

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3781

Appeal MA17-491-2

Toronto Police Services Board

June 4, 2019

Summary: The police received an access request for records relating to the appellant's child. In their decision, the police granted access, in part, and relied on the discretionary personal privacy exemption at section 38(b) to deny access to the remainder of the responsive records. During mediation, the appellant raised the issue of access to records identified by the police as not responsive to the request. In this order, the adjudicator orders the police to issue an access decision with respect to the officer's memorandum book notes. She also upholds the police's 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, sections 2(1) ("personal information"), 14, 17, and 38(b).

BACKGROUND:

[1] The Toronto Police Services Board (the police) received a request under the *Municipal Freedom of Information and Privacy Act* (the *Act*) for records relating to the requester's child, as follows:

Requesting all records - including officers notes. (regarding my son's:
[name of child] officers note)

[2] Following a time extension decision and the resolution of a deemed refusal appeal, the police issued a decision granting partial access to the responsive records. The police denied access to the remainder of the records were denied pursuant to the discretionary personal privacy exemption at section 38(b) of the *Act*. The police also stated that some information was removed as it was not responsive to the request.

[3] In addition, the police stated that they had not yet obtained the officer's memorandum book notes. The police asked the requester to contact them by a certain date to let them know if she still requires the memorandum book notes.

[4] Subsequently, the police sent another decision letter to the requester stating:

Since there has been no communication from you, presumably you no longer require the additional records. As such, the file is now closed.

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

[6] During mediation, the appellant advised that she wants access to all of the information to which the police denied access. The appellant also stated that she wants the memorandum book notes as indicated in her request.

[7] The police took the position that since the appellant did not contact them about the memorandum book notes, they would not conduct a search for these records. As a result, responsiveness of the memorandum book notes is at issue in this appeal, along with the information identified as not responsive to the request.

[8] As mediation did not resolve the appeal, it was moved to the adjudication stage, where an adjudicator conducts a written inquiry under the *Act*.

[9] During my inquiry, I invited the police, the appellant and the affected parties to provide representations. The appellant confirmed that she would not be providing representations, but reiterated that she wants all responsive records. Pursuant to section 7 of this office's *Code of Procedure* and *Practice Direction Number 7*, a non-confidential copy of the police's representations was shared with the appellant.¹

[10] I also received representations from an affected party. While these representations were not shared with the appellant, the affected party indicated he did not consent to the disclosure of his personal information.

[11] In this order, I order the police to issue an access decision with respect to the officer's memorandum book notes. I also uphold the police's decision and dismiss the appeal.

RECORDS:

[12] The records at issue consist of eleven general occurrence reports and an inquiry

¹ Some portions of the police's representations were withheld as they met the criteria for withholding representations found in this office's *Practice Direction Number 7: Sharing of representations*.

report as noted in the Index of Records dated November 15, 2017.

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?
- D. What records are responsive to the request?

DISCUSSION:

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

[13] In order to determine whether section 38(b) of the *Act* applies, it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates.

[14] "Personal information" is defined in section 2(1). Relevant paragraphs of that section are 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,

(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;

[15] 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.²

[16] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.³

[17] The police submit that the records contain personal information. They submit that there is information about the affected parties and other identifiable individuals, which falls within paragraphs (a), (b), (c), (d) and (g) of the definition of personal information in section 2(1) of the *Act*. The police also submit that the types of information include names, phone numbers, addresses, personal opinions and date of births for these individuals.

[18] As stated above, the appellant declined to provide representations.

[19] Based on my review of the records, I find that they contain the personal information of the appellant, the affected parties, and other identifiable individuals. Specifically, they contain personal information of the appellant and other individuals, which would fall within paragraphs (a), (b), (d), (e), (g) and (h) of the definition of "personal information" in section 2(1) of the *Act*. As these records contain personal information of both the appellant and other individuals, Part II of the *Act* applies and I must consider whether the records at issue are exempt pursuant to the discretionary exemption at section 38(b) of the *Act*.

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

[20] Since I found that the records contain the personal information of the appellant and other individuals, section 36(1) of the *Act* applies to the appellant's access request. Section 36(1) 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.

² Order 11.

³ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[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 requester. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the appellant.⁴

[22] Sections 14(1) to (4) provide guidance in determining whether disclosure of the information would be an unjustified invasion of personal privacy under section 38(b).

[23] In making this determination, this office will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.⁵ However, if the information fits within any of paragraphs (a) to (e) of section 14(1) or within 14(4), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b).

[24] If the information fits within any of paragraphs (a) to (h) of section 14(3), disclosure of the information is presumed to be an unjustified invasion of personal privacy. Also, 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 Some of the factors listed in section 14(2), if present, weigh in favour of disclosure, while others 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).⁷

Analysis and findings

[25] I note that the withheld information at issue does not fit within the exceptions set out in section 14(1)(a) to (e) nor section 14(4) of the *Act*. As such, I will turn to discuss whether any of the presumptions under section 14(3) apply and whether any of the section 14(2) factors apply.

[26] 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.⁸ The presumption can also apply to records created as

⁴ See below in the “Exercise of Discretion” section for a more detailed discussion of the institution’s discretion under section 38(b).

⁵ Order MO-2954.

⁶ Order P-239.

⁷ Order P-99.

⁸ Orders P-242 and MO-2235.

part of a law enforcement investigation where charges are subsequently withdrawn.⁹

[27] Based on my review of the records, I find that the presumption at section 14(3)(b) applies in this circumstance. The records concern information about investigations relating to identified offences. The withheld information was compiled and is identifiable as part of the police investigations into possible violations of the *Criminal Code of Canada*, which did not appear to result in charges being laid. Although no charges were laid, there need only have been an investigation into a possible violation of law for the presumption at section 14(3)(b) to apply.¹⁰ Section 14(3)(b) therefore weighs in favour of non-disclosure of the withheld information.

[28] Besides relying on the section 14(3)(b) presumption, the police submit that the factors at section 14(2) (f)(highly sensitive) and section 14(2)(g) (unlikely to be accurate or reliable) are relevant in this appeal. With respect to the former, the police submit that disclosure of the withheld information could cause personal distress to the affected parties and other individuals. With respect to the latter, the police submit that many of the allegations made by the appellant in these records were found not to be supported by any evidence. As such, some of the withheld information are unlikely to be accurate or reliable.

[29] From my review of the withheld information, and considering the evidence before me, I find that no section 14(2) factors weighing in favour of disclosure whether listed or unlisted apply. I find that the factors listed in paragraphs 14(2)(f) and 14(2)(g) apply to most of the withheld information, weighing against the disclosure of this information. I also find that the presumption at section 14(3)(b) applies to all of the withheld information. As such, given the application of this presumption, and the fact that no factors favouring disclosure in section 14(2) were established, and balancing all the interests of the parties, I am satisfied that the disclosure of the personal information of the individuals other than the appellant would constitute an unjustified invasion of their personal privacy. I also note that all of the appellant's personal information, which was reasonably severable, was already disclosed to her.

[30] Accordingly, I find that the disclosure of the withheld information would result in an unjustified invasion of personal privacy for the individuals in question. As such, I find that the withheld information is exempt under section 38(b) of the *Act* subject to my finding on the police's exercise of discretion below.

⁹ Orders MO-2213, PO-1849 and PO-2608.

¹⁰ Orders P-242 and MO-2235.

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

[31] As I found that the section 38(b) exemption applies to the withheld information in the records at issue, I will consider whether the police exercised their discretion.

[32] 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.

[33] 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.

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

[35] The police submit that they properly exercised their discretion in applying section 38(b). The police submit that they considered the totality of the records, the nature of the institution and the findings of two professional agencies. The police also submit that they considered the interaction between sections 28 and 29 of the *Act*. They further submit that the appellant's allegations are significant and sensitive, if proven factual, but were not supported by any factual evidence. Finally, the police submit that they considered that release of the records would lend credence to the false allegations, which would have a significant impact on the affected parties.

[36] Based on my review of the police's representations and the nature and the content of the records at issue, I find that the police properly exercised their discretion to withhold the personal information of the individuals other than the appellant pursuant to the discretionary personal privacy exemption at section 38(b) of the *Act*. I note that the police took into account the following relevant considerations: the nature of the information and the extent to which it is significant and sensitive to the law enforcement institution, the requester and the affected parties; the relationship between the appellant and the affected parties; and the wording of the exemption and

¹¹ Order MO-1573.

¹² Section 43(2).

the interests it seeks to protect. I am satisfied that they did not act in bad faith or for an improper purpose. Accordingly, I uphold the police's exercise of discretion in deciding to withhold the personal information pursuant to the section 38(b) exemption.

D: What records are responsive to the request?

[37] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

(1) A person seeking access to a record shall,

(a) make a request in writing to the institution that the person believes has custody or control of the record;

(b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

...

(2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[38] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.¹³

[39] To be considered responsive to the request, records must "reasonably relate" to the request.¹⁴

[40] During mediation, the appellant stated that she wanted to pursue access to the officer's memorandum book notes as indicated in her initial request.

[41] I note that the police sent the appellant a decision letter dated November 16, 2017 in which they stated that if she still required the officer's memorandum book notes, she was to advise them by December 6, 2017.

[42] I also note that the police sent the appellant a decision letter dated January 16, 2018 in which they stated that as she had not contacted their office by December 6,

¹³ Orders P-134 and P-880.

¹⁴ Orders P-880 and PO-2661.

2017, they presumed she was no longer interested in the officer's memorandum book notes. As such, they closed the file.

[43] I acknowledge that the appellant wants all responsive records, including the officer's memorandum book notes. I also note that she did not narrow her request to the police. The appellant simply did not respond to the police's decision letter. As such, I find that the police cannot unilaterally narrow the request on their own initiative. Accordingly, I will order the police to issue an access decision with respect to the officer's memorandum book notes.

[44] The police claim that three portions in two of the general occurrence reports are not responsive to the request.¹⁵ Upon reviewing them, I find that they are not responsive as they appear to be generic procedural statements that do not reasonably relate to the appellant's request. As such, I do not find that they are responsive to the request.

ORDER:

1. I order the police to issue an access decision with respect to the officer's memorandum book notes.
2. I also uphold the police's decision and dismiss the appeal.

Original signed by _____
Lan An
Adjudicator

_____ June 4, 2019

¹⁵ See general occurrence reports GO 2014-3313086 and GO 2016-2222220.