

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3817

Appeal MA18-63

Peel Regional Police Services Board

August 13, 2019

Summary: The appellant made a request to the Peel Regional Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for “personal information – everything under my name.” The police issued a decision granting partial access to some records, and denied access to other records pursuant to section 38(a) (discretion to refuse requester’s own information), in conjunction with sections 8(1)(d) and 8(1)(g) (law enforcement), and section 38(b) (personal privacy) of the *Act*. 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 8(1)(d), 8(1)(g), 38(a), and 38(b).

OVERVIEW:

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

Personal Information – everything under my name.

[2] The police issued a decision granting partial access to some records, while denying access to other records. Partial and complete access was denied pursuant to section 38(a) (discretion to refuse requester’s own information), in conjunction with sections 8(1)(d) and 8(1)(g) (law enforcement), and section 38(b) (personal privacy) of the *Act*. The police also determined that one of the requested records fell outside the scope of the *Act*.

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

[4] During mediation, the appellant confirmed that he was only seeking access to the severed information on pages 10 to 14 and complete access to pages 46 to 49 of the records. Both of these records are police occurrence reports. As such, only those records remain at issue in this appeal.

[5] As a mediated resolution was not possible, the appeal was transferred to the adjudication stage, where an adjudicator may conduct an inquiry under the *Act*. The adjudicator formerly assigned to this appeal sought and received representations from the parties, and these were shared in accordance with IPC *Practice Direction Number 7*.¹

[6] Subsequently, the appeal was transferred to me to continue the adjudication of the appeal. In this order, I uphold the police's decision to withhold the information at issue, and dismiss the appeal.

RECORDS:

[7] The information at issue in this appeal consists of portions of police occurrence report PR150 and police occurrence report PR140, in its entirety.

ISSUES:

- A. Does the record 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(a) in conjunction with the sections 8(1)(d) and 8(1)(g) exemptions apply to record PR140?
- C. Does the discretionary exemption at section 38(b) apply to the information at issue in record PR150?
- D. Did the police exercise their discretion under sections 38(a) and 38(b)? If so, should this office uphold the exercise of discretion?

¹ No representations were received from affected parties.

DISCUSSION:

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

[8] 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, to whom it relates. That term is defined in section 2(1). The relevant portions in this appeal 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;

[9] 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

[10] 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

² Order 11.

of a personal nature about the individual.³ To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁴

Representations

[11] The police submit that both occurrence reports contain personal information pertaining to the appellant and affected parties, specifically the type outlined in paragraphs (a), (b), (d), (e), (g) and (h) of section 2(1). The police submit that record PR150 contains the personal information of two affected parties that falls within paragraphs (d) and (e): the affected parties' address, telephone numbers, views and opinions.

[12] The appellant agrees that both occurrence reports contain his personal information and the personal information of the affected parties.

[13] After reviewing the representations of the parties and the records at issue, I find that the records at issue contain the personal information of the appellant and three affected parties pursuant to paragraphs (a), (b), (d), (e), (g) and (h) of section 2(1) of the *Act*.

Issue B: Does the discretionary exemption at section 38(a) in conjunction with the sections 8(1)(d) and 8(1)(g) exemptions apply to record PR140?

[14] 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.

[15] Section 38(a) reads:

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

if section 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

[16] Section 38(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.⁵

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

⁴ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

⁵ Order M-352.

[17] Where access is denied under section 38(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

[18] In this case, the institution relies on section 38(a) in conjunction with sections 8(1)(d) and 8(1)(g).

[19] Section 8(1) states, in part:

(1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,

(d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;

(g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;

[20] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.⁶

[21] It is not enough for an institution to take the position that the harms under section 8 are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter.⁷ The institution must provide detailed evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.⁸

Section 8(1)(d): confidential source

[22] The institution must establish a reasonable expectation that the identity of the source or the information given by the source would remain confidential in the circumstances.⁹

⁶ *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

⁷ Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

⁸ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

⁹ Order MO-1416.

Section 8(1)(g): law enforcement intelligence information

[23] The term “intelligence information” means:

Information gathered by a law enforcement agency in a covert manner with respect to ongoing efforts devoted to the detection and prosecution of crime or the prevention of possible violations of law. It is distinct from information compiled and identifiable as part of the investigation of a specific occurrence.¹⁰

Representations

[24] The police submit that the exemption at section 8(1)(d) applies to record PR140, because it is reasonably expected that disclosure would reveal the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by a confidential source.

[25] The police submit that the withheld information relates to information provided through Peel Crime Stoppers, and all information supplied through Crime Stoppers is provided under a strict assurance of confidentiality. The police submit that the law is clear that informer privilege extends to protect the source of anonymous tips received through Crime Stoppers as confirmed by the Supreme Court of Canada in *R. v. Leipert*.¹¹ The police further submits that informer privilege is a class privilege that unequivocally protects a confidential police informant’s identity and that privilege is virtually absolute, except when an accused person establishes that his or her innocence is at stake. The police add that the privilege extends to any information that may identify the confidential informant.

[26] The police submit that due to the nature of the information provided by the confidential informant, if the information at issue is disclosed, the informant would be clearly identifiable by the appellant.

[27] The police submit that the exemption at section 8(1)(g) also applies to record PR140, because the disclosure of the information at issue would interfere significantly with the Crime Stoppers program by removing the guarantee of anonymity, and this would interfere with the gathering of future intelligence information.

[28] The appellant submits that with respect to record PR140, he has no knowledge about the record. The appellant submits that he does not seek the informant’s

¹⁰ Orders M-202, MO-1261, MO-1583 and PO-2751; see also Order PO-2455, confirmed in *Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 4233 (Div. Ct.).

¹¹ v

information, and he agrees that informer privilege is a class privilege. The appellant submits that he wants access to record PR140, because the information could be incorrect and could lead to false assumptions of his "motive, character, etc." The appellant submits that this is detrimental to his interest, because it is a secret file about him. Furthermore, the appellant submits that informer privilege should not apply, because his innocence is at stake. The appellant argues that he should at least be advised of the nature of the record and what incident it relates to.

Analysis and findings

[29] In order for the exemption at section 8(1)(d) to apply, an institution must establish a reasonable expectation that the identity of the source, or the information given by the source, would remain confidential in the circumstances.¹²

[30] The information contained in record PR140 was supplied through Crime Stoppers. I accept the police's argument that all information supplied through Crime Stoppers is provided under a strict assurance of confidentiality. I find it reasonable that a source that supplies information to a program such as Crime Stoppers would expect that their information would be held in confidence, especially in the circumstances described in record PR140. Thus, I find there was a reasonable expectation that both the identity of the source and the information provided by that source would remain confidential.

[31] Based on my review of record PR140, I am satisfied that if the record were disclosed, the identity of the source of information would be obvious to the appellant. In coming to this conclusion, I considered the appellant's argument that he should at least be advised about what incident record PR140 relates to. However, I am satisfied that if the appellant were advised about what incident record PR140 relates to by disclosure of the record, it would reveal the identity of the source of information due to the nature of the incident and the information provided. Furthermore, I also considered if record PR140 could be severed to provide the appellant with partial access to it. However, I find that the record could not be reasonably severed to provide the appellant with any meaningful information, without revealing the confidential source of information.

[32] Therefore, I find that record PR140 is exempt from disclosure in its entirety pursuant to the discretionary exemption at section 38(a) in conjunction with section 8(1)(d) of the *Act*, subject to my findings below with respect to the police's exercise of discretion. Given this finding, I do not need to review whether the exemptions in sections 8(1)(g) and 38(b) would also apply to record PR140.

¹² Order MO-1416.

Issue C: Does the discretionary exemption at section 38(b) apply to the information at issue in record PR150?

[33] As stated above, 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.

[34] Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an “unjustified invasion” of the other individual’s personal privacy, the institution may refuse to disclose that information to the requester. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.

[35] If the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b).

[36] Sections 14(2) and (3) also help in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 38(b). Also, section 14(4) lists situations that would not be an unjustified invasion of personal privacy. If any of paragraphs (a) to (c) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b).

[37] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy 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.¹³

[38] If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 38(b). Section 14(2) also lists various factors that may be relevant in determining whether disclosure of the personal information would be an unjustified invasion of personal privacy. 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).¹⁴

Representations

[39] The police submit that the presumption at paragraph (b) of section 14(3) applies

¹³ Order MO-2954.

¹⁴ Order P-99.

to the withheld information in record PR150, because that information was gathered as part of an investigation into a possible violation of law, even though no criminal proceedings were commenced. The police submit that since section 14(3)(b) applies, disclosure of the withheld information in record PR150 would constitute an unjustified invasion of personal privacy.

[40] The police submit that paragraph (f) of section 14(2) applies to the withheld information, because the information is highly sensitive, and there is a reasonable expectation of significant personal distress to the affected parties, if it were disclosed. The police further submit that none of the circumstances in section 14(4) apply to the withheld information.

[41] The police submit that in light of the considerations above, disclosure of the withheld information in record PR150 would constitute an unjustified invasion of another individual's personal privacy and it is therefore exempt from disclosure under section 38(b) of the *Act*.

[42] The appellant submits that with respect to record PR150, he already knows the identity of both affected parties, so disclosure of their personal information would not cause any harm to them. The appellant further submits that nothing happened to justify the affected party becoming concerned about the other affected party. The appellant submits that if the request for police assistance was made on the grounds of personal prejudice of race, age, gender, colour, personal dislike or anything other than facts, it is important for him to access the withheld information.

Analysis and findings

[43] The police argue that none of the exceptions at sections (a) to (e) of 14(1) apply, and I agree and find that none apply to the withheld information. The police also argue that none of the exceptions in section 14(4) apply, and I also agree and find that none of them apply in the circumstances of this appeal.

[44] The police argue that the presumption in section 14(3)(b) applies. Section 14(3)(b) states:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information, was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation[.]

[45] Based on my review of the record, I am satisfied that the withheld information in

record PR150 was compiled and is identifiable as part of investigations into possible violations of law. 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.¹⁵ Therefore, I find that the presumption at section 14(3)(b) applies to the withheld information, and its disclosure is presumed to be an unjustified invasion of the personal privacy of the individuals to whom the information relates.

[46] While the appellant made arguments that the withheld information in PR150 should be disclosed, he did not raise or argue that any factors favouring disclosure in section 14(2)(a) to (d) are relevant, and I find that none apply in the circumstances of this appeal. I also considered whether any unlisted factors favouring disclosure, such as inherent fairness issues, apply and I also find that none apply.

[47] Since I have found that the section 14(3)(b) presumption applies and there are no factors favouring disclosure of the withheld information, balancing the interests of the parties, the facts of this appeal weigh against disclosure of the personal information at issue. Therefore, I find that the information at issue in record PR150 is exempt from disclosure pursuant to the discretionary exemption at section 38(b) of the *Act*, subject to my findings below with respect to the police's exercise of discretion.

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

[48] 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.

[49] 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.

[50] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁶ This office may not, however,

¹⁵ Orders P-242 and MO-2235.

¹⁶ Order MO-1573.

substitute its own discretion for that of the institution.¹⁷

[51] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹⁸

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- 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
- the age of the information
- the historic practice of the institution with respect to similar information.

Representations

[52] The police submit that in determining whether or not to disclose the withheld information, they exercised their discretion appropriately. The police submit that they considered the relevant factors under the *Act*, including the balancing of rights and the

¹⁷ Section 43(2).

¹⁸ Orders P-344 and MO-1573.

need to protect sensitive information. The police submit that they provided information that would have already been within the appellant's knowledge, but withheld sensitive and personal information pertaining to the affected parties.

[53] The police submit that they exercised their discretion in good faith, taking into account the relevant factors without consideration of any irrelevant factors, and they maintain that their exercise of discretion and decision should be upheld.

[54] The appellant submits that the police did not properly exercise their discretion in a fair manner, or take into account relevant considerations of sections 38(a) and (b), such as the withheld information contained in the report could lead to false assumption of the appellant's character. The appellant submits that this may lead the misjudgement of him in the future.

Analysis and findings

[55] After considering the representations of the parties and the circumstances of this appeal, I find that the police did not err in their exercise of discretion with respect to their application of section 38(a) in conjunction with section 8(1)(d), and section 38(b) of the *Act*. I am satisfied that they did not exercise their discretion in bad faith or for an improper purpose. I am also satisfied that the police took into account relevant factors, and did not take into account irrelevant factors in the exercise of its discretion. In particular, it is evident that the police took into account the fact that the records contain the appellant's own personal information, and I am satisfied that the police provided him with access to as much information as possible by applying the exemptions in a limited and specific manner.

Accordingly, I find that the police exercised their discretion in an appropriate manner in this appeal, and I uphold it.

ORDER:

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

Original signed by _____

Anna Truong
Adjudicator

August 13, 2019