

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-3899-I

Appeal MA19-00358

Durham Regional Police Services Board

February 6, 2020

Summary: Durham Regional Police Services Board received a request under the *Municipal Freedom of Information and Protection of Privacy Act* for two specific police reports and two videotapes of the requester's interviews with the police. The police denied access to the two responsive police reports, relying on the discretionary personal privacy exemption in section 38(b). The police also indicated that no responsive videotapes exist.

In this interim order, the adjudicator does not uphold the police's exercise of discretion under section 38(b) with respect to the narratives in the police reports and orders them to re-exercise their discretion. She upholds the police's decision under section 38(b) to withhold the remaining information in the reports. She also upholds the police's search for the responsive videotapes.

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"), 14(3)(b), 14(2)(h), 17(1), and 38(b).

OVERVIEW:

[1] Durham Regional Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA or the Act) for access to the following information:

1. [report #] [names of requester, her spouse, and her neighbours]
2. [report #] [names of requester, her spouse, and her neighbours]

3. [police officer's] taped interview recording copy of on or about [on or about specific date in 2018]
4. [another police officer's] taped video/on or about [on or about specific date in 2017]

[2] The police issued a decision denying access to the two reports identified as responsive to items 1 and 2 of the request, pursuant to the discretionary personal privacy exemption in section 38(b) of the *Act*. The police also indicated that no responsive records exist with respect to items 3 and 4 of the request.

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

[4] During the course of mediation, the appellant raised the issue of search, stating that videotaped interviews should exist. The mediator conveyed the appellant's concerns to the police. The police advised the mediator that they did not have any taped interviews or videos relating to the appellant's request. The police further advised the mediator that they were maintaining their decision to deny access to the responsive records.

[5] As mediation did not resolve the issues in this appeal, it was transferred to the adjudication stage where an adjudicator may conduct an inquiry.

[6] Representations were then sought from the police, the appellant, her spouse and her neighbours.

[7] The appellant's spouse consented to disclosure of his personal information in the records. The neighbours named in the request, the affected persons, did not provide representations, but did contact this office to advise that they object to disclosure of their personal information in the records.

[8] In this order, I do not uphold the police's exercise of discretion under section 38(b) with respect to the narratives in the police reports and order them to re-exercise their discretion. I uphold the police's decision under section 38(b) to withhold the remaining information in the reports. I also uphold the police's search for the responsive videotapes.

RECORDS:

[9] The records at issue in this appeal consist of two police general occurrence reports that total 15 pages.

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 personal privacy 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. Did the police conduct a reasonable search for records?**

DISCUSSION:

Issue 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 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) 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,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(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;

[11] 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

[12] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.²

[13] 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

[14] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁴

Representations

[15] The police state that the records responsive to this appeal are two general occurrence police reports, prepared from information from two affected persons, who are not the appellant. The police provided representations on the entirety of the reports and state that they contain the affected persons', as well as the appellant's, names, addresses, phone numbers, dates of births, ethnicities, employers, driver's licence numbers and details of an ongoing neighbour dispute with the appellant.

[16] The appellant did not address this issue in her representations.

Analysis/Findings

[17] The records relate to an ongoing dispute between two sets of neighbours regarding their properties and their interaction as neighbours. The appellant and her spouse live on one property, which is a neighbouring property to that of the affected

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

persons.

[18] I find that the two general occurrence reports contain the personal information of the appellant, her spouse, and the affected persons. This information includes these individuals' addresses, phone numbers, dates of birth, ethnicities, employers, and driver's licence numbers, as well as the personal opinions or views of the affected persons.

[19] Therefore, the records contain the personal information of the appellant, her spouse and the affected persons in accordance with paragraphs (a) to (e), and (g) of the definition of personal information in section 2(1).

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

[20] 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.

[21] 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.⁵

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

[23] If the information fits within any of paragraphs (a) to (e) of section 14(1), or paragraphs (a) to (c) of section 14(4), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). Other than the application of section 14(1)(a) regarding the signed consent of the appellant's spouse, the information in the records does not fit within these exceptions.

[24] The appellant's spouse, whose written consent was supplied by the appellant, consented to disclosure of his personal information in the records. As this individual provided a written consent to the disclosure of their personal information in the context of an access request, I am satisfied that the exception in section 14(1)(a) applies.⁶ This section reads:

⁵ See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 38(b).

⁶ See Order PO-1723.

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access.

[25] Therefore, by virtue of their consent under section 14(1)(a), the personal information of the appellant's spouse is not exempt under the section 38(b) personal privacy exemption.

[26] Therefore, I will order disclosure of the appellant's spouse's information in the records to the appellant, other than that which is intermingled with that of the affected persons because, as I find below, the affected parties' personal information is exempt from disclosure under section 38(b). The information that I will order disclosed consists of discrete biographical information that the police garnered from other occurrence reports.

[27] Certain information in the records also relates solely to the appellant. As was the case with her spouse, the information that is solely that of the appellant is discrete biographical information garnered by the police from other police reports. In her representations, the appellant produced the narratives from a number of other police general occurrence reports related to the ongoing dispute in the records.

[28] I will consider the application of section 38(b) to the remaining personal information in the records, including that of the appellant and her spouse, which is intermingled with the personal information of the affected persons.

[29] 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).

[30] 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

[31] 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).

Representations

[32] The police rely on the presumption in section 14(3)(b), which reads:

⁷ Order MO-2954.

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.

[33] The police also appear to be relying on the factor in section 14(2)(h), which reads:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

the personal information has been supplied by the individual to whom the information relates in confidence.

[34] The police state that the information at issue in the two occurrence reports was provided in confidence to the police by the affected persons as part of a criminal harassment investigation involving the appellant, but the affected persons have not consented to their disclosure.

[35] The police submit that if the affected persons had been concerned that this information would be released to the appellant, they may not have been able to speak freely and honestly to the police about this issue. They state that they must protect the information given to the police in confidence, because if they do not then individuals may not want to participate in police investigations and this would be a disservice to justice.

[36] The appellant did not address this issue directly in her representations. Instead, she provided details of her and her spouse's contentious history with the affected persons.

Analysis/Findings

[37] 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

⁸ Orders P-242 and MO-2235.

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

[38] It is clear from my review of the information at issue in this appeal that the personal information in the reports was compiled by the police and is identifiable as part of an investigation into a possible violation of law. The possible violation of law was a charge of criminal harassment under the *Criminal Code*. Therefore, I find that section 14(3)(b) applies to the records.

[39] 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.¹⁰

[40] 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).¹¹

[41] The police's representations raise the application of section 14(2)(h), by suggesting that the information was supplied in confidence to the police by the affected persons. This factor applies if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Thus, section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.¹²

[42] Based on my review of the two general occurrence reports, the ongoing and longstanding dispute that is the subject matter of the records, which includes a number of publicly available documents related to this dispute, I do not find that the personal information in them was supplied by the affected persons to the police in confidence. Therefore, I find that the factor in section 14(2)(h), which favours privacy protection, does not apply.

[43] As stated above, 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.

[44] I have taken into account the application of the presumption against disclosure in section 14(3)(b) and the absence of any listed or unlisted factors favouring disclosure, as well as the parties' representations and the information at issue in the records. I find that disclosure of the personal information remaining at issue in the records would be an unjustified invasion of personal privacy of the affected persons. Therefore, this information is exempt under section 38(b), subject to my review of the police's exercise of discretion.

¹⁰ Order P-239.

¹¹ Order P-99.

¹² Order PO-1670.

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

[45] 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.

[46] 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.

[47] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹³ This office may not, however, substitute its own discretion for that of the institution.¹⁴

[48] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹⁵

- 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

¹³ Order MO-1573.

¹⁴ Section 43(2).

¹⁵ Orders P-344 and MO-1573.

- 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

[49] The police state that:

This institution understands that section 38(b) of the *Act* introduces a balancing principle. The records at issue contain the personal information of both the appellant and the affected parties¹⁶ in the two requested reports; therefore, we considered the information and weighed the appellant's right of access to her own information against the affected parties right to the protection of their privacy. The appellant does have a right to access her own personal information; however, the records at issue contain other information disclosed by the affected parties about the appellant and also disclose the affected parties' personal information. The information contained in the two requested incident reports was supplied by the affected parties in a complaint about the appellant, and they believed they were supplying this information in confidence to the [police]; therefore, their right to privacy needs to be protected.

The personal information relating to the appellant in the two requested reports is minimal, in that it only contains her name, date of birth, address, telephone number, driver's licence number, and ethnicity, but no concerns or opinions, as she was not consulted with for either of these reports.

The appellant's information was not given to the [police] by the affected parties, but gathered previously from the appellant by the [police] for another incident. The personal information relating to the affected parties in the two requested reports is all of the same as the appellant's

¹⁶ Referred to as the affected persons in this order.

information, as well as their concerns and opinions about the appellant and another person, and they believed they were supplying this to the [police] officer in confidence...

[50] The appellant did not directly address this issue in her representations. Instead, she provided significant details about her and her spouse's ongoing dispute with their neighbours.

Analysis/Findings

[51] The records are two general occurrence reports. One is seven pages long; the other is eight pages long. The first three pages of each reports contains biographical information of the appellant, her spouse and the affected persons. I have found (above) that the police must disclose the biographical information of the appellant and her spouse, which is found in the first three pages of both reports.

[52] However, contrary to the police submissions, the narratives in the records contain the personal information of the appellant and her spouse. This personal information of the affected parties is intermingled with the affected persons' views or opinions about the appellant and her spouse in accordance with paragraph (g) of the definition of personal information in section 2(1) of the *Act*.

[53] I find that in denying access to the narratives of the police reports, the police exercised their discretion in an improper manner by not taking into consideration relevant considerations, namely that the narrative portions of the records contain the personal information of the appellant and her spouse.

[54] Therefore, I will be ordering the police to re-exercise their discretion under section 38(b) regarding the narratives at issue in the two records.

[55] The remaining portions of the records (not the narratives of the two reports or the biographical information of the appellant and her spouse), consist of the biographical information of the affected persons, as well as information as to why the reports were generated and concluded. I find that in withholding this information, the police exercised their discretion in a proper manner, taking into account proper consideration. Therefore, I uphold the police's exercise of discretion under section 38(b) with respect to this information.

Issue D: Did the police conduct a reasonable search for records?

[56] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a

reasonable search for records as required by section 17.¹⁷ If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[57] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.¹⁸ To be responsive, a record must be "reasonably related" to the request.¹⁹

[58] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.²⁰

[59] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.²¹

[60] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.²²

Representations

[61] The police state that the responsive records, the requested police reports and videotaped interviews, were searched for by an experienced police employee, who has been employed in the Records Department since August 2000, and further, has worked in the Information and Privacy Unit as an analyst gathering records and responding to thousands of requests for information since 2006. The police submit that this employee is very knowledgeable in all of the present and past records management systems (RMS) as well as the role of the various units within the police and, as such, is very qualified to identify and locate responsive records to all types of requests for information held by them. The police state:

Based on the request of the appellant in this matter, it was reasonable to look to the [the police's] present records management system for the requested records. In order to complete this request, the employee inputted the incident numbers which were given to us by the appellant

¹⁷ Orders P-85, P-221 and PO-1954-I.

¹⁸ Orders P-624 and PO-2559.

¹⁹ Order PO-2554.

²⁰ Orders M-909, PO-2469 and PO-2592.

²¹ Order MO-2185.

²² Order MO-2246.

into the police's [RMS] in order to determine what records were relevant to this request. This search resulted in the location of two General Occurrence Hardcopies, and there was no other information in [RMS] for either of these incidents.

In order to access the two video-taped interviews that were requested, the Analyst contacted [the police's] Video Disclosure Unit (VDU) by email, requesting copies of any videotaped interviews relating to the two named incident reports requested by the appellant, as well as three other incident numbers involving the appellant that occurred during the same time frames listed by the appellant on her request. The VDU responded that [it] only had one video relating to one of the incidents involving the appellant; however, the video was from another person, not the appellant. This video was supplied to the IPC upon the opening of this appeal file.

After being notified of this appeal, the Analyst decided to make further inquiries of the two [police] officers named in the requested video interviews. [One officer] advised that his last interaction with the appellant was in [month] 2016, which was prior to the dates given by the appellant. [Another officer] advised that he never formally interviewed the appellant, but did have a discussion in a side meeting room at one of the [police] Divisions; however, he did not take a statement from her, he was just gathering information for a report...

If the requested videotaped interviews did exist, they would still be on file with the [police's] VDU, as the retention schedule deadline would not have been met yet.

[62] The appellant believes that videotapes of her interviews with the police should exist, but is unsure of the date in 2017 when one of these interviews was recorded. She indicates that for the 2017 interview, she may have been interviewed approximately four months earlier than the date in the request. She states that one of the officers told her that she was being videotaped during this 2017 interview.

Analysis/Findings

[63] The appellant requested two specific videotapes of her interviews with two identified police officers, one on a date in 2017 and the other on a date in 2018.

[64] The police provided detailed representations as to their search for responsive videotapes. Their search only located one videotape; however, it was not a videotape of the appellant being interviewed. The appellant requested a videotape of her own interview with the police, not that of another individual.

[65] Based on my review of the parties' representations, and considering in particular the police's detailed representations on their search efforts, I find that the police made

a reasonable effort to identify and locate responsive videotapes related to the two dates identified by the appellant in her request.

[66] I find that the appellant has not provided a reasonable basis for me to conclude that videotaped recordings of interviews she asserts she had with the police on the dates set out in her request exist, but have not been located.

[67] Given the extensive interaction between the appellant and the police as set out in her representations, I do not agree with the appellant's submission that the police should have located an interview for a date that is four months prior to the date specified in her request.

[68] I find that the police have conducted a reasonable search for the videotapes for the appellant's interviews that occurred on or about the specific dates set out in her request. Therefore, I am upholding the police's search for these videotapes as reasonable.

ORDER:

1. I uphold the police's search for records responsive to the request.
2. I order the police to disclose the biographical information of the appellant and her spouse to the appellant found in the first three pages of each record by **March 13, 2020** but not before **March 9, 2020**. For ease of reference, I am providing the police with a copy of the first three pages of each record highlighting the information to be disclosed to the appellant.
3. I order the police to re-exercise their discretion in accordance with the analysis set out above concerning the three-page narratives in each record and to separately advise the appellant, the affected persons, and this office of the result of this re-exercise of discretion, in writing.
4. I also order the police to provide the appellant, the affected persons, and this office with an explanation of the basis for re-exercising their discretion.
5. The police are required to send the results of their re-exercise of discretion, and their explanation by no later than **March 9, 2020**. If the appellant or the affected persons wish to respond to the police's re-exercise of discretion, they must do so within 30 days of the date of the police's correspondence by providing me with written representations.
6. I remain seized of this matter in order to deal with any issues stemming from the re-exercise of discretion by the police.

Original Signed By: _____
Diane Smith

February 6, 2020

Adjudicator