

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-3723

Appeal MA17-517

Toronto Police Services Board

January 25, 2019

**Summary:** The Toronto Police Services Board received a request under the *Municipal Freedom of Information and Protection of Privacy Act* for access to a police occurrence report and related officers' notes. The police granted partial access to responsive records, but withheld the personal information of an affected party under the discretionary personal privacy exemption in section 38(b). In this order, the adjudicator finds that disclosure of the withheld information would constitute an unjustified invasion of the affected party's personal privacy. She finds that the police exercised their discretion properly in withholding this information and she upholds the police's decision.

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

### OVERVIEW:

[1] The requester and another individual (the affected party) had a verbal exchange during a funeral. Afterwards, the requester reported to the Toronto Police Services that he had been threatened during the exchange. An investigation into the allegation was commenced. The requester then made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Toronto Police Services Board (the police) for access to the related police occurrence report and police officer's notes.

[2] This appeal addresses the police's decision to deny access to some of the information sought by the requester.

[3] In his request, the requester sought access to the following:

All information regarding Threatening Report #[specified number] 13 Division (416) 808-1300

I would like all details including:

My complaint

Officers Action

Accused feedback & response

What officer said to accused and accused response.

[4] The police initially issued a decision (the September 2017 decision) in which they denied access to the records, citing section 38(a) (discretion to refuse requester's own information) in conjunction with sections 8(1)(a) (law enforcement matter) and 8(1)(b) (law enforcement investigation). Specifically, the police wrote that the incident that was the subject of the request was still under investigation and that sections 8(1)(a) and 8(1)(b) allowed an institution to deny access to information prior to the conclusion of a police investigation. The police also relied on the discretionary personal privacy exemption at section 38(b). In their decision, the police invited the requester to contact the officer in charge of the investigation, or, alternatively to resubmit his request once the investigation was complete.

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

[6] During mediation, the police completed their investigation and issued a revised decision (the November 2017 decision) by which they provided the appellant with partial access to the records. The police withheld portions of the records pursuant to the personal privacy exemption at section 38(b). The police withheld some information as not responsive to the request. Finally, the police advised that, as their investigation was complete, they were no longer claiming sections 8(1)(a) or (b) to withhold any records, so that the law enforcement exemptions, and section 38(a), were no longer at issue.

[7] The appellant confirmed during mediation that he was seeking access only to certain withheld information on pages 5, 6, and 8 to 16 of the records, but not information withheld as non-responsive to the request, or information that would identify an affected party (such as that individual's name, address or telephone number), as the affected party is known to the appellant.

[8] At the appellant's request, the mediator contacted the affected party to seek his consent to the release of his personal information in the withheld portions of the requested records. The affected party informed the mediator that he did not consent to the release of his personal information.

[9] As further mediation was not possible, the file was transferred to the adjudication stage of the appeal process, where an adjudicator conducts a written inquiry. Representations were sought from the police, the appellant and the affected party. Only the police submitted representations.

[10] With their representations, the police issued a further revised decision (the March 2018 decision), in which they disclosed additional information. The newly disclosed information included details of the location of the incident under investigation, and was disclosed on the grounds that it was within the appellant's knowledge and was included in the appellant's own statement to the police, such that withholding it would be absurd.

[11] The appellant was given the opportunity to make representations regarding the March 2018 decision. He did not respond and, despite follow-up from this office, has made no representations in support of his appeal.

[12] In this order, I find that the records contain the appellant's personal information, as well as the personal information of an affected party, and that disclosure of the affected party's personal information would constitute an unjustified invasion of that individual's personal privacy, and so is exempt from disclosure under section 38(b). I also find that the police properly exercised their discretion in withholding this information under section 38(b), and I uphold the police's decision.

## **RECORDS:**

[13] The records in this appeal consist of a police occurrence report and officer's handwritten notebook entries. The information remaining at issue consists of withheld portions of pages 5 and 6 of the occurrence report and pages 8 through 16 of the officer's notes that the police withheld.

## **ISSUES:**

- A. Do the records contain "personal information" as defined in section 2(1)?
- B. Would disclosure of the information constitute an unjustified invasion of personal privacy under section 38(b)?
- C. Should the police's exercise of discretion under section 38(b) be upheld?

## **DISCUSSION:**

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

[14] In order to determine which sections of the *Act* may apply, it is necessary to

decide whether the record contains “personal information” and, if so, whose. 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.

[15] 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.<sup>1</sup> To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.<sup>2</sup>

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<sup>1</sup> Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

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

### ***Representations***

[16] The police submit that the withheld portions of the record contain personal information of the affected party that includes his name, address, and other identifying information that falls into paragraphs (a), (b) and (c) of section 2(1) and that was collected as part of an investigation into a possible violation of law.

### ***Finding***

[17] I have reviewed the records and find that they contain the personal information of the appellant and another identifiable individual, namely, the affected party. The records contain biographical and other personal information relating to both the appellant and the affected party. With respect to the appellant, I find that the records contain his name, address, telephone number, gender, age and date of birth, as well as his opinions and views on the incident described in the record. As a result, I find that the record contains information about the appellant that qualifies as his personal information within the meaning of paragraphs (a), (b), (d), (e) and (h) of the definition in section 2(1).

[18] With respect to the affected party to whose information the appellant seeks access, I find that the record likewise contains his name, address and telephone number, age, date of birth, gender, and his opinions and views regarding the alleged incident. This is information that also qualifies as personal information within the meaning of paragraphs (a), (b), (d), (e) and (h) of section 2(1).

[19] Accordingly, having found that the records contains the appellant's personal information and the personal information of an affected party, I now turn to consideration of the application of the discretionary personal privacy exemption in section 38(b) to the personal information withheld by the police.

### **Issue B: Would disclosure of the information at issue constitute an unjustified invasion of personal privacy under section 38(b)?**

[20] 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.

[21] Under section 38(b), where a record contains personal information of both the appellant and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the appellant. This involves a weighing of the appellant's right of access to his own personal information against the other individual's right to protection of their privacy.

[22] Sections 14(1) to (4) provide guidance in determining whether the threshold for an unjustified invasion of personal privacy under section 38(b) is met. Section 14(2) provides a list of factors for the police to consider in making this determination, while

section 14(3) lists the types of information whose disclosure is presumed to constitute an invasion of personal privacy.

[23] Section 14(4) sets out certain types of information whose disclosure is not an unjustified invasion of personal privacy. In the circumstances of this appeal, the police submit that section 14(4) is not relevant. I agree and I find that section 14(4) does not apply.

[24] For records to be exempt 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 in determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy.<sup>3</sup>

### ***Representations***

[25] The police rely on section 38(b), together with the presumption against disclosure in section 14(3)(b). They further submit that the factor at section 14(2)(h) applies and weighs against disclosure of the withheld information.

[26] The police explain that, as a law enforcement agency, they collect information disclosed to them in confidence in the course of conducting investigations into alleged violations of law. They submit that section 38(b), read together with section 14(3)(b), applies to this appeal because the information at issue was compiled as part of an investigation into a possible violation of law after the appellant contacted them to report an alleged threat made against him. The police argue that, because the record was created as part of that investigation, release of the affected party's information would therefore constitute an unjustified invasion of that individual's personal privacy.

[27] The police also submit that the factor in section 14(2)(h) applies because the information at issue was supplied to the investigating officers in confidence and with the belief that it was being supplied in confidence.

### ***Analysis and findings***

[28] The information that was not disclosed by the police and which remains at issue in this appeal is not the appellant's personal information but that of the affected party. The affected party has not consented to the release of his personal information.

[29] Under section 14(3)(b), the disclosure of personal information is presumed to be 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 of law or to continue the investigation.

[30] Even if no criminal proceedings were commenced against any individuals, as is

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

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>4</sup>

[31] I have reviewed the records and find that the personal information in them was compiled and is identifiable as part of an investigation into a possible violation of law. Based on the appellant's report to the police alleging that the affected party made a threat against him, the police initiated an investigation that could have resulted in criminal charges. My finding is not altered by the fact that no charges were laid, since the presumption only requires that there be an investigation into a possible violation of law. As a result, I find that the presumption against disclosure in section 14(3)(b) applies.

[32] The police argued that the factor in section 14(2)(h) applies and weighs against disclosure of the information. The appellant made no submissions regarding any factors in section 14(2) that might support his claim that the information should be disclosed, nor did he assert that any unlisted factors might apply to favour disclosure.

[33] Section 14(2)(h) requires the police to consider, among other things, whether the personal information was supplied in confidence, in determining whether its disclosure constitutes an unjustified invasion of personal privacy. As noted above, the police submit that the affected party supplied his personal information to them in confidence as part of their investigation.

[34] Having found that the personal information at issue was compiled as part of an investigation into a possible violation of law, disclosure of this information is presumed to be an unjustified invasion of personal privacy under section 14(3)(b). I further find that no factors, listed or unlisted, in favour of disclosure apply. In the circumstances of this appeal, I also find that, on balance, the affected party's personal privacy interests in his personal information, including his views of the allegations against him, outweigh the appellant's interest in access. For these reasons, I find that disclosure of the withheld personal information would constitute an unjustified invasion of personal privacy under section 38(b). Given my finding, there is no need to consider the application of the factor at section 14(2)(h).

### ***Absurd result***

[35] I have also considered the absurd result principle and find that it does not apply to the circumstances of this appeal.

[36] Past orders have held that denying a requester access to information that he may have originally supplied, or is otherwise aware of, could lead to an absurd result. In certain cases, the information may be found not exempt under section 38(b), because the adjudicator is persuaded that withholding it would be absurd and inconsistent with the purpose of the exemption. The absurd result principle has been applied where, for example, the requester sought access to his own witness statement,

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<sup>4</sup> Orders P-242 and MO-2235.

was present when the information was provided to the institution, or where the information is clearly within the requester's knowledge.

[37] In releasing additional information from the records to the appellant with their March 2018 decision, the police submit that they considered the absurd result principle. They say they disclosed this additional information on the basis that it would be absurd to withhold it, because it was information within the appellant's knowledge and consisted of details that were contained in the appellant's own statement to the police. The police submit that the absurd result principle does not apply, however, to the remaining withheld personal information at issue because that information is not within the appellant's knowledge, is the personal information of the affected party, and was not collected in the appellant's presence.

[38] Based on the relationship between the appellant and the affected party and the appellant's involvement in the investigation, it is clear that the appellant is aware of some of the withheld information, such as the affected party's name and other biographical details. Indeed, during mediation, the appellant conceded that he wants access to the contents of the affected party's statement to the police and not his identifying information. Having given no representations during this inquiry, however, the appellant has provided no basis on which I could find that disclosure of this withheld information would not be inconsistent with the purpose of section 38(b).

[39] Having reviewed the records, I note that the withheld personal information is limited to the personal information of the affected party, and includes not only identifying information about him, but his views about the incident itself. I accept the police's submission that this is information that was not collected in the presence of the appellant or would otherwise be known to him. Given my finding that disclosure of the withheld information would be an unjustified invasion of personal privacy under section 38(b), and without any representations from the appellant, I find that disclosure under the absurd result principle would be inconsistent with the purpose of the section 38(b) exemption. I therefore find that the absurd result principle does not apply.

### **Issue C: Should the police's exercise of discretion under section 38(b) be upheld?**

[40] The section 38(b) exemption is discretionary and permits an institution to disclose information despite the fact that it could withhold it. Where an institution has the discretion to disclose information, the commissioner may determine whether the institution erred in its exercise of discretion, or did so in bad faith or for an improper purpose, or whether it failed to consider relevant factors and considered irrelevant ones.

[41] While this office may send the matter back to the institution for an exercise of discretion based on proper considerations,<sup>5</sup> it may not, however, substitute its own

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<sup>5</sup> Order MO-1573.

discretion for that of the institution.<sup>6</sup>

[42] Relevant considerations may include, but are not limited to, those listed below:<sup>7</sup>

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

### ***Representations***

[43] The police submit that the information sought is entirely the affected party's personal information that was collected during a police investigation under circumstances where they concluded that disclosure of it would constitute an unjustified invasion of personal privacy. In exercising their discretion under section 38(b) to withhold information, the police state that they considered that the appellant has a right to his own personal information and that exemptions from the right of access should be limited and specific.<sup>8</sup>

[44] The police submit that they considered relevant factors in exercising their discretion in favour of withholding the affected party's information from disclosure, such as the fact that the information was collected as part of a police investigation. The police submit that they balanced the appellant's right of access to information against the protection of the affected party's right to privacy and did not exercise their discretion in bad faith or for an improper purpose.

### ***Finding***

[45] Based on the circumstances of this appeal, I find that the police properly exercised their discretion under section 38(b) to withhold the affected party's information.

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<sup>6</sup> Section 43(2) of the *Act*.

<sup>7</sup> Orders P-244 and MO-1573.

<sup>8</sup> Section 1 of the *Act*.

[46] In withholding the affected party's personal information, the police took into account that the information in the records contains the appellant's own personal information and that the appellant would be aware of some of the withheld information, and weighed it against the fact that the information was nevertheless the affected party's personal information which, if disclosed, would identify him, reveal other personal information about him, and describe his involvement in a police investigation. The police also considered that exemptions from the right of access should be limited and specific; in making disclosure of the police occurrence report and officer's notebook entries, the police withheld only the personal information belonging to another individual.

[47] I am satisfied that the police did not take into account irrelevant factors in exercising their discretion and there is no evidence before me that the police acted in bad faith in doing so. Therefore, I uphold the police's exercise of discretion to withhold the affected party's personal information under section 38(b) of the *Act*.

[48] For these reasons, I uphold the police's decision to deny access to the withheld portions of the records and dismiss this appeal.

**ORDER:**

I uphold the police's decision to deny access to the withheld portions of the record and dismiss this appeal.

Original signed by: \_\_\_\_\_  
Jessica Kowalski  
Adjudicator

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January 25, 2019