

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3788

Appeal MA17-677

Toronto Police Services Board

June 18, 2019

Summary: The appellant made a three-part access request for records relating to herself for a specified time period and at a specified address. 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. The police also found some information not to be responsive to the request. In this order, the adjudicator 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) (definition of "personal information"), 17 and 38(b).

Orders and Investigation Reports Considered: Orders Mo-2609-I, MO-2980, and MO-2513.

BACKGROUND:

[1] The Toronto Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following:

1. All video tapes done by detective at 12 division given to me in full.
2. All police reports filed by me to PC in car because of death threat by [a named individual] aka [a nickname] at [a specified address in North York, Ontario].

3. All complaints to Police about [an apartment number] from 2012 to 2015 where a violent on me occurred and I did a police statement to be given to me.

[2] The police issued a decision granting the requester partial access to the responsive records, which were four occurrence reports. The police denied access to the remainder of the records pursuant to the discretionary personal privacy exemption at section 38(b) of the *Act*. The police also stated that it removed some information in one of the occurrence reports on the basis that it was not responsive to the request.

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

[4] During mediation, the appellant noted to the mediator that some of the information in the records is inaccurate or spelled incorrectly. The police responded that the appellant could address her concerns about the information in the records by exercising her right to request correction of her personal information under the *Act*. The appellant indicated that she intends to submit a correction request to the police. Accordingly, section 36(2)(a) (right of correction) is no longer at issue in this appeal.

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

[6] During my inquiry, I invited the police and the appellant to provide representations. Both parties provided representations. 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

[7] In this order, I uphold the police's decision.

RECORDS:

[8] The records at issue are four general occurrence reports.

[9] During mediation, the appellant argued that another video or audio statement should exist with a specified officer. In their representations, the police submit that this officer was contacted and stated the following: "I have never taken a video or an audio statement from [the appellant]." The appellant had an opportunity to respond to this statement and has not done so. As such, I find that the existence of another video or audio statement is no longer at issue in this appeal.

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*.

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 information is 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?

[10] 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.

[11] "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,

(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;

[12] 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

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

[14] The police submit that the records contain “personal information” as defined under the *Act*. They submit that the records contain the personal information of several affected parties and the appellant, including their names, addresses, date of births and other identifying information about them.

[15] Although the appellant provided representations, her representations did not address this issue.

[16] Based on my review of the records, I find that they contain the personal information of the appellant and several affected parties. Specifically, they contain personal information of the appellant and other individuals, which would fall within paragraphs (a), (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?

[17] 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.

[18] 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

² Order 11.

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

appellant.⁴

[19] 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).

[20] 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).

[21] 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

[22] 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 factors or presumptions under sections 14(2) and (3) apply.

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

[24] 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 personal 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.

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.

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

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.

[25] Although the police submit that none of the section 14(2) factors are relevant, I find that section 14(2)(f) (the personal information is highly sensitive) is relevant. I note that the personal information at issue is contained in several police reports. As Adjudicator Colin Bhattacharjee states in Order MO-2980:

However, the names and addresses of individuals have greater sensitivity when this information is collected by the state or agencies of the state such as the police. For example, if the police interview a witness who saw a murder and can identify the suspect, the witness's name and address would clearly be highly sensitive. In other cases, however, a witness' name and address may be sensitive, but not necessarily highly sensitive.

[26] In this case, due to the nature of some of the allegations, the names and addresses of the alleged suspects and witnesses would be highly sensitive. As such, I find that this factor weighs in favour of non-disclosure of the withheld information.

[27] In her representations, the appellant states:

I want the privacy commissioner to release the police evidence. Showing why 4 gang members that sell and produce weed and pimp women and sell their naked image on the internet never got questioned or interview by anyone.

[28] It appears that the above statements may be the reasoning behind the appellant's access request. As such, it appears that she may wish to rely on the factor at section 14(2)(a) (the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny). However, I do not find that this factor is relevant as it is evident from the records that the police did conduct investigations into the appellant's complaints. However, the appellant believes their investigations did not progress as much as she would like. As well, I note that, during one of the investigations, the police attempted to contact the appellant to discuss the matter further, but the phone number she provided was no longer in service.

[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 apply. I find that the factor listed in paragraph 14(2)(f) applies to most of the withheld information, weighing against the disclosure of this information. I also find that the

¹⁰ Orders P-242 and MO-2235.

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.

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 under this section.

[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 relationships between the appellant and the affected parties, along with the privacy interests of these other individuals

¹¹ Order MO-1573.

¹² Section 43(2).

using sections 14(1) to (4) as a guideline. The police also submit that they considered the interaction between sections 28 and 29 of the *Act*.¹³

[36] Based on my review of the police's representations and the nature and content of the records at issue, I find that the police properly exercised their discretion to withhold the personal information 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 relationship between the appellant and the affected parties; and the wording of the exemption and 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 information is 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.¹⁴

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

¹³ These sections relate to the collection of personal information by an institution, such as the police.

¹⁴ Orders P-134 and P-880.

the request.¹⁵

[40] The police claim that three portions of one of the general occurrence reports are not responsive to the request.¹⁶ Upon reviewing them, I find that they are not responsive as they appear to be an IP address that clearly does not reasonably relate to the appellant's request. As such, I do not find that this information is responsive to the request.

ORDER:

I uphold the police's decision and dismiss the appeal.

Original Signed By: _____

June 18, 2019 _____

Lan An
Adjudicator

¹⁵ Orders P-880 and PO-2661.

¹⁶ See general occurrence reports GO# TP 2016-9001475.