parties did not consent to the sharing of their representations or to the disclosure of their information. I shared the non-confidential representations of the police with the appellant when inviting her representations.

[10] Despite requests for her representations and an extension of time, the appellant did not submit any representations.

[11] Having reviewed the representations of the police and the affected parties, I find that the withheld portions of the records contain the affected parties' personal information and that to release the personal information of those individuals without their consent would be an unjustified invasion of their personal privacy under section 38(b) of the *Act*. I uphold the police's decision to withhold the personal information of the affected parties and find that the police properly exercised their discretion in doing so.

RECORDS:

[12] The records in dispute consist of the withheld portions of a police occurrence report containing the name and address of an individual who is currently in possession of the dog, as well as the name and statement of another individual contained in a supplementary occurrence report.

ISSUES:

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

DISCUSSION:

Issue A: Does the record 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, whose. The police submit that the exemption at section 38(b), which provides that they may withhold an individual's personal information if disclosure would constitute an unjustified invasion of another individual's personal privacy, applies to the information they withheld.

[14] The section 38(b) exemption can only apply to information of other individuals that is their "personal information". For that reason, and because section 38(b) is an exemption from a requester's general right to his or her own personal information, I must decide whether the record contains the personal information of the requester, and whether it also contains the personal information of other individuals.

[15] Section 2(1) defines that term 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.

[16] The list of examples of personal information under section 2(1) is not exhaustive. Information that does not fall within paragraphs (a) to (h) may still qualify as personal information.²

[17] To qualify as personal information, this information must be about the individual

² Order 11.

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 However, even if information relates to an individual in a professional or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.⁴

[18] The police submit that, notwithstanding that the withheld information appears in a record that also contains the appellant's personal information and that was created as a result of an investigation commenced following a complaint by the appellant, the withheld information is personal information of the affected individuals because it contains information relating to their name, age, sex, address, telephone number, and medical information.

[19] The police also submit that, in the case of the witness statement, the record contains the views or opinions of the affected individuals about the events under investigation.

[20] On review of the records and the withheld information that falls within the scope of the appellant's request for names of affected parties and their discussions with the police, I am satisfied that it is information that meets the definition of "personal information" in paragraphs (a), (b), (d), (e), (g) and (h) in section 2(1). The withheld information refers to the name, age, sex, address, telephone number, as well as medical information of individuals other than the appellant. The withheld information of affected individuals' discussions with the police also contains their statements and views regarding the events at issue in the investigation.

[21] I therefore find that the records in issue contain the personal information of the appellant, and that the withheld portions of the records also contain the personal information of affected individuals.

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

[22] Section 36(1) gives individuals a general right of access to their own personal information held by an institution. Section 38, however, provides a number of exemptions from this right.

[23] 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.

[24] If the information falls within the scope of section 38(b), the institution may still exercise its discretion to disclose the information to the appellant. This involves a

³ Orders P-257, P-427, P-1412, R-980015, MO-1550-F and PO-2225.

⁴ Orders P-1409, R-980015, PO-2225 and MO-2344.

weighing of the appellant's right of access to her own personal information against the right of other individuals to the protection of their privacy. I discuss the police's exercise of discretion further below, under Issue C.

[25] Sections 14(1) to (4) give guidance in determining whether disclosure of the information would be an unjustified invasion of personal privacy under section 38(b). None of the circumstances listed in sections 14(1) or (4) is present here.

[26] In this case, the factors and presumptions at sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 38(b). 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.⁵

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

[27] 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).

[28] The police rely on the presumption at section 14(3)(b). Section 14(3)(b) states that:

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;

[29] This presumption requires only that there be an investigation into a possible violation of law.⁶

[30] I find that the information was compiled and is identifiable as part of an investigation into a possible violation of law. The police were investigating the appellant's allegations of an alleged criminal offence – a theft – under the *Criminal Code of Canada*. The information compiled included the personal information of an individual whom the appellant identified to the police as a suspect as well as individuals who had past and present possession of the dog.

[31] In Order MO-2235, Adjudicator Stephanie Haly wrote:

⁵ Order MO-29544.

⁶ Orders P-242 and MO-2235.

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 [Order P-242]. Thus, even though no charges were laid by the police in this case, the information in the record falls within the section 14(3)(b) presumption and its disclosure is presumed to be an unjustified invasion of privacy.

[32] Adopting the reasoning of Adjudicator Haly, I find the result of the investigation, namely that no charges were laid, not to be determinative. Therefore, I find that section 14(3)(b) applies to the records.

Section 14(2) factors

[33] Section 14(2) also sets out various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy under section 38(b).⁷

[34] 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 is not exhaustive and the institution must also consider any circumstances that are relevant, even if they are not listed in section 14(2).⁸

[35] In her appeal, the appellant indicated that she needs the records in order to pursue civil action. Section 14(2)(d) requires an institution, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, to consider whether the personal information is relevant to a fair determination of rights of the person who made the request.

[36] Previous orders of this office have found that in order for the factor at section 14(2)(d) to apply, the appellant must establish that:

- (1) the right in question is a legal drawn from the concepts of common law or statute law, as opposed 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; and

⁷ Order P-239.

⁸ Order P-99.

(4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.⁹

[37] I find that section 14(2)(d) may apply to the records but have given it little weight. The appellant has adduced no evidence that would establish that her desire for the information would override the need to protect the personal privacy of the affected individuals, beyond making a reference in her appeal to a desire to bring a small claims court action. I further find that the police's withholding of the affected individuals' personal information does not impede the appellant's remedies that might be available within the civil litigation process.

[38] The police do submit, however, that the requested personal information is highly sensitive so that section 14(2)(f) applies since the information was collected by the police as part of an investigation. Section 14(2)(f) states that an institution, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider whether the personal information is highly sensitive.

[39] In Order MO-2980, Adjudicator Colin Bhattacharjee wrote that "the names and addresses of individuals have greater sensitivity when this information is collected by the state or agencies of the state such as the police."

[40] In Order M-1146, Adjudicator Laurel Cropley considered the rationale for protecting an individual's address. She wrote:

One of the fundamental purposes of the Act is to protect the privacy of individuals with respect to personal information about themselves held by institutions (section 1(b)).

In my view, there are significant privacy concerns which result from disclosure of an individual's name and address. Together, they provide sufficient information to enable a requester to identify and locate the individual, whether that person wants to be located or not. This, in turn, may have serious consequences for an individual's control of his or her own life, as well as his or her personal safety. This potential result of disclosure, in my view, weighs heavily in favour of privacy protection under the Act.

This is not to say that this kind of information should never be disclosed under the Act. However, before a decision is made to disclose an individual's name and address together to a requester, there must, in my view, exist cogent factors or circumstances to shift the balance in favour of disclosure.

⁹ 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 Do. 839329 (Ont. Div. Ct.).

[41] I agree with Adjudicator Cropley's reasoning and find that there are no compelling factors before me to shift the balance in favour of disclosure, and especially given that the appellant herself has made no representations.

[42] I have found above that the presumption at section 14(3)(b) applies, and that the factor at section 14(2)(f) also applies. These both weigh in favour of non-disclosure. On the other hand, I have also found that the factor at section 14(2)(d), which weighs in favour of disclosure applies, but I give that factor little weight. Weighing the factors and presumptions in section 14(2) and (3) and balancing the interests of the parties, I find that disclosure of the information would be an unjustified invasion of personal privacy under section 38(b).

Does the "absurd result" principle apply?

[43] According to this principle, where the requester originally supplied the information, or is otherwise aware of it, the information may not be exempt under section 38(b), because to withhold it would be absurd and inconsistent with the purpose of the exemption.¹⁰

[44] The police submit that, although the appellant provided information such as the name, address and phone number of an affected individual, these details still remain the personal information of affected individuals and that further disclosure would inevitably result in an unjustified invasion of their personal privacy.

[45] I agree that it was the appellant that provided to the police the name and contact information of the original adopter. Her request, however, is for the contents of an individual's witness statement to the police collected during the police's investigation into her allegations that that individual stole the dog.

[46] I find that witness statements were collected by the police as part of their investigation into a possible violation of law, and that, by disclosing the name of the witness attached to a particular statement simply because the appellant provided the name and contact information of a witness to the police would be inconsistent with the purpose of the exemption.

[47] As noted above, the witness statement contains the witness' personal information. In addition to a name, age, sex, address and telephone number, and opinions and views, the withheld information includes medical information.

[48] In Order MO-2321, Adjudicator Daphne Loukidelis referenced former Senior Adjudicator David Goodis' Order PO-2285 and his review of the issue of disclosure and consistency with the purpose of the section 14(3)(b) exemption. He wrote that:

Although the appellant may well be aware of much, if not all, of the information at issue, this is a case where disclosure is not consistent with

¹⁰ Orders M-444 and MO-1323

the purpose of the exemption, which is to protect the privacy of individuals other than the requester.

[49] It would therefore not be an “absurd result” to withhold the information at issue. I find that to disclose the information would be an unjustified invasion of the personal privacy of the affected individuals and that the information is exempt from disclosure under section 38(b), subject to my finding regarding the police’s exercise of discretion, below.

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

[50] 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.

[51] 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; or it fails to take into account relevant considerations.

[52] While this office may send the matter back to the institution for an exercise of discretion based on proper considerations,¹¹ it may not, however, substitute its own discretion for that of the institution.¹²

Relevant considerations

[53] Relevant considerations may include, but are not limited to, those listed below:¹³

- the purposes of the *Act*, including that information should be available to the public
- exemptions from the right of access should be limited and specific
- the wording of the exemption and the interests it seeks to protect
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- whether disclosure will increase public confidence in the operation of the institution

¹¹ Order MO-1573.

¹² Section 43(2).

¹³ Orders P-244 and MO-1573.

- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person.

[54] In withholding information from the record, I find that the police properly exercised their discretion pursuant to section 38(b).

[55] In their representations, the police referred to several factors that informed their decision to withhold the affected individuals' personal information. In the case of medical information, the police considered that it was highly sensitive. In the case of the name and address of the people in possession of the dog, the police considered the possible consequences of disclosure of that information where, as in this case, the appellant made allegations that the police determined to be unfounded. The police also considered that the appellant has alternate means to obtain the information required for a civil action within the civil litigation process itself. Finally, the police considered that, in the circumstances of this complaint, the affected parties had a reasonable expectation of personal distress if their information were disclosed.¹⁴

[56] Accordingly, I am satisfied that the police properly exercised their discretion in withholding personal information of affected parties from the appellant after weighing relevant factors. I am satisfied that the police did not take into account irrelevant factors in exercising their discretion and there is no evidence before me that the police acted in bad faith.

ORDER:

I uphold the police's decision and dismiss this appeal.

Original Signed by: _____

Jessica Kowalski
Adjudicator

August 23, 2018

¹⁴ Orders PO-2518, PO-2617, MO-2262 and MO-2344.