

Information and Privacy Commissioner,  
Ontario, Canada



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

---

## ORDER MO-3675

Appeal MA17-583

The Greater/Grand Sudbury Police Services Board

October 17, 2018

**Summary:** The appellant made a request to the Greater/Grand Sudbury Police Services Board (the police) for a copy of an identified report relating to himself, under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The police located the report and withheld portions of it on the basis of section 38(a) (discretion to refuse requester's own personal information) in conjunction with section 8 (law enforcement), as well as the personal privacy exemptions at sections 14(1) and 38(b) of the *Act*. Subsequently, the police located additional responsive records and issued a supplemental decision, withholding portions of a record on a similar basis as their original access decision. The appellant appealed both decisions. This order upholds the access decisions of the police.

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

**Orders Considered:** Order P-1618.

### OVERVIEW:

[1] The Greater/Grand Sudbury Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a specified incident report.

[2] In response to the request, the police located the specified occurrence report.

[3] The police then issued an access decision to the appellant, granting him partial access to the record, withholding some of the information on the basis of various law

enforcement exemptions [in conjunction with section 38(a)] and the personal privacy exemption at section 38(b) of the *Act*.

[4] The requester, now the appellant, appealed the police's decision to this office.

[5] After the Notice of Mediation was issued, the police issued a supplementary access decision to the appellant, granting him full access to his own witness statement and partial access to a victim report dated after the Notice of Mediation was issued. Information in the victim report was withheld on the basis of the law enforcement exemption at section 8(1)(l) (facilitate commission of an unlawful act) and the personal privacy exemptions at sections 14(1) and 38(b). The appellant advised the mediator that he was appealing that supplementary decision as well, and the case moved to the adjudication stage.

[6] At adjudication, I sought written representations from the police, two affected parties, and the appellant. Only the police provided written representations in response. I shared the non-confidential portions of the police's representations with the appellant, in accordance with *Practice Direction 7* of this office's *Code of Procedure*.

[7] Because the police representations indicated that the police were no longer relying on the law enforcement exemption at section 8(1)(l) or the exemption at section 38(a), read in conjunction with another law enforcement exemption, these exemptions are no longer at issue in this appeal and will not be discussed in this order.

[8] For the reasons that follow, this order upholds the access decisions of the police.

## **RECORDS:**

[9] The information at issue is found in a four-page occurrence report and on a one-page victim 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 personal privacy exemption at section 38(b) apply to the information at issue?
- C. Did the police exercise their discretion under section 38(b)? 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?**

[10] 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.

[11] The records contain the personal information of the appellant and other identifiable individuals who are affected parties, as explained below.

[12] The term “personal information” 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,

...

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except if they relate to another individual,

...

(g) the views or opinions of another individual about the individual, and

(h) the individual’s name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[13] To qualify as personal information, the information must be about the individual in a personal capacity and it must be reasonable to expect that an individual may be identified if the information is disclosed.<sup>1</sup>

[14] Having reviewed the records, I find that they contain the personal information of

---

<sup>1</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

the appellant and one or more identifiable individuals. The personal information at issue in this record includes information that falls within paragraphs (a), (c), (d), (e), and/or (g) of the definition of "personal information" above appearing with names (paragraph h), and the introductory wording of the definition of "personal information" at section 2(1) of the *Act*.

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

[15] As explained below, I find that the police have met their burden, as the party resisting disclosure, to show that the information withheld is exempt from disclosure under the personal privacy exemption at section 38(b).

[16] 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.

[17] Under section 38(b), if 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.<sup>2</sup>

[18] 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.<sup>3</sup> Section 14(4) lists situations that would not be an unjustified invasion of personal privacy, but, as the police submit, it does not apply in this case.

***Section 14(3)***

[19] Although it appears that the police take the position that the presumption at section 14(3)(b) applies to all the information at issue, as I will explain below, I find that this presumption only applies to the occurrence report, and not the victim report.

[20] Section 14(3)(b) says:

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

---

<sup>2</sup> See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 38(b).

<sup>3</sup> Order MO-2954.

necessary to prosecute the violation or to continue the investigation;

[21] Unless disclosure of the information at issue is necessary to prosecute a violation of law or continue an investigation, disclosure will be presumed to be an unjustified invasion of personal privacy if these requirements are met:

- the personal information at issue was compiled as part of an investigation into a possible violation of law; and
- that information is identifiable as part of an investigation into a possible violation of law.

[22] I find that these requirements are met in relation to the occurrence report to bring it within the scope of the of the presumption at section 14(3)(b):

- the personal information of the affected parties was compiled as part of an OPP law enforcement investigation into a complaint against the appellant regarding a possible violation of the *Criminal Code of Canada*;<sup>4</sup> and
- the information is identifiable as part of an investigation into a possible violation of law because it appears in an occurrence report that the OPP investigating officer created for the purpose of the investigation into that possible violation of the *Criminal Code of Canada*.

[23] Even if no criminal proceedings were commenced against any individuals (as it was the case here), section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.<sup>5</sup>

[24] The fact that section 14(3)(b) applies to the information withheld in the occurrence report is a factor that weighs in favour of a finding that disclosure of the withheld personal information within it would be an unjustified invasion of personal privacy.

[25] However, I find that the presumption at section 14(3)(b) does not apply to the victim report. Section 14(3)(b) does not apply if a record was created after the completion of an investigation into a possible violation of law.<sup>6</sup> Based on my review of the occurrence report and the victim report, I find that the victim report was created after the completion of the investigation into a possible violation of law.

### ***Section 14(2)***

[26] On the basis of the following, I find that the factors weighing against disclosure at sections 14(2)(f) and 14(2)(h) apply to both the occurrence report and the victim

---

<sup>4</sup> R.S.C., 1985, c. C-46.

<sup>5</sup> Orders P-242 and MO-2235.

<sup>6</sup> Orders M-734, M-841, M-1086, PO-1819 and PO-2019.

report.

[27] Section 14(2) lists factors that may be relevant in determining whether disclosure would be an unjustified invasion of personal privacy under section 38(b).<sup>7</sup> Any circumstances that are relevant, even if they are not listed under section 14(2), must be considered.<sup>8</sup>

[28] As mentioned, the appellant chose not to provide written representations to address factors that would favour disclosure. Upon my own review of the records and consideration of the circumstances in this case, no factors favouring disclosure were evident to me.

*Factors weighing against disclosure*

[29] The police submitted that they considered a number of section 14(2) factors, and in particular, the factor listed at section 14(2)(h).

[30] Based on my review of the records, I find that section 14(2)(f) is also relevant.

[31] Sections 14(2)(f) and (h) state that:

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,

(f) the personal information is highly sensitive;

...

(h) the personal information has been supplied by the individual to whom the information relates in confidence;

[32] For the following reasons, I find that the factors listed at sections 14(2)(f) and 14(2)(h) weigh against disclosure.

Section 14(2)(f) – highly sensitive

[33] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed,<sup>9</sup> and I find that here there is.

[34] In this case, the context of the creation of the records is a key consideration. This office has found that the personal information of individuals who are “complainants, witnesses or suspects” as part of their contact with the OPP is “highly sensitive” for the purpose of section 14(2)(f).<sup>10</sup> Applying this principle, I find that both

---

<sup>7</sup> Order P-239.

<sup>8</sup> Order P-99.

<sup>9</sup> Orders PO-2518, PO-2617, MO-2262 and MO-2344.

<sup>10</sup> Order P-1618.

the occurrence and victim reports contain the personal information of one or more affected parties as complainants, witnesses, or individuals otherwise in contact with the OPP, which is highly sensitive for the purpose of section 14(2)(f).

Section 14(2)(h) – supplied in confidence

[35] In their representations, the police specifically relied upon the factor at section 14(2)(h), which is a factor weighing against disclosure if the personal information was supplied to an institution in confidence.

[36] 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 objective assessment of the reasonableness of any confidentiality expectation.<sup>11</sup> In the circumstances before me, and based on my review of the records at issue, I find that the statements of the affected parties who interacted with the police about the alleged violation(s) of law constitute personal information provided to the police in confidence.

*Weighing the factors for and against disclosure*

[37] In determining whether disclosure of the affected parties' personal information would constitute an unjustified invasion of personal privacy, I have considered the factors and presumptions at sections 14(2) and (3) of the *Act* in the circumstances of this case. I have found that there are no factors favouring disclosure of the information withheld in either of the responsive records. On the other hand, three factors weigh against disclosure of the occurrence report: the presumption at section 14(3)(b) and the factors at sections 14(2)(f) and 14(2)(h). The latter two factors also weigh against the disclosure of the victim report. Weighing the factors and presumptions, I find that disclosure of the records at issue would be an unjustified invasion of personal privacy. Therefore, I find that the responsive records are exempt from disclosure under the personal privacy exemption at section 38(b), subject to my review of the exercise of the discretion of the police.

*Absurd result principle*

[38] I also find that the absurd result principle does not apply to the personal information of the affected party that has a particular relationship with the appellant. Where a requester is aware of the personal information at issue, 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.<sup>12</sup> The absurd result principle has been applied where, for example, the information is clearly within the requester's knowledge.<sup>13</sup>

[39] Here, the police submit, and I find, that although the appellant may have some

---

<sup>11</sup> Order PO-1670.

<sup>12</sup> Orders M-444 and MO-1323.

<sup>13</sup> Orders MO-1196, PO-1679 and MO-1755.

knowledge of the personal information withheld about one of several affected parties because of that affected party's relationship to the appellant, the absurd result principle does not apply to that affected party's personal information. It is not clear that the information at issue is clearly within the appellant's knowledge. I also accept that the appellant was not present when this information was collected by the police. Therefore, it would not be absurd to withhold this affected party's personal information in the circumstances.

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

[40] On the basis of the following, I find that the police properly exercised their discretion in deciding to withhold information under section 38(b).

[41] 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.

[42] 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.

[43] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>14</sup> This office may not, however, substitute its own discretion for that of the institution.<sup>15</sup>

[44] Here, the police considered and balanced the right of an individual to have access to his own personal information with the need to protect the privacy and personal information of affected parties. The police submit, and I accept, that they disclosed as much information to the appellant as possible, withholding only information to the extent that it was required to protect the privacy and personal information of affected parties. These were proper and relevant considerations, and I am satisfied that they were made in good faith and not in bad faith. There is no evidence before me that the police took into consideration any irrelevant factors. Therefore, I uphold the exercise of discretion by the police.

---

<sup>14</sup> Order MO-1573.

<sup>15</sup> Section 43(2).



**ORDER:**

I uphold the access decisions of the police and dismiss this appeal.

Original Signed by: \_\_\_\_\_

Marian Sami

October 17, 2018 \_\_\_\_\_