

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3696

Appeal MA18-167

Peterborough Police Services Board

November 28, 2018

Summary: The Peterborough Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all communications involving the appellant and two named individuals, as well as all records involving the appellant. The police issued an access decision indicating that all responsive records had already been provided to the appellant in response to a previous request, and that there had been no new incidents on file since that time. The decision letter also reiterated the basis of the police's decision in response to the previous request to grant only partial access to the requester: the personal privacy exemption at section 38(b) of the *Act*. The requester appealed the police's decision. At mediation, the parties disputed access to records which, according to the police, had not previously been sought: a video witness statement and an occurrence report that includes a summary of the video statement. This order upholds the decision of the police to withhold the video statement and withheld portions of the occurrence report.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 14(2)(a), 14(2)(d), 14(2)(f), 14(3)(b), and 38(b), and 51.

Orders Considered: Orders PO-1014, P-1618, PO-1663, and PO-2461.

OVERVIEW:

[1] The Peterborough 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 all communications involving the requester and two named individuals, as well as all records involving the requester.

[2] In response to this request, the police issued an access decision advising the requester that all responsive records had been provided to him under a previous specified request, and that there were no new incidents on file since that time. The decision letter also reiterated that the police had granted only partial access to the information requested because the personal privacy exemption at section 38 (b) of the *Act* applied to some information, and some information had been identified as not responsive to the request.

[3] The requester, now the appellant, appealed the police's decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC, or this office).

[4] At mediation, the parties disputed access to two additional records: a video statement and an occurrence report that included a written summary of the video statement. According to the police, the appellant had not previously sought access to those records in his previous access request. The police disclosed portions of the occurrence report to the appellant but withheld the video statement in its entirety.

[5] The matter could not be further resolved through mediation, so the appeal was moved to the adjudication stage.

[6] I conducted my inquiry under the *Act* by sending a Notice of Inquiry, setting out the facts and issues on appeal, initially to the police and an affected party (who had not previously been notified), and then to the appellant. I shared only the non-confidential portions of the police representations, in accordance with the IPC's *Practice Direction Number 7* regarding the sharing of representations, with the appellant. The affected party did not consent to the disclosure of their personal information or their representations. After receiving the written representations of the appellant in response to the police's representations, I decided that I did not need to seek further representations from the other parties.

[7] For the reasons that follow, I find that section 38(b) applies to the records at issue and I uphold the decision of the police to withhold them on that basis.

RECORDS:

[8] There are two records remaining at issue consisting of:

- a CD with a video statement of a named individual, and
- the first page of a supplementary occurrence report (identified as Document #26), which summarizes the video statement.

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)? 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?

[9] Having reviewed both records at issue, I find that they contain the personal information of the appellant and other identifiable individuals, as defined by section 2(1) of the *Act*.

[10] The relevant portions of the definition of "personal information" in section 2(1) are:

"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,

...

(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;

[11] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.¹

[12] Having reviewed the records, I find that the information at issue consists of the personal information of the appellant and other identifiable individuals, as defined by the portions of the section 2(1) definition of personal information listed above, and the introductory language of the definition. I note that the police disclosed some of the appellant's personal information to him in the occurrence report. While much of the withheld personal information in the report and the video is the appellant's, it is highly intermingled with the personal information of others. The witness statement is itself the personal information of the affected party providing it, under paragraph (h), above, and the introductory wording of the definition of personal information. I find that there is such a high degree of intermingling in the information at issue that the appellant's personal information cannot reasonably be severed from that of other parties in the records at issue.

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

[13] 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.

[14] 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.²

[15] If the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not prohibited and the information is not exempt under section 38(b). Nor would disclosure be an unjustified invasion of personal privacy if any of paragraphs (a) to (c) of section 14(4) apply. It is not disputed that all of these paragraphs are irrelevant to the circumstances of this appeal.

[16] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), sections 14(2) and (3) also provide guidance. This office will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties to determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy.³ Any unlisted factors that may also be

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

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

³ Order MO-2954.

relevant must be considered, too.

Section 14(3)

[17] The police submit, and I find, that the presumption at section 14(3)(b) applies to both records, as explained below.

[18] 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 necessary to prosecute the violation or to continue the investigation;

[19] The police submit, and I find, that the records at issue were compiled and are identifiable as part of the police's investigation into a possible violation of the *Criminal Code of Canada* and this brings them within the scope of the presumption at section 14(3)(b). The presumption applies even though no criminal proceedings were commenced against any individuals. The presumption only requires that there be an investigation into a possible violation of law.⁴

[20] When records contain both the personal information of the appellant and other identifiable individuals, the fact the presumption at section 14(3)(b) applies is a factor weighing toward finding that disclosure of the withheld personal information would be an unjustified invasion of personal privacy. I find that to be the case here.

[21] I find that no other presumption at section 14(3) applies, and the parties have not claimed otherwise.

Section 14(2)

[22] On the basis of the following, I find that several section 14(2) factors are relevant in this appeal.

[23] 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.⁵ This section is a non-exhaustive list of factors that may be relevant in determining whether disclosure would be an unjustified invasion of personal privacy under section 38(b).⁶ Any circumstances that are relevant, even if they are not listed

⁴ Orders P-242 and MO-2235.

⁵ Order P-239.

⁶ Order P-239.

under section 14(2), must be considered.⁷

Factors favouring disclosure

[24] Generally, the factors at sections 14(2)(a), (b), (c), and (d) favour disclosure. These sections say:

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,

- (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;
- (b) access to the personal information may promote public health and safety;
- (c) access to the personal information will promote informed choice in the purchase of goods and services;
- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

[25] The appellant's representations do not specifically cite any of the listed factors that would favour disclosure.

[26] However, they do make reference to scrutiny of police activity and the possibility of suing various parties, including the affected parties in this case. As these concerns might fall within the factors at sections 14(2)(a) and 14(2)(d), respectively, listed above, I have examined them.

Section 14(2)(a) – public scrutiny

[27] The appellant argues that the actions of the police should be subject to scrutiny, but he has not established that disclosure of the information at issue in this case is a matter for public scrutiny.

[28] This office has long held that the objective of 14(2)(a) is "to ensure appropriate degree of scrutiny by the public" [emphasis in original].⁸ Section 14(2)(a) does not apply when an appellant only seeks to have access to the records himself and is not arguing that the public should be able to scrutinize records at issue.⁹ I find that despite the appellant's references to scrutiny of police activity in his representations, he seeks disclosure of the records for himself, not the public. From my independent review of the records, there is no public scrutiny interest in disclosure of the information at issue.

⁷ Order P-99.

⁸ Order P-1014.

⁹ Ibid.

Therefore, the factor at section 14(2)(a) does not apply.

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

[29] It is clear from the appellant's representations that he is concerned about the chance to pursue litigation against several parties, including the affected parties in this case. In my view, that concern, by itself, does not mean that the factor at section 14(2)(d) applies, or has much weight if it does.

[30] For section 14(2)(d) to apply, the appellant must have established each of the following points:

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;
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 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.¹⁰

[31] The appellant submits that he cannot sue the affected parties for defamation without disclosure of the information at issue, but he did not provide evidence for that assertion. The same can be said about the appellant's ability to pursue litigation against the police.

[32] The fact that the police have withheld the personal information at issue under *MFIPPA* does not prevent the appellant from pursuing litigation. *MFIPPA* does not replace any other legal avenue the appellant may have to obtaining the same information under the *Rules of Civil Procedure* that govern a lawsuit over which a court would preside. This is clear from the wording of the *Act* at section 51:

- (1) This Act does not impose any limitation on the information otherwise available by law to a party to litigation.
- (2) This Act does not affect the power of a court or a tribunal to compel a witness to testify or compel the production of a document.

[33] Since there is no evidence that the appellant cannot pursue litigation without the personal information in the records, I find that disclosure of that personal information is

¹⁰ 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.).

not “required” to prepare for the lawsuit or to “ensure” an impartial hearing, so Part 4 of the section 14(2)(d) test is not met. Since all four parts must be met for the factor at section 14(2)(d) to apply, I find that this factor does not apply.

[34] However, even if section 14(2)(d) does apply, the weight I would place on it is diminished because the *Act* does not limit other legal avenues to obtain the information.

Factors weighing against disclosure

[35] The police submit that the factors weighing in favour of non-disclosure at sections 14(2)(e), (f), (h), and (i) apply to the records. For the reasons that follow, I find the factor at section 14(2)(f) to be most relevant in this case, and it is not necessary for me to determine if the other factors apply.

[36] Section 14(2)(f) says:

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,

the personal information is highly sensitive;

Section 14(2)(f) – highly sensitive

[37] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.¹¹ I find that that is the case here with respect to all the individuals whose personal information is in the records.

[38] The context of the creation of the records is a key consideration when assessing the factor at section 14(2)(f). This office has found that the personal information of individuals who are “complainants, witnesses or suspects” as part of their contact with the police is “highly sensitive” for the purpose of section 14(2)(f).¹² Applying this principle, I find that the personal information of the complainant who provided the witness statement is highly sensitive because it exists in records as part of that individual’s contact with the police as a complainant.

[39] On my review of the video statement, I also find that the disclosure of the personal information of several other identifiable individuals in this record would also reasonably be expected to lead to significant personal distress of those individuals.

[40] For these reasons, I find that section 14(2)(f) is a factor that is relevant and weighs significantly against disclosure.

¹¹ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

¹² Order P-1618.

Balancing the factors for and against disclosure

[41] 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 appeal.

[42] Even if I were to find that the factor at section 14(2)(d) applies in favour of disclosure, it would be outweighed by the application of the presumption at section 14(3)(b) and the factor at section 14(2)(f).

[43] Weighing the factors and presumptions, and taking into account the interests of the parties, I find that disclosure of the records at issue would be an unjustified invasion of personal privacy of the identifiable individuals whose personal information is contained in the records. 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.

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

[44] 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.

[45] 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.

[46] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹³ This office may not, however, substitute its own discretion for that of the institution.¹⁴

[47] I withheld some of the police's representations about the exercise of discretion, in accordance with *Practice Direction 7* of the IPC's *Code of Procedure*.

[48] The portion of the police's representations that I shared with the appellant indicates that the police considered the wording of the exemption and the interests it seeks to protect, the fact that the appellant was seeking his own personal information,

¹³ Order MO-1573.

¹⁴ Section 43(2).

and the principles that the appellant should have a right of access to his own personal information and that the privacy of individuals should be protected. These are relevant and proper considerations.

[49] Based on my review of both the shared and confidential representations about the exercise of discretion, I also find that there is no evidence that the police exercised their discretion in bad faith or for an improper purpose, or that they took into consideration any irrelevant factors.

[50] Therefore, I find that the police exercised their discretion properly under section 38(b) of the *Act*.

ORDER:

I uphold the decision of the police to withhold the records at issue, and dismiss this appeal.

Original Signed by: _____
Marian Sami
Adjudicator

November 28, 2018