

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3835

Appeal MA18-404

The Greater/Grand Sudbury Police Services Board

September 20, 2019

Summary: The appellant submitted a request to the Greater/Grand Sudbury Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to an occurrence report for an incident involving him. The police granted partial access to the responsive record with severances made under section 38(a) (discretion to refuse requester's own personal information), in conjunction with section 8(1)(l) (facilitate commission of an unlawful act), and section 38(b) (personal privacy). In this order, the adjudicator upholds the police's decision, and dismisses the appeal.

Statutes Considered: The *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 8(1)(l), 14(3)(b), 38(a) and 38(b).

OVERVIEW:

[1] The Greater/Grand Sudbury Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the full copy of an occurrence report for an incident involving the requester.

[2] The police issued a decision granting partial access to the responsive record with severances pursuant to section 38(a) (discretion to refuse requester's own personal information), in conjunction with section 8(1)(l) (facilitate commission of an unlawful act), and section 38(b) (personal privacy).

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

[4] During mediation, the appellant advised that he was pursuing access to the full

responsive record. The police confirmed that they would not change their decision. At the appellant's request, the mediator contacted an affected party to seek consent to disclose additional personal information. However, the affected party did not consent.

[5] As a mediated resolution was not possible, the appeal proceeded to the adjudication stage, where an adjudicator may conduct an inquiry under the Act. I decided to commence the inquiry by inviting representations from the police, initially. A non-confidential copy of the police's representations was shared with the appellant. The severances were made in accordance with the IPC's Practice Direction Number 7, because the severed information would reveal the substance of records for which an exemption under the Act has been claimed. Although I invited the appellant to submit representations, he declined to submit any.

[6] In this order, I uphold the police's decision, and dismiss the appeal.

RECORD:

[7] The information at issue in this appeal is the withheld portions of a three-page police occurrence report.

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 section 8(1)(l) exemption apply to the information at issue?
- C. Does the discretionary exemption at section 38(b) apply to the information at issue?
- D. Did the police exercise their discretion under sections 8(1)(l), and 38(a) and 38(b)? If so, should this office uphold the exercise of discretion?

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 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,
- c. any identifying number, symbol or other particular assigned to the individual,
- d. the address, telephone number, fingerprints or blood type of the individual,
- e. the personal opinions or views of the individual except if they relate to another individual,
- 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.¹ To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.²

[10] The police submit that the withheld information contains personal information of the complainant, such as the complainant's full name, address, date of birth, phone number, driver's licence, income and details about the complainant's family. Therefore, the police submit that the withheld information consists of personal information according to paragraphs (a) – (e) and (g) – (h) of section 2(1) of the Act.

[11] As noted above, the appellant did not make any representations in this appeal.

[12] After reviewing the record and the representations of the police, I find that the

¹ Order 11.

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

withheld information contains the mixed personal information of the appellant and another individual, the complainant. Specifically, I find that the withheld information contains personal information about them that fits within paragraphs (a) – (e) and (g) – (h) of section 2(1) of the Act.

Issue B: Does the discretionary exemption at section 38(a) in conjunction with the section 8(1)(l) exemption apply to the information at issue?

[13] 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.

[14] The police have claimed section 38(a), which 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.

[15] 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.³

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

[17] In this case, the police rely on section 38(a) in conjunction with section 8(1)(l) to withhold police operational codes. Section 8(1)(l) states:

1. A head may refuse to disclose a record if the disclosure could reasonably be expected to,
 - i. facilitate the commission of an unlawful act or hamper the control of crime.

[18] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.⁴

³ Order M-352.

⁴ *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

[19] 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.⁵ 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.⁶

[20] The police submit that they denied access to codes such as terminal and map codes pursuant to section 38(a) in conjunction with section 8(1)(l). The police submit that if this information is disclosed, it would facilitate the commission of an unlawful act or hamper the control of a crime.

Analysis and findings

[21] Previous orders of this office have found that police codes are exempt from disclosure under section 8(1)(l). For example, in Order MO-3773, Adjudicator Cathy Hamilton stated:

This office has issued many orders regarding the release of police codes and has consistently found that section 8(1)(l) applies to ten codes, as well as other law enforcement codes. The rationale for applying section 8(1)(l) to exempt these types of codes from disclosure is to avoid compromising police officers' ability to provide effective policing services. The disclosure of these codes would make it easier for individuals engaged in illegal activities to carry them out and would jeopardize the safety of police officers.

[22] I agree with this reasoning, and I find that it is relevant to the information at issue in this appeal. As a result, I am satisfied that disclosure of the police codes could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. Accordingly, subject to my findings on the police's exercise of discretion, below, I find that the withheld police codes are exempt pursuant to section 38(a) in conjunction with section 8(1)(l) of the Act .

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

[23] As noted 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

⁵ Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

⁶ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

number of exemptions from this right.

[24] 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.

[25] 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).

[26] 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).

[27] 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.⁷

[28] 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).⁸

Representations

[29] The police submit that none of the paragraphs from (a) to (e) of section 14(1) apply to the withheld information. The police also submit that none of the factors in section 14(2) apply, and the exceptions in section 14(4) also do not apply.

[30] The police submit that paragraph (b) of section 14(3) applies to the withheld information, because that information was compiled and is identifiable as part of an

⁷ Order MO-2954.

⁸ Order P-99.

investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation.

[31] The police further submit that in determining if the disclosure of personal information would constitute an unjustified invasion of personal privacy, a number of factors were considered. The police submit that the most obvious factor is that disclosing the personal information pertaining to the complainant would completely contradict the complainant's wishes and would certainly be breaching their personal privacy, as the complainant reported a breach of their personal privacy stemming from the appellant to police.

[32] As noted previously, the appellant did not submit any representations.

Analysis and findings

[33] 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.

[34] 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[.]

[35] Based on my review of the record, I am satisfied that the withheld information 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.⁹ 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.

[36] As noted above, the appellant did not make any representations or provide information to suggest that any listed or unlisted factors favouring disclosure in section 14(2) 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

⁹ Orders P-242 and MO-2235.

issues, apply and I also find that none apply.

[37] 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 this appeal 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 sections 8(1)(l), and 38(a) and 38(b)? If so, should this office uphold the exercise of discretion?

[38] The sections 38(a), 38(b) and 8(1)(l) exemptions are discretionary, and permit 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.

[39] 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.

[40] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁰ This office may not, however, substitute its own discretion for that of the institution.¹¹

[41] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹²

- 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

¹⁰ Order MO-1573.

¹¹ Section 43(2).

¹² Orders P-344 and MO-1573.

- 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

[42] The police submit that they exercised their discretion under section 8(1)(l), 38(a) and 38(b), withholding the appellant's information only to the extent required to protect the privacy and personal information of all other affected parties.

[43] The police acknowledge that an individual has the right to access their personal information, but also state that the privacy of individuals should be protected. Therefore, the police submit that they have provided the appellant with information accordingly, and in good faith.

[44] Furthermore, the police submit that they did not exercise their discretion in bad faith, and provided the appellant with as much information as they would have provided to any other requester seeking personal information. The police submit that all relevant factors were taken into account and no irrelevant factors were taken into account.

Analysis and findings

[45] After considering the representations and the circumstances of this appeal, I find that the police did not err in their exercise of discretion with respect to their decision to

deny access to some information under section 38(a) in conjunction with section 8(1)(l), 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.

[46] I am also satisfied that the police took into account relevant factors, and did not take into account irrelevant factors in the exercise of 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.

[47] 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 decision, and dismiss the appeal.

Original Signed by: _____

Anna Truong
Adjudicator

September 20, 2019 _____