

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3699

Appeal MA17-275

York Regional Police Services Board

November 29, 2018

Summary: The York Regional Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records pertaining to a police check about the appellant's welfare. The records arose from an interaction involving the appellant at his workplace, which resulted in a representative from his employer's labour relations department placing a 911 call to the police regarding his welfare. The police relied on section 38(b) of the *Act* (personal privacy) to deny access to the 911 call recording. The appellant's employer argued that the 911 call recording was excluded from the *Act* by operation of the labour relations exclusion at section 52(3) of the *Act*. In this order, the adjudicator finds that section 52(3) does not apply and that only the personal cellphone number of the caller qualifies for exemption under section 38(b) of the *Act*. The adjudicator orders the police to disclose a severed version of the 911 call recording.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) ("personal information" definition), 14(2)(d), 14(2)(f), 38(b), 52(3)1 and 52(3)3.

Orders Considered: Orders M-927, MO-2556 and PO-2225.

BACKGROUND:

[1] The York Regional Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) for access to records pertaining to a police check about the requester's welfare. The

records arose from an interaction involving the requester at his workplace, which resulted in a representative from his employer's labour relations department (the caller) placing a 911 call to the police regarding his welfare. As a result of the call, the police attended at the requester's home.

[2] The police identified responsive records, which included a 911 call recording, and issued initial and supplementary access decisions. The police granted partial access to the responsive records except for the 911 call recording, access to which was denied in full. The police relied on section 38(b) (personal privacy) of the *Act* to deny access to the information they withheld. Amongst the information provided to the appellant was a summary of the 911 call to the police contained in a document entitled "Call Hardcopy".

[3] The requester (now the appellant) appealed the police's access decision to deny access to the 911 call recording.

[4] At mediation, the mediator contacted an individual whose interests may be affected by disclosure of the 911 call recording for their position on disclosure. This individual did not consent to the disclosure of any of their information. However, a number of other issues were resolved at mediation and at the close of mediation, only the request for access to the 911 call recording remained at issue in the appeal.

[5] As mediation did not resolve the appeal, it was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*.

[6] I commenced my inquiry by sending a Notice of Inquiry to the police and the person who was notified at mediation on the facts and issues set out in a Notice of Inquiry. The police provided responding representations. Although not invited to do so, Toronto Hydro Electric System Limited (hydro), an institution under the *Act* and the appellant's employer, provided representations in the appeal which raised the possible application of the exclusion at section 52(3) (employment or labour relations) of the *Act*. The person who was notified at mediation did not file their own representations, but relied on hydro's representations. Accordingly, I added the possible application of section 52(3) as an issue in the appeal and hydro as an affected party.

[7] I then sent a Notice of Inquiry to the appellant along with a copy of the representations of the police and hydro. The appellant provided responding representations. The appellant's representations deal with a severance to the 911 Call Hardcopy that was withheld from him, but this specific severance is not within the scope of the appeal which addresses the 911 call recording only and I will address it no further in this order. The appellant's representations were shared with the police and hydro for a reply. Only the police provided reply representations. The appellant was provided with a copy of the police's representations for sur-reply, but did not provide any sur-reply representations.

[8] In this order, I find that the section 52(3) exclusion does not apply and that only

the personal cellphone number of the caller qualifies for exemption under section 38(b) of the *Act*. I order that a severed version of the 911 call recording be disclosed to the appellant.

RECORD:

[9] Remaining at issue in this appeal is a 911 call recording.

ISSUES:

- A. Do sections 52(3)1 and 52(3)3 exclude the record from the *Act*?
- B. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- C. Does the discretionary exemption at section 38(b) apply to the information remaining at issue?
- D. Did the institution exercise its discretion under section 38(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A: Do sections 52(3)1 and 52(3)3 exclude the record from the *Act*?

[10] Hydro appears to claim that the record is excluded from the *Act* pursuant to sections 52(3)1 and 52(3)3. Those sections state:

Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[11] If section 52(3) applies to the record, and none of the exceptions found in section 52(4) apply, the record is excluded from the scope of the *Act*.

[12] For the collection, preparation, maintenance or use of a record to be "in relation

to” the subjects mentioned in paragraph 1, 2 or 3 of this section, it must be reasonable to conclude that there is “some connection” between them.¹

[13] The term “labour relations” refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of “labour relations” is not restricted to employer-employee relationships.²

[14] The term “employment of a person” refers to the relationship between an employer and an employee. The term “employment-related matters” refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.³

[15] If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date.⁴

[16] Section 52(3) may apply where the institution that received the request is not the same institution that originally “collected, prepared, maintained or used” the records, even where the original institution is an institution under the *Freedom of Information and Protection of Privacy Act*.⁵

[17] The exclusion in section 52(3) does not exclude all records concerning the actions or inactions of an employee simply because this conduct may give rise to a civil action in which the Crown may be held vicariously liable for torts caused by its employees.⁶

[18] The type of records excluded from the *Act* by section 52(3) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees’ actions.⁷

Section 52(3)1: court or tribunal proceedings

[19] For section 52(3)1 to apply, the institution must establish that:

¹ Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

² *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.); see also Order PO-2157.

³ Order PO-2157.

⁴ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507.

⁵ Orders P-1560 and PO-2106.

⁶ *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).

⁷ *Ministry of Correctional Services*, cited above.

1. the record was collected, prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or usage was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; and
3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the institution.

[20] The word "proceedings" means a dispute or complaint resolution process conducted by a court, tribunal or other entity which has the power, by law, binding agreement or mutual consent, to decide the matters at issue.⁸

[21] For proceedings to be "anticipated", they must be more than a vague or theoretical possibility. There must be a reasonable prospect of such proceedings at the time the record was collected, prepared, maintained or used.⁹

[22] The word "court" means a judicial body presided over by a judge.¹⁰

[23] A "tribunal" is a body that has a statutory mandate to adjudicate and resolve conflicts between parties and render a decision that affects the parties' legal rights or obligations.¹¹

[24] "Other entity" means a body or person that presides over proceedings distinct from, but in the same class as, those before a court or tribunal. To qualify as an "other entity", the body or person must have the authority to conduct proceedings and the power, by law, binding agreement or mutual consent, to decide the matters at issue.¹²

[25] The proceedings to which the paragraph appears to refer are proceedings related to employment or labour relations per se - that is, to litigation relating to terms and conditions of employment, such as disciplinary action against an employee or grievance proceedings. In other words, it excludes records relating to matters in which the institution has an interest as an employer. It does not exclude records where the institution is sued by a third party in relation to actions taken by government employees.¹³

Section 52(3)3: matters in which the institution has an interest

[26] For section 52(3)3 to apply, the institution must establish that:

⁸ Orders P-1223 and PO-2105-F.

⁹ Orders P-1223 and PO-2105-F.

¹⁰ Order M-815.

¹¹ Order M-815.

¹² Order M-815.

¹³ *Ministry of Correctional Services*, cited above.

1. the records were collected, prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and
3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

[27] The phrase "labour relations or employment-related matters" has been found to apply in the context of:

- a job competition¹⁴
- an employee's dismissal¹⁵
- a grievance under a collective agreement¹⁶
- a "voluntary exit program"¹⁷
- a review of "workload and working relationships"¹⁸

[28] The phrase "labour relations or employment-related matters" has been found *not* to apply in the context of:

- an organizational or operational review¹⁹
- litigation in which the institution may be found vicariously liable for the actions of its employee.²⁰

[29] The phrase "in which the institution has an interest" means more than a "mere curiosity or concern", and refers to matters involving the institution's own workforce.²¹

[30] The records collected, prepared maintained or used by the institution are excluded only if [the] meetings, consultations, discussions or communications are about labour relations or "employment-related" matters in which the institution has an interest. Employment-related matters are separate and distinct from matters related to

¹⁴ Orders M-830 and PO-2123.

¹⁵ Order MO-1654-I.

¹⁶ Orders M-832 and PO-1769.

¹⁷ Order M-1074.

¹⁸ Order PO-2057.

¹⁹ Orders M-941 and P-1369.

²⁰ Orders PO-1722, PO-1905 and *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

²¹ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

employees' actions.²²

Hydro's representations

[31] Hydro submits that "the [appellant's] interest in the requested 911 call record amounts to a request for labour relations, not an MFIPPA disclosure".²³ Hydro submits:

The question for the adjudicator is whether the 911 call relates, or has a connection to the [appellant's] employment at [hydro], or the conduct of labour relations at [hydro] and whether [hydro] has an interest in the content of the call.

The 911 call was made on the premises of [hydro] and is at the centre of a grievance being pursued by the [appellant's] union on his behalf. In fact, the issue of a [hydro] employee making a 911 call has been referred to arbitration. The 911 call falls squarely within section 52(3) as a matter related to employment or labour relations. The very purpose of section 52(3) of the *Act* is to ensure that information used in employment and labour tribunal proceedings is excluded from the application of the *Act*.

The appellant's representations

[32] The appellant submits that the 911 call has nothing to do with the appellant's employment or labour relations, nor does hydro have any interest in the matter. The appellant also takes issue with hydro's description and characterization of the call. The appellant further submits that "[a]lthough [the appellant] had previously filed a grievance through his union, that grievance was withdrawn by the union. The 911 call was not 'at the centre' of this grievance, nor is there any further grievance being pursued".

[33] The appellant further submits that the mere fact of placing the call from hydro's premises does not transform it into an employment or labour relations matter nor does it give rise to any interest on the part of hydro:

... it is the content of the telephone call, not the location at which it was placed, that is to be the determinative factor. If the content of the record is employment-related, the record is excluded from the *Act*; if it merely pertains to an employees' action by contrast, it is not. The location at which the call was placed is completely irrelevant.

²² *Ministry of Correctional Services*, cited above.

²³ In support of this submission Hydro refers to Order PO-2157 and *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.).

Moreover, it is clear from those records which have been disclosed that the telephone call had nothing to do with the [appellant's] employment, or indeed with [hydro].

...

These allegations [about the appellant] (although unfounded) all pertained to actions of [the appellant]. The actions alleged were not taken in the course of the [appellant's] work duties. They were not during work hours. Indeed, they were not even on a [hydro] property – [the appellant] was at his personal residence at the time.

As the *Ministry of Correctional Services*²⁴ decision makes clear, records pertaining to an employee's actions are not excluded from the *Act*. In our submission, this is particularly the case where the actions alleged were at the employee's personal residence, during off-hours, and where the allegations were unfounded.

In our respectful submission, the 911 call has nothing to do with either labour relations or other employment-related matters, nor does [hydro] have any interest in the call, and as such it is not excluded from the *Act* by section 52(3)3.

Analysis and finding

[34] In my view, neither of sections 52(3)1 and 52(3)3 apply in the circumstances of this appeal.

[35] Orders of this office have drawn a distinction between records that are created for an employment-related purpose and those that are created for another purpose but may later be used for an employment-related purpose. For example, in Order MO-2556, Senior Adjudicator Frank DeVries had to determine whether a police incident sheet and a general occurrence report were excluded under section 52(3) of the *Act*. The police claimed that the section 52(3) exclusion applied because a complaint was made by the appellant in that appeal against a police officer, and that the records at issue were collected, prepared, maintained and used in relation to proceedings arising from the complaint.

[36] In finding that section 52(3) did not apply to the records, Senior Adjudicator DeVries relied on the analysis contained in an earlier Order, Order M-927, and stated:

... As the records at issue in this appeal relate to the initial, day-to-day police investigation into circumstances involving the appellant, which

²⁴ Cited above.

occurred within the jurisdiction of the Police, they do not fall within the exclusionary provision in section 52(3). Although it may well be that subsequent complaints about the actions of the investigating officer resulted in further investigations and/or the creation of additional files (of which I have very little evidence), the original records that relate to the original investigations into the appellant's actions are not removed from the scope of the *Act* simply because they were reviewed or considered as part of a review of the officer's conduct under other legislation. Any such review does not alter the character of the original records, which were prepared for the purposes of the investigations conducted by the officer... Accordingly, I find that the original incident sheet and general occurrence report that form the records at issue in this appeal are not excluded from the operation of the *Act* simply because of their possible inclusion or review in subsequent complaint investigations and/or other proceedings.

[37] As noted by Senior Adjudicator John Higgins in Order M-927:

[It] would be a manifestly absurd result, and one not intended by the Legislature, if the records at issue were removed from the scope of the *Act* because they happen to have been reviewed in connection with an investigation of an employee's conduct.²⁵

[38] In my view, although the context is different, this rationale is equally applicable to the case before me. The request at issue was not for access to an employee's file or for the file prepared by hydro to address any grievance, but for access to the recording of the 911 call in the custody and control of the police. The record is a record in connection with day-to-day police investigations of incidents occurring within the force's jurisdictional boundaries. Whether the record did or did not subsequently become part of a Hydro labour relations matter, it was initially prepared for a police matter for police purposes.

[39] Because the request is to the police for a copy of a record that originally served to document the events as they transpired, I find that it is not excluded from the scope of the *Act* under sections 52(3)1 or 52(3)3. As a result, I conclude that the exclusionary provision does not apply to the 911 call recording and I find that the 911 call recording falls within the scope of the *Act*.

[40] I will now consider whether the 911 call recording qualifies for exemption under the *Act*, specifically, under the personal privacy exemption at section 38(b) claimed by the police.

²⁵ See also Orders MO-2131, MO-2504, MO-3238 and PO-2095.

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

[41] 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;

[42] 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.²⁶ To qualify as personal information, it must be reasonable to

²⁶ Order 11.

expect that an individual may be identified if the information is disclosed.²⁷

[43] Sections 2(2.1) and (2.2) also relate to the definition of personal information. These sections state:

(2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[44] 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.²⁸ 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.²⁹ Order PO-2225 sets out the two-part test used by this office to assist in determining whether information is about an individual acting in a business capacity as opposed to a personal capacity:

... the first question to ask in a case such as this is: *"in what context do the names of the individuals appear?"* Is it a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere?

The analysis does not end here. I must go on to ask: *"is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual?"* Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature?³⁰

Hydro's representations

[45] Hydro submits that the 911 call recording contains the personal information of the hydro employee that made the 911 call. Hydro submits:

²⁷ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

²⁸ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

²⁹ Orders P-1409, R-980015, PO-2225 and MO-2344.

³⁰ See also: Orders MO-2342 and PO-2934.

Given that a [hydro] employee made the 911 call to the [police], it is reasonable to assume that the 911 call would provide information relating to the aforementioned employee.

Though the record in question may not reveal "something of a personal nature" about the [hydro] employee, it is also reasonable to expect that the individual may be identified if the information is disclosed.

The police's representations

[46] The police submit that although the individual made the call regarding the appellant while in their business capacity, the 911 call is the personal information of the caller. They submit:

... [it] is reasonable that the individual would be identified if the information is disclosed as the record is the voice recording of the affected party's 911 call to police in which the individual provides their name, personal cell-phone number, name of employer, job title and position, information about the appellant provided by third parties to the affected party and personal opinions of the affected party regarding the appellant or his actions.

The appellant's representations

[47] The appellant submits that the police already released the name of the caller when they disclosed the 911 Call Hardcopy to him. The appellant submits that since the call was placed from hydro premises the hydro telephone numbers are not "personal information", but rather public knowledge. The appellant submits:

... Even if not every telephone number is released to the public, the telephone numbers are circulated internally to all employees, including [the appellant]. Moreover, as the above decisions establish, business information about the complainant is not "about" her within the meaning of section 2(1).

The police's reply submissions

[48] In reply, the police reiterate that the 911 call recording contained the personal cellphone number of the caller, not her business number.

Analysis and findings

[49] I have considered the representations of the parties and listened to the 911 call recording.

[50] The call was made by the caller in their business capacity and relates to the

appellant and his actions. That said, I am satisfied that it contains information, including the caller's personal cellphone number and the caller's voice, tone and inflection, that, had the call not been made in their business capacity, may arguably all have qualified as the caller's personal information, thereby falling within the scope of the definition of personal information. In light of the nature and content of the call, which relates to the appellant and his actions, the 911 call recording also contains the personal information of the appellant. As set out below, since section 38(b) can only apply to the personal information of an individual other than the appellant, it is arguable that none of the caller's information, except for her personal cellphone number could qualify for exemption under section 38(b) of the *Act*. However, for the sake of completeness, I have decided to consider whether any of the information at issue qualifies for exemption under section 38(b) of the *Act*.

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

[51] 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.

[52] 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.

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

[54] 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). Sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Also, section 14(4) lists situations that would not be an unjustified invasion of personal privacy.

[55] 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.³¹

[56] 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

³¹ Order MO-2954.

38(b).

[57] 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.³² Some of the listed factors, if present, weigh in favour of disclosure, while others, if present, weigh in favour of non-disclosure. 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).³³

[58] Hydro and the notified individual provided no representations on the potential application of section 38(b), the factors at section 14(2) or the presumptions at section 14(3). However, because of the nature of the call and that it is to the 911 call service, I will consider whether the factor favouring non-disclosure at section 14(2)(f) might apply.

[59] Referring to the factor at section 14(2)(d), the appellant submits that the information sought is relevant to a fair determination of rights affecting the appellant.³⁴ In that regard, he refers to a specific complaint he brought³⁵ in which he alleges, among other things, that during the 911 call, the caller disclosed his personal medical information to the police. He submits:

... The question of precisely what information pertaining to [the appellant] was disclosed to the police during the telephone call is central to a fair determination of this aspect of [the appellant's complaint].

[60] The appellant also submits that in any event it would be absurd to withhold the information, "because information which is relevant to the fair determination of the [appellant's complaint] would be withheld in order to protect information that is already known to the appellant".

[61] The police state that none of the factors or presumptions in sections 14(2) or 14(3) apply, but the caller did not consent to the release of her personal information and as a result, disclosing the caller's personal information to the appellant would be an unjustified invasion of her personal privacy. With respect to the appellant's absurd result argument, the police submit in reply:

It would not be absurd to withhold the information in the circumstances. It is clear within the records that the personal information of the [caller] was obtained by police directly from the affected party and not supplied

³² Order P-239.

³³ Order P-99.

³⁴ In support of this submission, the appellant refers to *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).

³⁵ A copy of the initiating document accompanied the appellant's representations.

by the appellant. The personal information of the [caller] was very specific and it is unlikely that the appellant would know the name, personal cell-phone number, job position and opinions of the [caller].

.... The appellant has other avenues to pursue in order to obtain the information for his [complaint]. The appellant or his representative may serve [the police] with a motion for production of third party records in relation to his [complaint].

Analysis and finding

[62] Sections 14(2)(d) and 14(2)(f) read:

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;
- (f) the personal information is highly sensitive.

Section 14(2)(d)

[63] 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 hearing³⁶

[64] I am satisfied that the factor at section 14(2)(d) applies. The appellant has established that there is an existing proceeding and provides sufficient argument to establish that the information, other than the caller's personal cellphone number, has

³⁶ 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.).

some bearing on the right in questions and is required for the hearing. That said, the 911 Call Hardcopy and police officer's notes have already been disclosed and as the police point out, the appellant has another avenue to obtain the 911 call recording, if necessary. Accordingly, while I am satisfied that the factor at section 14(2)(d) applies, I would give it moderate weight.

Section 14(2)(f)

[65] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.³⁷ I am satisfied that there is only a reasonable expectation of significant personal distress if the caller's personal cellphone number is disclosed. In my view, there is no reasonable expectation of significant personal distress if the remainder of the call is disclosed. I make this finding having heard the caller's tone and inflection during the call and the content of the call, and, taking into account that the appellant is already in possession of the 911 Call Hardcopy which summarized the call and disclosed the identity of the caller.

[66] Having determined that section 14(2)(d) favours disclosure of the 911 call recording (with the exception of the caller's personal cellphone number) and that 14(2)(f) applies to the caller's personal cellphone number and balancing the interests, I find that in the circumstances, the disclosure of the caller's personal cellphone number would be an unjustified invasion of personal privacy under section 38(b) of the *Act*. Accordingly, I find that only the caller's personal cellphone number qualifies for exemption under section 38(b).

Absurd result

[67] Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may not be exempt under section 38(b), because to withhold the information would be absurd and inconsistent with the purpose of the exemption.³⁸ I am not satisfied that the appellant is aware of the caller's personal cellphone number and I find that the absurd result principle does not apply to it.

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

[68] 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.

[69] In addition, the Commissioner may find that the institution erred in exercising its

³⁷ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

³⁸ Orders M-444 and MO-1323.

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.

[70] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.³⁹ This office may not, however, substitute its own discretion for that of the institution.⁴⁰

Relevant considerations

[71] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:⁴¹

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution

³⁹ Order MO-1573.

⁴⁰ Section 43(2).

⁴¹ Orders P-344 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
- the age of the information
- the historic practice of the institution with respect to similar information.

The police's representations

[72] The police submit that in exercising their discretion they looked to the purpose of the *Act*, which states that individuals should have a right of access to their own personal information and that the privacy of individuals should be protected. They submit that:

... The appellant was provided with a hard copy of the call history which identified the reason for the call made to police. The appellant was also provided with copies of the attending officers' notebook entries in their entirety which explained in detail the reason for police attendance at this home and the circumstances regarding the attendance. The only information not released to the appellant was the voice recording of the 911 call made by the affected party. Not granting access to the 911 voice recording does not take away from basis of the request for police assistance nor does it affect the outcome of the call.

[73] The police submit that they took all these factors into consideration in exercising their discretion to withhold the remaining information at issue. They submit that protecting the privacy of the affected party outweighed any factor that would convince them to disclose the information to the appellant.

The appellant's representations

[74] The appellant submits that the police failed to properly exercise their discretion, and in particular, failed to take into account the following factors:

1. That they had already disclosed the name of the caller to the appellant;
2. That the appellant was aware of or had access to the telephone number from which the 911 call was placed;
3. That the appellant has a compelling need for the information, namely to assist in the fair determination of his pending [complaint]; and
4. That the information which the appellant is seeking pertains to his own personal health information which appears to have been released to the police without his consent.

[75] The appellant submits that in the circumstances, the disclosure of the withheld information would not be an “unjustified invasion of personal privacy”, and hence the decision not to disclose the information sought was unreasonable.

The police’s reply representations

[76] In reply, the police submit that the information the appellant already received explains in detail the reason for the attendance at the appellant’s home and the circumstances regarding the attendance.

Analysis and finding

[77] In light of the extent of information that has already been disclosed to the appellant by the police and through this order, and all the circumstances of the appeal, I am satisfied that the police properly exercised their discretion to withhold the caller’s personal cellphone number from the appellant.

Conclusion

[78] In light of my conclusions above, I will order the police to disclose a severed version of the 911 call recording to the appellant, withholding the caller’s personal cellphone number. In that regard, the police can consider whether a fee for severing the 911 call recording is permitted under section 45 of the *Act*.

ORDER:

1. I uphold the police’s decision to withhold the caller’s personal cellphone number that is contained in the 911 call recording at issue.
2. Subject to section 45 of the *Act*, I order the police to disclose to the appellant the remainder of the 911 call recording by January 8, 2019, but not before January 3, 2019.
3. In order to verify compliance with the provisions of this order, I reserve the right to require the police to provide me with a copy of the 911 call recording that it sends to the appellant.

Original Signed by: _____
Steven Faughnan
Adjudicator

_____ November 29, 2018