

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3782

Appeal MA17-670

Barrie Police Services Board

June 6, 2019

Summary: In this order, the adjudicator does not uphold the decision of the police to withhold 32 photographs of bathroom wall graffiti under the personal privacy exemption in section 38(b). She orders the police to disclose responsive photographs, either in full or in part, because she finds that the exemption does not apply to them. The appeal leading to this order resulted from the appellant's request to the Barrie Police Services Board under the *Municipal Freedom of Information and Protection of Privacy Act* for access to records relating to an investigation into the graffiti. The police granted access to most of the records related to the specified occurrence number, but withheld all photographs in their entirety under the personal privacy exemption. Although the appellant narrowed the scope of her request to "only the information that is specific to me" and comments "orbiting" her name during the appeal, the police maintained that the photographs contained "personal information" about other individuals that was exempt under section 38(b) and that they could not be severed and disclosed to the appellant. Following an inquiry, the adjudicator finds that portions of the photographs do not contain the "personal information" of individuals other than the appellant, as it is defined in section 2(1) of the *Act*, with the result being that the portions cannot be withheld under section 38(b).

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"), 4(2) and 17.

Orders and Investigation Reports Considered: Orders MO-1194 and PO-2225.

OVERVIEW:

[1] This order addresses the issues raised by an access decision issued by the Barrie Police Services Board (the police) in response to a request submitted under the

Municipal Freedom of Information and Protection of Privacy Act (the *Act*) for access to "all reports, interviews and photographs encompassed by [a specified] investigation and its outcome." The requester explained that a workplace harassment investigation had been initiated after she informed senior management that she had been told that a bathroom wall in the Barrie Courthouse contained references to her and other members of the Ontario Provincial Police.

[2] In response to the access request, the police issued a decision granting full access to certain records related to the specified investigation. However, the police denied access to the photographs of the bathroom wall based on the mandatory personal privacy exemption in section 14(1), with reference to sections 14(2)(i) (unfair damage to reputation), 14(3)(b) (possible violation of law) and 14(3)(d) (employment or education history) of the *Act*. The police also stated in the decision that they were "... unable to locate any specific references to your name in these photos."

[3] The requester (now the appellant) appealed the police's decision to this office and a mediator was appointed to explore the possibility of resolution. During mediation, the appellant clarified that she seeks access to references to her nicknames, as well as her legal name, in the photographs, and she provided a list of her nicknames. The appellant also said she sought access to comments surrounding or "orbiting" references to her on the wall.

[4] Following further review of the photographs based on that information, the police wrote to the appellant stating that a matching surname appeared on two of the 32 pages of photographs. The police claimed that no comments appeared near the appellant's surname. The police also stated they would not disclose nicknames because they could not verify if they were her nicknames. Accordingly, the police maintained their claim that the personal privacy exemption applied to the photographs in full, although they now stated that they relied on section 38(b), the discretionary personal privacy exemption, which becomes relevant when a record contains a requester's own personal information in addition to that of other individuals.

[5] The appellant confirmed that she would accept disclosure of any record containing her personal information in a severed form to include "only the information that is specific to myself." The police continued to maintain that they could not sever the records to disclose the photographs to the appellant.

[6] As a mediated resolution of the appeal was not possible, it was transferred to the adjudication stage for a written inquiry. I sought representations from the police on the application of the personal privacy exemption, the police's exercise of discretion under section 38(b) and the issue of severance under section 4(2) of the *Act*. I received representations from the police, which I shared with the appellant. The appellant submitted representations in which she challenged the police's position on the identifiability of the individuals whose handwriting appears in the photographs. The appellant's representations on the exemption claim, including suggestions for disclosure of the information in alternate formats, were provided to the police for reply. I

subsequently sought and received reply and sur-reply representations from the police and the appellant, respectively.

[7] In this order, I find that some of the withheld records contain the appellant's surname and a nickname reasonably connected to her, which are her personal information because they reveal that she was the subject of bathroom wall graffiti. I also find that the comments orbiting the appellant's personal information are not the appellant's personal information, nor are they the personal information of anyone else, as that term is defined in section 2(1) of the *Act*. Based also on findings related to the narrowed scope of the appellant's request, I find that the appellant's personal information and the non-personal information that is responsive to her request are not exempt under section 38(b), and I order the police to disclose 11 photographs to the appellant, either in full or in part.

RECORDS:

[8] The records at issue in this appeal consist of 32 photographs of the bathroom wall and door printed on 8" X 11½" paper. The order provisions apply only to these paper copies of the records.

DISCUSSION:

Considering the narrowed scope of the appeal, none of the information the appellant seeks is the personal information of other individuals, and so it must be disclosed to her

[9] The police have denied access to the photographs in their entirety. Although the appellant narrowed the scope of her request to "information that is specific to myself" and comments "orbiting" her names, the police maintain that the bathroom wall graffiti is exempt under section 38(b) because the individuals who wrote on the wall could be identified by disclosure, and this would result in an unjustified invasion of their personal privacy. In the reasons that follow, I explain why I reject the police's position.

[10] In order to determine whether the discretionary personal privacy exemption in section 38(b), or the mandatory one in section 14(1), may apply, it is necessary to decide if the records contain "personal information." This is because the personal privacy exemption can only apply to the personal information of an individual other than the requester. "Personal information" is defined in section 2(1) as "recorded information about an identifiable individual." Examples of what qualifies as personal information are given in paragraphs (a) to (h) of the definition and include an individual's race, religion,

age or marital status in paragraph (a), their address or telephone number in paragraph (d), and their views or opinions in paragraph (e). The list of examples of personal information under section 2(1) is not exhaustive. Information that does not fall under paragraphs (a) to (h) may still qualify as personal information.¹

[11] To qualify as personal information, the information must be about the individual in a personal capacity. Generally, information associated with an individual in a professional, official or business capacity will not be considered to be “about” the individual.² 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.³ The appellant argued that the graffiti was written by individuals in the execution of their professional duties, given the employee-only nature of the bathroom, thereby making it business identity information under section 2(2.1) of the *Act*, which cannot be withheld under the personal privacy exemption.⁴ On the facts of this appeal, however, I find that in any event the information would not reveal anything of a personal nature about the graffiti writers, as discussed in Order PO-2225, thereby making it unnecessary for me to consider the exception in section 2(2.1). I will not address the exception further in this order.

[12] Also important in this appeal is the principle that for information to qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁵ In other words, identifiability matters.

Representations

[13] The police submit that the information at issue in the photographs is clearly personal information as defined in section 2(1) of the *Act* because it consists of surnames, given names, nicknames and employment or training information relating to individuals. The police also submit that since the records contain “handwriting in a number of different styles,” the handwriting may itself “be identifiable as personal information of the involved parties.” The term “involved parties” appears to refer to the individuals who wrote the graffiti on the bathroom wall.

[14] According to the police, the bathroom where the graffiti was found is located in a restricted area of the Barrie Courthouse that is only accessible to police personnel

¹ Order 11.

² Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

³ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁴ Section 2(2.1) of *MFIPPA* states that “Personal information does not include the name, title, contact information or designation of an individual that identifies that individual in a business, professional or official capacity.”

⁵ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

(Barrie Police and the Ontario Provincial Police). The police argue that the handwriting is distinctive and that because these staff members work closely together, they could recognize each other's handwriting, with the foreseeable result of disclosure being that it would reveal the writer's personal information (i.e. the fact that the writer placed graffiti on the bathroom wall). The police rely on Order P-940, stating that "handwriting qualifies as personal information when the individual may be identified by it."

[15] The appellant begins her representations by explaining the context in which she submitted the access request. She explains that she works in a supervisory capacity in a particular OPP unit and that she filed a Respectful Workplace Policy complaint with the Ontario Public Service (OPS) after another individual reported the bathroom wall graffiti to her. She indicates that disclosure of her personal information will help determine how she proceeds with the OPS complaint. She refers to the police withholding the photographs as an absurdity, since had she not reported the graffiti or had she instead gone to the Barrie Courthouse first to view it, she would be able to see it for herself.⁶

[16] Regarding the location of the bathroom where the graffiti appeared, the appellant agrees that it is located within a restricted area of the Barrie Courthouse and would only be used by Barrie Police or Ontario Provincial Police staff in the execution of their duties. The appellant argues that the identities of the individuals who wrote on the bathroom wall cannot be determined from their handwriting. The appellant acknowledges that her professional duties include the review of her colleagues' notebooks, if not routinely those of Barrie Police, but she maintains that she has neither the acumen nor the training to discern who wrote the graffiti, especially given the difference, she suggests, between writing in a notebook compared to writing on a wall.

[17] The appellant also provided three possible solutions to eliminate the possibility of handwriting identifying the author of the graffiti, but given my findings, it is not necessary to review them here.⁷

[18] In reply representations, the police continue to assert that the only information in the photographs that may relate to the appellant is a surname matching hers. The police also maintain that there are no degrading comments or other information that can be connected to the surname, which may not even be hers. The police argue that

⁶ The appellant's argument seems to be based on the absurd result principle. Under this principle, "where the requester originally supplied the information, or the requester is otherwise aware of it, the information may not be exempt under sections 14(1) or 38(b), because to withhold the information would be absurd and inconsistent with the purpose of the exemption (See Orders M-444 and MO-1323)." Given my finding on the "personal information" issue, I will not address the appellant's position on the absurd result principle further.

⁷ The appellant suggested the following: the bathroom wall content could be typed out; the messages could be read to her; or the graffiti images could be distorted to obscure the handwriting style, while maintaining its legibility. The police declined to adopt any of the suggested methods of disclosure.

since the appellant's surname is "not an uncommon one," and there are no other personal identifiers next to it, they cannot verify that it is hers.

[19] In her sur-reply representations, the appellant responds to the assertion that her surname is "not uncommon," submitting that she is the only individual working in her particular unit with that last name, and that she is not aware of any person working for the Barrie Police with that surname.⁸ Based on information she says she has received, the appellant believes that other writing on the bathroom wall can be connected to her name. In the appellant's view,

The mere presence of my name among these "derogatory comments" implies a link to those comments. Additionally, I envision "graffiti" as being read in a mosaic, in a disorganized fashion as opposed to literary prose meant to be read left to right. I would request access to the comments orbiting my surname please. I do not believe there is a minimum spatial measurement that is required to form a nexus between a comment and my surname.

Analysis and findings

[20] The appellant seeks access to her name or nicknames as they appear in photographs of graffiti on a bathroom wall located in an area of the Barrie Courthouse that is restricted to staff. The police denied access in full to these photographs based on the position that disclosure would result in an unjustified invasion of the personal privacy of the graffiti authors or other individuals. Based on the representations of the police and the appellant, and the content of the photographs, and for the reasons given below, I will order the police to disclose three complete and eight partial photographs to the appellant.

[21] Before I explain my findings on the personal information in the photographs, I will confirm the scope of the appellant's request that is the subject of this appeal. In the appellant's request, she sought access to reports, interviews and photographs related to alleged "sexually disparaging remarks" regarding members of an identified OPP unit that were written on the wall of a bathroom at the Barrie Courthouse. Through mediation of the appeal, and during the inquiry, the appellant clarified that her interest is in receiving access to information in the photographs that is "specific to" her and which identifies her by legal name or nicknames. The appellant also seeks access to any comments that "orbit" her name. She is amenable to any record containing her personal information being severed before disclosure to her. In my view, the appellant appears

⁸ The appellant provided an email from an OPP Staff Sergeant who viewed the graffiti and stated that "95% of the comments were about members of the [appellant's unit]," in support of the unlikelihood of there being another individual with the same surname. Another email sent by a Barrie Police inspector who viewed the wall was also provided in support of this submission.

to understand that severances would be applied to the personal information of other people. The appellant's clarification effectively removes from the scope of this appeal any personal information about other identifiable individuals. Therefore, I must determine:

- What information in the photographs is about the appellant (i.e., what qualifies as her "personal information");
- What information constitutes comments "orbiting" her name/nickname; and
- Whether any of the information included in the above two determinations constitutes the personal information of another individual, such that it must be severed from the disclosure provided to her.

[22] There are 32 photographs at issue. Pages 1 to 29 consist of photos of the bathroom wall from different angles and close-ups of different areas. Specifically, pages 1 to 3 are zoomed-out photographs of the entire wall, while pages 4 to 29 are enlargements (of varying magnification) of different parts of the wall. Pages 30 to 32 are of the bathroom door. Page 30 shows the entire bathroom door, while pages 31 and 32 are enlargements of the graffiti on the door.

[23] As I noted above, "personal information" is defined in section 2(1) of the *Act* as recorded information about an identifiable individual that fits within the introductory wording or one of the paragraphs (a) through (h) of the definition. There must be a reasonable expectation that an individual may be identified if the information is disclosed.⁹

[24] I have reviewed the photographs themselves, and I find that a number of them contain the personal information of the appellant, as well as the personal information of other individuals. For the most part, the personal information consists of names and these fit within paragraph (h) of the definition, because they reveal that these individuals are the subject of bathroom wall graffiti. Other personal information in these photographs consists of comments or nicknames and these may also fit within paragraphs (e) (personal views or opinions) or (g) (views or opinions about another individual). However, I need not concern myself with the other individuals who are referred to on the wall, since the appellant does not seek that information.

What information in the photographs is the appellant's personal information?

[25] I find that the appellant's personal information appears in the photographs numbered 1 to 6, 8, 9, 13, 15, 17, 25 and 29, which are all photographs of the

⁹ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

courthouse bathroom wall. This finding requires some further explanation and clarification.

[26] As noted previously, the photographs on pages 1 to 3 are zoomed-out photographs of the entire bathroom wall where the graffiti was written. However, at the distance these photographs were taken, none of the graffiti can be read. The presence of the appellant's personal information, and that of other individuals, is only detectable from the enlarged photos appearing later in the series. To provide the appellant with an idea of the shape of the graffiti mosaic on the bathroom wall, however, and since these pages are photographs of a wall that is known to contain information about the appellant, as I explain below, I have decided to order disclosure of pages 1 to 3 in their entirety. However, since the disclosure ordered relates to the printed photographs, not their electronic form,¹⁰ I am satisfied that there is no reasonable possibility of this disclosure identifying any other individual.

[27] Next, identifying the appellant's surname in the photographs of the bathroom wall graffiti as her "personal information" is one thing, and I confirm that it appears on pages 1 to 6, 8, 9, 13 and 29. However, identifying the appellant's nicknames from the list she provided to this office is quite another. The appellant listed seven nicknames by which she says she is known within her unit. Some of these are variants of one another. However, based on my careful review of the photographs, some of which are limited in their clarity, I could identify only one of the full nicknames provided. I am satisfied that this specific nickname constitutes her "personal information" in the circumstances of this appeal, and I find that it appears on pages 1 to 6, 8, 15, 17 and 25.

[28] I find that the appellant's personal information does not appear in the photographs of the bathroom door found at pages 30 to 32.

[29] As for the other six nicknames provided (which include surnames different than the one the appellant uses), my review of the records reveals that multiple variants of them appear in the photographs: there are five instances of one nickname/surname, two instances of another nickname/surname, and 13 instances of a one-word nickname. However, none of these particular variants contains the appellant's first or (used) last name. Indeed, in most of them, there is another first name or surname adjacent to the nickname. In the circumstances, I am not persuaded that these variants consist of information of a personal nature about the appellant. Therefore, I find that they do not qualify as the appellant's personal information. While they may be the personal information of other identifiable individuals, that question is not before me.

¹⁰ While electronic form viewing might permit enlargement and an opportunity to try to discern names or other words, I am expressly not ordering disclosure of electronic copies of the photographs.

What information constitutes comments "orbiting" the appellant's name/nickname?

[30] The police submitted, and I accept, that some of the comments written on the bathroom wall cannot reasonably be connected to any identifiable individual. In other words, some of the graffiti does not constitute "personal information." In particular, I note that one of the 13 instances of a specific nickname provided by the appellant cannot reasonably be connected with any identifiable individual. However, there are also other one or two-word references that appear on the wall around the appellant's name, or one nickname, that are similarly not capable of being connected with an identifiable individual. These comments or references would qualify as comments "orbiting" references to the appellant and are, therefore, included in the information to which the appellant seeks access. This type of information appears next to the appellant's name or one nickname on pages 1 to 6, 8, 9, 13, 15, 17, 25 and 29.

Does any of the appellant's personal information and orbiting information contain the personal information of another individual?

[31] As stated, the police are concerned about disclosure of these photographs based on a belief that the individuals who wrote the graffiti could be identified, leading to an unjustified invasion of their personal privacy. The police rely on Order P-940.

[32] That order and others have reviewed the issue of identifiability in relation to handwriting and signatures. Often quoted is Order MO-1194, in which Assistant Commissioner Tom Mitchinson considered Order P-194 where the handwritten comments of trainers were found not to qualify as their personal information; he observed, however, that handwriting style has been found to qualify as personal information where identity is an issue.¹¹ In Order M-585, where both handwritten and typewritten versions of a by-law complaint were at issue, the adjudicator concluded that the handwritten version qualified as the complainant's personal information because there was a reasonable expectation that the identity of the author could be determined from the handwritten version. The Assistant Commissioner concluded his review of the issue in Order MO-1194 by stating that "whether or not a signature or handwriting style is personal information is dependent on context and circumstances."

[33] I agree with the endorsement in Order MO-1194 of a context-based determination to deciding the issue of handwriting and identifiability, and I apply it here in finding that the handwriting styles on the bathroom wall does not constitute the personal information of any identifiable individual.

¹¹ Order P-940, also cited by the police in this appeal. In that order, even when personal identifiers of candidates in a job competition were severed, the finding was that their handwriting could identify them, thereby bringing the records within the scope of the definition of personal information. But see Order PO-2632, where the signatures of individuals signing contracts on behalf of an institution in their official capacity were found not to be personal information under the *Act*.

[34] The police mentioned that this particular bathroom is only available to police personnel, and the appellant does not dispute this submission. I understand the police's argument to be that the pool of individuals who may have written on the bathroom wall is limited and since the individuals are (likely) known to one another, their handwriting style could reasonably be connected to an identifiable individual or individuals. Yet, the police admitted in response to questioning that they do not know the identity of any of the authors.¹²

[35] Having considered the issue and upon review of the photographs, I prefer the appellant's position, which highlights the remoteness of the possibility of identifying any of the graffiti authors based on their handwriting, particularly given the effects of writing on a wall as opposed to in a notebook. Simply put, there is insufficient evidence before me upon which I could conclude that the individuals who wrote the appellant's surname and one nickname and the comments "orbiting" them, which is the only information remaining within the scope of this appeal, could reasonably be expected to be identified by their handwriting. Therefore, I find that disclosure of the graffiti that refers to the appellant and other information orbiting the appellant's personal information – comments not connected to other individuals – could not reasonably be expected to lead to the identification of other individuals. As a result, I find that there is no personal information of other individuals contained in the portions of the photographs sought by the appellant.

[36] Section 38(b) provides an institution, such as the police, with the discretion to refuse to disclose information where a record contains the personal information of the requester and other individuals. It does not provide the police with the discretion to refuse to disclose information to the individual to whom the information relates, unless that information also relates to another individual and disclosure would constitute an unjustified invasion of the other individual's personal privacy. Nor does it allow an institution to withhold information that does not qualify as "personal information" according to the definition in section 2(1) of the *Act*, unless another exemption applies to it. In this appeal, no other exemptions are claimed, nor would any mandatory ones apply.¹³ I have found that the information that remains at issue in the photographs on pages 1 to 6, 8, 9, 13, 15, 17, 25 and 29 does not contain the personal information of other individuals. It is either solely the appellant's own personal information or is not personal information at all. Therefore, section 38(b) cannot apply to it, and I find that it is not exempt from disclosure under the *Act*. In this context, I do not need to address

¹² Specifically, the police submitted that the handwriting would be distinctive and therefore consist of the personal information of the involved party or parties. When specifically asked in the Notice of Inquiry if the identity of the "involved party" with distinctive writing was known, the police responded that it was not.

¹³ Additionally, the police did not claim that section 52(3) excluded the photographs from the scope of the *Act*. The circumstances of the appeal are such that the photographs are not obviously excluded, and I have decided that I do not need to consider the issue in this order.

the parties' other arguments on the application of the personal privacy exemption.

Severance

[37] In fashioning the disclosure provisions of this order, I considered the issue of severance. Section 4(2) of the *Act* obliges the police to disclose as much of any responsive record as can reasonably be severed without disclosing material that is exempt or, in this appeal, non-responsive. One of the key considerations in approaching severance is reasonableness. Section 4(2) does not require an institution to sever and disclose a record if doing so would result in the disclosure of meaningless or disconnected snippets.

[38] Above, I stated that I would be ordering disclosure of the complete photographs at pages 1 to 3. These photographs contain the appellant's personal information and will give her a sense of the graffiti mosaic on the wall. I am satisfied that no other individuals may be identified by the disclosure of these pages, due to their scale. In the case of the photographs at pages 4 and 5, however, these are moderately enlarged views of the entire wall in which some content, including names and content relating to individuals other than the appellant, is discernable. Therefore, because of the scale of these two photographs and because the appellant will receive enlarged versions the graffiti content responsive to her narrowed request, I find that applying severance to disclose the responsive information as it appears on pages 4 and 5 is not a reasonable exercise and I will not order that it be done.

[39] However, I find that pages 6, 8, 9, 13, 15, 17, 25, 29 can reasonably be severed without disclosing information that is not responsive to her request. These photographs represent various degrees of enlargement of the two sections of the wall where references to the appellant appear. It is not entirely clear that the disclosed information will assist the appellant in deciding her next steps, but it is information that is responsive to her request and she is entitled to receive access to it.

ORDER:

1. I order the police to disclose to the appellant the photographs at pages 1 to 3 in full and the ones at pages 6, 8, 9, 13, 15, 17, 25, and 29 in part, as they are severed in the copy provided with this order. The information that is to be disclosed to the appellant in each photograph is highlighted. I order the police to disclose the records by **July 12, 2019**, but not before **July 5, 2019**.
2. In order to verify compliance with this order, I reserve the right to require the police to provide me with copies of the records disclosed to the appellant pursuant to Provision 1.

Adjudicator