

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3681

Appeal MA16-97

Sault Ste. Marie Police Services Board

October 26, 2018

Summary: The appellant submitted an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Sault Ste. Marie Police Services Board (the police) for records relating to himself. The police provided him with access to some parts of the records but denied access to other parts under various exemptions in the *Act*, including section 38(b) (personal privacy). The appellant appealed the police's decision to deny him access to parts of the records and specified that he was now only seeking access to statements that his former common-law spouse made about him to the police. In this order, the adjudicator finds that these statements contain the personal information of the appellant, his former common-law spouse and other individuals. He finds that this personal information is exempt from disclosure under section 38(b), because disclosing it to the appellant would constitute an unjustified invasion of the personal privacy of his former common-law spouse and other individuals. He upholds the police's access decision and dismisses the appeal.

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

OVERVIEW:

[1] The main issue to be decided in this appeal is whether statements that the appellant's former common-law spouse made about him to the police contain personal information that is exempt from disclosure under section 38(b) (personal privacy) of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

[2] The appellant had submitted an access request under the *Act* to the Sault Ste. Marie Police Services Board (the police) for the following records:

. . . [A] copy of all records associated with my name dating back to June 1, 2006. I also request that any other party involved is contacted and is asked if their personal information can be viewed as well. Anything available, officer notes, statements etc.

[3] In response, the police located occurrence reports and police officers' notes that are responsive to the appellant's access request. They then issued a decision letter that provided him with access to some parts of the records but denied access to other parts under the discretionary exemption in section 38(a) (discretion to refuse requester's own information), read in conjunction with sections 8(1)(a), (b), (c), (e), and (l) (law enforcement) and section 38(b), read in conjunction with the presumption in section 14(3)(b) and the factors in sections 14(2)(f), (g) and (i) of the *Act*.

[4] The appellant appealed the police's decision to deny him access to parts of the records. In his appeal letter, he specified that he was seeking access to "all information that [his former common-law spouse] has said about me."

[5] This appeal was assigned to a mediator, who attempted to resolve the issues in dispute between the parties. The appellant reiterated to the mediator that he was only seeking information in the records relating to his former common-law spouse, particularly the statements she made to the police about him. In addition, he was not seeking access to any information in the records that the police had withheld under section 38(a), read in conjunction with sections 8(1)(a), (b), (c), (e), and (l) of the *Act*.

[6] This appeal was not resolved during mediation and was moved to adjudication for an inquiry. I sought representations from the police and the appellant on the issues to be resolved in this appeal. I received representations from the police but not from the appellant.

[7] In this order, I find that the statements that the appellant's former common-law spouse made about him to the police contain the personal information of the appellant, herself and other individuals. I find that this personal information is exempt from disclosure under section 38(b) of the *Act*, because disclosing it to the appellant would constitute an unjustified invasion of the personal privacy of his former common-law spouse and other individuals. I uphold the police's access decision and dismiss the appeal.

RECORDS:

[8] The only records remaining at issue in this appeal are the parts of those occurrence reports and police officers' notes that contain statements that the appellant's former common-law spouse made about him to the police.

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1) of the *Act* and, if so, to whom does it relate?
- B. Does the discretionary exemption at section 38(b) apply to the information at issue?

DISCUSSION:

PERSONAL INFORMATION

A. Do the records contain "personal information" as defined in section 2(1) of the Act and, if so, to whom does it relate?

[9] The discretionary personal privacy exemption in section 38(b) of the *Act* only applies to "personal information." Consequently, it must first be determined whether the statements that the appellant's former common-law spouse made about him to the police contain "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 where 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;

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

[11] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.²

[12] For the reasons that follow, I find that the statements that the appellant's former common-law spouse made about him to the police contain the "personal information" of the appellant, herself and other individuals, including a child.

[13] The police cite paragraph (g) of the definition of "personal information" in section 2(1) and submit that the statements made by the appellant's former common-law spouse express her personal opinions about the appellant. However, they do not specify whether these statements contain the personal information of the appellant, his former common-law spouse or both of them.

[14] In my view, paragraphs (e) and (g) of the definition of "personal information" in section 2(1) both provide guidance in making this determination. Under paragraph (e), personal information means recorded information about an identifiable individual including "the personal opinions or views of the individual except if they relate to another individual." Given the wording of this paragraph, I find that the comments that the appellant's former common-law spouse made about him in her statements cannot qualify as her own personal information, because her personal opinions and views relate to another individual (the appellant).

[15] Under paragraph (g) of the definition, personal information means recorded information about an identifiable individual including "the views or opinions of another individual about the individual." In line with the wording of this paragraph, I find that the comments that the appellant's former common-law spouse made about him in her statements to the police are his personal information, because they are the views or

¹ Order 11.

² Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

opinions of another individual about him.

[16] However, these statements also include the name of the appellant's former common-law spouse and reveal other information about her, such as her family status, as well as her views and observations of certain incidents. In my view, this information qualifies as her "personal information" under paragraph (h) of the definition of that term in section 2(1) and the introductory wording of the definition.

[17] Finally, the statements made by the appellant's former common-law spouse also contain information about other individuals, including a child. I find that this information qualifies as the latter individuals' personal information under paragraph (h) of the definition of that term in section 2(1) and the introductory wording of the definition.

[18] In short, I find that the statements that the appellant's former common-law spouse made about him to the police contain the personal information of the appellant, herself and other individuals, including a child. I will now turn to determining whether this personal information is exempt for disclosure under the discretionary exemption in section 38(b) of the *Act*.

PERSONAL PRIVACY

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

Introduction

[19] I have found that the statements that the appellant's former common-law spouse made about him to the police contain the personal information of the appellant, herself and other individuals.

[20] Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. However, section 38 provides a number of exemptions from this right. In particular, section 38(b) states:

A head may refuse to disclose to the individual to whom the information relates personal information,

if the disclosure would constitute an unjustified invasion of another individual's personal privacy.

[21] Because of the wording of section 38(b), the correct interpretation of "personal information" in the preamble is that it includes the personal information of other individuals found in records which also contain the requester's personal information.³

³ Order M-352.

[22] In other words, 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.

[23] I have found that those parts of the records that set out the statements that the appellant’s former common-law spouse made about him contain the personal information of the appellant, herself and other individuals, including a child. In the circumstances of this appeal, it must be determined, therefore, whether disclosing this personal information to the appellant would constitute an unjustified invasion of the other individuals’ personal privacy under section 38(b).

[24] Sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold under section 38(b) is met:

- 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);
- section 14(2) lists “relevant circumstances” or factors that must be considered;
- section 14(3) lists circumstances in which the disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy; and
- section 14(4) lists circumstances in which the disclosure of personal information does not constitute an unjustified invasion of personal privacy, despite section 14(3).

[25] There is no evidence before me to suggest that exceptions in section 14(1)(a) to (e) or the circumstances in section 14(4) apply to the personal information in the records. I find that none of these provisions is applicable in the circumstances of this appeal.

Sections 14(2) and (3)

[26] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), I must consider and weigh the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.⁴

⁴ Order MO-2954.

Section 14(3)

[27] I will start by examining the presumptions in section 14(3). This provision lists circumstances in which the disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy.

[28] The police claim that the section 14(3)(b) presumption applies to the personal information in the statements that the appellant's former common-law spouse made to them. This provision states:

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] 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.⁵

[30] The police submit that the records containing the statements provided by the appellant's former common-law spouse were compiled as part of an investigation into possible violations of law by the appellant.

[31] Based on my review of the records, I am satisfied that the withheld personal information was compiled and is identifiable as part of various investigations into possible violations of the *Criminal Code*. In particular, the statements that the appellant's former common-law spouse provided to the police relate to specific incidents between the appellant and herself that were investigated by the police to determine whether violations of the *Criminal Code* had occurred.

[32] In these circumstances, I find that the personal information in those parts of the records falls within the section 14(3)(b) presumption and its disclosure to the appellant is presumed to constitute an unjustified invasion of the personal privacy of his former common-law spouse and other individuals. In my view, this presumption should be given considerable weight in determining whether disclosing the personal information in those parts of the records to the appellant would constitute an unjustified invasion of other individuals' personal privacy under section 38(b).

⁵ Orders P-242 and MO-2235.

Section 14(2)

[33] Section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.⁶ This provision states:

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;
- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
- (f) the personal information is highly sensitive;
- (g) the personal information is unlikely to be accurate or reliable;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

[34] The factors in paragraphs (a), (b), (c) and (d) of section 14(2) generally weigh in favour of disclosure, while those in paragraphs (e), (f), (g), (h) and (i) weigh in favour of privacy protection.⁷ 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).⁸

⁶ Order P-239.

⁷ Order PO-2265.

⁸ Order P-99.

[35] The police submits that sections 14(2)(f) and (i) apply to the personal information in the records.

Section 14(2)(f): highly sensitive

[36] In determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy under section 38(b), section 14(2)(f) requires the police to consider whether the personal information is highly sensitive. If this factor is found to apply, it would weigh in favour of privacy protection.

[37] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.⁹

[38] The police submit that the personal information in the records is highly sensitive because it involves domestic-related situations and custody of a minor child.

[39] Given the nature of the incidents that triggered the appellant's former common-law spouse to contact the police and to make statements to them, I am satisfied that it is reasonable to expect that both she and the other individuals whose personal information is found in the records would experience significant personal distress if their personal information is disclosed to the appellant.

[40] In short, I find that the factor in section 14(2)(f) applies to the personal information of the appellant's former common-law spouse and other individuals, and this factor is therefore relevant in determining whether disclosing their personal information would constitute an unjustified invasion of their personal privacy under section 38(b). In my view, this factor weighs in favour of privacy protection and should given considerable weight.

Section 14(2)(i): unfair damage to reputation

[41] In determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, section 14(2)(i) requires the police to consider whether the disclosure may unfairly damage the reputation of any person referred to in the record. The applicability of this section is not dependent on whether the damage is present or foreseeable, but whether this damage would be "unfair" to the individual involved.¹⁰ If this factor is found to apply, it would weigh in favour of privacy protection.

[42] Although the police claim that section 14(2)(i) applies to the personal information in the statements that the appellant's former common-law spouse provided to them, they have not provided any evidence or arguments to support this position. Based on my review of the personal information in the records, it does not appear that the appellant's common-law spouse or any of the other individuals (other than the

⁹ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

¹⁰ Order P-256.

appellant) are accused of any wrongdoing. In such circumstances, it is difficult to see how disclosing their personal information to the appellant may unfairly damage their reputations.

[43] The statements made by the appellant's former common-law spouse also include the appellant's personal information. Given that the appellant is the individual who is seeking access to this information, I find that disclosing this information to him would not unfairly damage his reputation.

[44] In short, I find that section 14(2)(i) does not apply to the personal information in the statements that the appellant's former common-law spouse provided to the police.

Conclusion

[45] The statements that the appellant's former common-law spouse made to the police about him contain the personal information of both of them and other individuals. In assessing whether this personal information qualifies for exemption under section 38(b), I have found that it fits within the section 14(3)(b) presumption and disclosing it to the appellant is presumed to be an unjustified invasion of the personal privacy of his former common-law spouse and other individuals.

[46] In addition, I have found that in the particular circumstances of this case, the personal information of the individuals other than the appellant is "highly sensitive," within the meaning of that term in section 14(2)(f), which weighs in favour of privacy protection. Because the appellant did not submit any representations in this appeal, I do not have any evidence before me to suggest that any of the factors in section 14(2) that weigh in favour of disclosure would apply to the personal information in his former common-law spouse's statements to the police, and it is not evident to me on my review of the records that any such factors would apply.

[47] Section 4(2) of the *Act* requires an institution to disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions. Consequently, I have considered whether these statements can be severed in a manner that provides the appellant with his own personal information without disclosing the personal information of his former common-law spouse and other individuals. However, the personal information of all of these individuals is closely intertwined in these parts of the records, and I find that it cannot be reasonably severed.

[48] In short, subject to my assessment below as to whether the police exercised their discretion appropriately, I find that all of the personal information in these statements is exempt from disclosure under section 38(b), because disclosing it to the appellant would constitute an unjustified invasion of the personal privacy of his former common-law spouse and other individuals.

Exercise of discretion

[49] 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 IPC may determine whether the institution failed to do so.

[50] In addition, the IPC 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.

[51] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.¹¹ The IPC may not, however, substitute its own discretion for that of the institution.¹²

[52] The police state that in applying the section 38(b) exemption to the personal information in the statements provided by the appellant's former common-law spouse, they considered the purposes of the *Act*, including the right of individuals to access their own personal information and the obligation on institutions to protect the privacy of individuals with respect to their personal information. The police submit that they exercised their discretion to withhold the personal information in these parts of the records under section 38(b) in good faith and did not withhold this information for an improper purpose.

[53] I am satisfied that the police exercised their discretion in denying access to the personal information in the statements under section 38(b) and did so appropriately. There is no evidence before me to suggest that they exercised their discretion in bad faith or for an improper purpose or that they took into account irrelevant considerations. In short, I uphold the police's exercise of discretion under section 38(b).

ORDER:

I uphold the police's decision to withhold the personal information in the statements of the appellant's former common-law spouse under section 38(b) of the *Act*. The appeal is dismissed.

Original Signed by: _____

October 26, 2018 _____

¹¹ Order MO-1573.

¹² Section 43(2).

Colin Bhattacharjee
Adjudicator