

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3911

Appeal MA18-00840

Toronto Police Services Board

March 4, 2020

Summary: The police received an access request for an occurrence report, witness statement, officer notes and I/Cad report relating to a bicycle/pedestrian collision involving the requester. They granted partial access and relied on the discretionary personal privacy exemption at section 38(b) to withhold the remaining information. In this order, the adjudicator orders the police to disclose the name and address of the cyclist as it is not exempt under section 38(b) of the Act.

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(2)(d) and 38(b).

Orders Considered: Orders MO-2677, MO-2980, MO-3247, and MO-3875.

OVERVIEW:

[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 an occurrence report, witness statement, officer notes and I/Cad report relating to a bicycle/pedestrian collision involving the requester.

[2] The police granted partial access and relied on the discretionary personal privacy exemption at section 38(b) of the *Act* to withhold the remaining information. In addition, the police advised that some information was removed on the basis that it was

not responsive to the request.

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

[4] During mediation, the appellant advised that he is not interested in the information that is not responsive to his request. As such, this information is no longer at issue in this appeal, specifically pages 1 and 4 of the I/CAD report.

[5] The appellant indicated that he was seeking information in the records relating to the cyclist's (affected party's) involvement in the incident.

[6] The mediator contacted the affected party but he refused to consent to the disclosure of his personal information.

[7] As further mediation was not possible, the appeal was moved to the adjudication stage, where an adjudicator may conduct a written inquiry under the *Act*.

[8] I invited the police, appellant and the affected party to provide representations. I received representations from the police and the appellant. The affected party confirmed that he will not be providing representations.

[9] Pursuant to section 7 of this office's *Code of Procedure* and *Practice Direction Number 7*, a complete copy of the representations of the police and the appellant were shared with one another.

[10] In this order, I order the police to disclose some of the withheld information that is not exempt under section 38(b) of the *Act*. Specifically, I order them to disclose the affected party's name and address.

RECORDS:

[11] The records at issue consist of an I/CAD report, an officer's memorandum book notes, and a general occurrence report.

[12] During the inquiry, the appellant confirmed that he is only seeking information about the affected party. As such, I have removed from the scope of the request the personal information of another individual.

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?

DISCUSSION:

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

[13] 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.

[14] “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,

(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,

(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;

[15] 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

[16] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.²

[17] The police submit that the records contain the information of the appellant and

¹ Order 11.

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

other individuals, which falls within paragraphs (a), (b), (d) and (h) of the definition of "personal information" as defined in section 2(1) of the *Act*. As noted above, the appellant only seeks the affected party's information.

[18] Although the appellant provided representations, his representations did not address this issue.

[19] Based on my review of the records, I find that they contain the personal information of the appellant and the affected party. Specifically, they contain information of both individuals, which would fall within paragraphs (a), (b), (d) and (h) of the definition of "personal information" in section 2(1) of the *Act*. As these records contain the personal information of both the appellant and another individual, Part II of the *Act* applies, and I must consider whether the information at issue is 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?

[20] Since I found that the records contains the personal information of the appellant and another individual, 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.

[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 appellant.

[22] 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).

[23] 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.³ 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).

[24] 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

³ Order MO-2954.

personal privacy.⁴ 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).⁵

Representations

[25] The police submit that the presumption at section 14(3)(b) applies as the withheld personal information was compiled and is identifiable as part of an investigation into a possible violation of law.

[26] In addition, the police submit that the factor weighing against disclosure at section 14(2)(h) (the personal information has been supplied in confidence) applies. In this regard, the police cite Order MO-3028, where Adjudicator Stella Ball reiterates the test for section 14(2)(h). The police submit that every time an individual gives their personal information to the police, there is an expectation that the information will be held in confidence.

[27] The police also submit that the factor weighing in favour of disclosure at section 14(2)(d) (fair determination of rights) does not apply as the affected party has the right to have his privacy protected. They submit that the rights of the appellant do not outweigh those of the affected party.

[28] In response, the appellant explains that the records were created due to an incident in which he, a pedestrian, was hit by a cyclist, the affected party. He points out that he sustained facial trauma after being hit by the bicycle. As such, the appellant submits that he requires the identity of the affected party to be able to commence a lawsuit for damages.

[29] The appellant submits that the four-part test for section 14(2)(d) has been met:

- the right to sue for damages caused by the fault or neglect of a person is drawn from concepts of common law and the *Negligence Act*;
- the right is related to a proceeding which is being contemplated by the appellant;
- the personal information is significant to the determination of rights; and
- the appellant requires the personal information (specifically the name and contact information) in order to start the civil proceeding.

⁴ Order P-239.

⁵ Order P-99.

[30] The appellant also submits that section 14(1)(b) (compelling circumstances affecting health or safety) of the *Act* applies. He submits:

The incident to which the records pertain has caused various traumas and injuries to [the appellant], for which treatment and other modalities are required. The lack of identity of the potential defendant stands in the way of commencing a civil action for which damages can be sought for the appellant's recovery.

[31] In addition, he cites Order MO-2954 for the principle that the *Act* should not be used in a way that precludes individuals from exercising their legal rights.

[32] Finally, the appellant cites Order MO-2980, a dog bite case, where Adjudicator Colin Bhattacharjee found that the section 14(3)(b) presumption was outweighed by other factors, such as the appellant's fair determination of rights in section 14(2)(d), and an unlisted factor (the *Act* should not be used in a way that prevents individuals from exercising their legal rights) in section 14(2).

[33] In response, the police submit that they believe the section 14(2)(h) factor outweighs the section 14(2)(d) factor. They state:

This institution contends that personal information provided by any individual to any law enforcement agency implies that the information is being provided in confidence. If such information were routinely disclosed, it could heavily impact the trust members of the public have in any police service. This mistrust will deter the public from coming forward to provide information (i.e. essential facts such as complete details of an incident, or their full name and address) to the police regarding any incident, hindering police investigations, thus preventing the police from exercising their mandate properly.

[34] In addition, the police submit that the appellant could start a civil process against the other party as an unnamed defendant, and then use the *Rules of Civil Procedure* to obtain the defendant's contact information from the police or another body that holds that information. As such, the police submit that their decision to withhold the affected party's personal information is not a deterrent, nor an infringement of rights, impeding the appellant's ability to commence a civil action.

[35] The police submit that Order MO-2980 is distinguishable from the current appeal due to the different set of facts. They state:

Cases where dog bites are involved are different from the appellant's case as dogs may carry diseases, transmissible by injuries caused by their bites, thus presenting a health risk to the victim. In such cases, it is imperative to ascertain what vaccinations, if any, the animal has received in order to provide proper care to the victim. The lack of this information

could potentially affect the health and safety of the victim, hence the decision of the adjudicator to order the police to disclose the dog owner's name and information about the dog.

[36] The police finally submit that section 14(1)(b) does not apply as disclosure of the affected party's personal information would not change the appellant's health or safety status.

[37] In response, the appellant submits the section 14(2)(h) factor does not outweigh the section 14(2)(d) factor. Citing Order MO-2980, he submits that he should not have to jump through numerous hoops in different forums to seek basic information that would enable him to exercise his legal right to seek redress through a civil action. The appellant submits that he has the right to seek the information in the most efficient, cost-effective manner.

[38] The appellant also submits that Order MO-2980 has important similarities to his case, in that an individual had been injured and was seeking to obtain the information of the defendant in order to bring a civil action. He acknowledges that the specific facts (the cause of the personal injury) in that order are different from his case but it does not mean that the same general principles should not apply.

[39] With respect to section 14(1)(b), the appellant reiterates his submission that it applies. He submits that this exception allows a head to disclose personal information to a person other than the individual to whom the information relates, in compelling circumstances affecting the health or safety of an individual. He submits that the exception does not contemplate the health and safety of the individual to whom the information relates, as section 14(1)(b) clearly states "affecting the health or safety of an individual" and not "affecting the health or safety of the individual to whom the information relates". The appellant also submits that section 14(1)(b) applies as compelling circumstances exist affecting the appellant's health. He further submits that information about the affected party would allow him to bring a civil action, for which he can seek compensation and treatment for the trauma and injuries he suffered due to the incident, which would significantly improve his recovery.

Analysis and findings

[40] I have carefully reviewed the parties' representations and conclude that none of the exceptions in section 14(1) of the *Act* apply to remove the personal information at issue from the scope of the section 38(b) exemption.

[41] I acknowledge the appellant's raising of the exception in section 14(1)(b); however, in my view, this exception does not apply in this case.

[42] Section 14(1)(b) states:

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

in compelling circumstances affecting the health or safety of an individual, if upon disclosure notification thereof is mailed to the last known address of the individual to whom the information relates;

[43] In my view, in order to meet the “compelling” threshold, the purpose for seeking the personal information in question must be a matter of immediate and essential health or safety affecting the requester.⁶ In other words, the circumstances must either be self-evident or evidence must be provided to demonstrate that release of the information could reasonably be expected to ameliorate any health or safety issues. While some of the personal information about the affected party in this case may be of great importance to the appellant in pursuing his civil suit for damages, I am not satisfied that the circumstances here meet the standard of compelling. Disclosure of the information about the affected party will not ameliorate any health issues of the appellant in the immediate and essential way contemplated by section 14(1)(b).

[44] Besides finding that none of the exceptions in section 14(1) apply, I also find that none of the exceptions in section 14(4) apply. As such, I will turn to discuss whether any of the factors or presumptions under sections 14(2) and (3) apply.

Section 14(3)(b): investigation into possible violation of law

[45] The police submit that the presumption at section 14(3)(b) applies to the personal information at issue, which reads as follows:

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;

[46] 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.⁷

[47] I am satisfied that section 14(3)(b) applies in this circumstance. The records

⁶ See Order PO-2541 where the adjudicator found that records held by Archives of Ontario regarding the requester’s father could provide essential medical information regarding a loss of function in his own daughter’s arm that the medical profession had been unable to isolate.

⁷ Orders P-242 and MO-2235.

concern an incident that the police investigated. The personal information was compiled and is identifiable as part of a police investigation into a possible violation of the *Criminal Code of Canada*, which did not result in charges being laid. 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.⁸ Section 14(3)(b) therefore weighs in favour of non-disclosure of the personal information at issue.

[48] As noted above, the appellant submits that the factor in section 14(2)(d) and an unlisted factor apply and weigh in favor of disclosure while the police submit that the factor in section 14(2)(h) weighs in favour of non-disclosure. Those sections read as follows:

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,

(d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

(h) the personal information has been supplied by the individual to whom the information relates in confidence;

Section 14(2)(d): fair determination of rights

[49] The appellant submits that the affected party's name and contact information are relevant to a fair determination of his rights. He submits that the personal information at issue would allow him to access civil remedies to seek damages for the injuries he sustained from the cycling incident. Without this information, the appellant submits he cannot serve the affected party or obtain damages against him.

[50] This office has found that for section 14(2)(d) to apply, the appellant must establish that:

(1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and

(2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and

(3) the personal information to which the appellant seeks access has some bearing on or is significant to the determination of the right in question; and

⁸ Orders P-242 and MO-2235.

(4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.⁹

[51] There is no dispute that the appellant seeks the affected party's name and contact information to sue for damages in court. I am satisfied that he has met the four-part test in section 14(2)(d) because:

1. his right to sue is drawn from common law;
2. the right is related to a contemplated civil claim for damages;
3. the personal information to which he seeks access (i.e. the affected party's name and contact information for service) has a direct bearing on a determination of his right to receive damages because he needs to identify the affected party in order to bring a successful claim; and
4. he needs the affected party's name to prepare for the proceeding by serving him with his claim.

[52] Therefore, I find that the affected party's name and address in the circumstances of this particular case is relevant to a fair determination of the appellant's rights under section 14(2)(d) and that this factor weighs in favour of disclosing this information to him.

[53] The police submit that, although section 14(2)(d) applies, they believe the factor at section 14(2)(h) outweighs the factor at section 14(2)(d).

[54] Relying on section 14(2)(h), the police submits that it would be unfair to disclose the affected party's personal information since he provided it voluntarily. They submit that disclosure of this information could seriously erode the public confidence in the police, and would tend to discourage members of the public from volunteering relevant information.

[55] In order for section 14(2)(h) to apply, both the individual supplying the information and the recipient must have an expectation that the information will be treated confidentially, and that expectation must be reasonable in the circumstances. Thus, section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.¹⁰

[56] I find that the personal information in the record has been supplied by the affected party in confidence and that the factor in section 14(2)(h), which weighs against disclosure, applies.

⁹ Order PO-1764; see also Order P-312, upheld on judicial record in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).

¹⁰ Order PO-1670.

[57] With respect to unlisted factors, the appellant raises an unlisted factor. He points out that in Order MO-2954, Adjudicator Laurel Cropley noted that the *Act* should not be used in a way that prevents individuals from exercising their legal rights. She found that this is an unlisted factor favouring disclosure.

[58] Although the facts in this appeal are different from those before Adjudicator Cropley in Order MO-2954, I find that the same general principle nevertheless applies. I agree that the *Act* should not be used in a way that prevents individuals from exercising their legal rights, and find that the non-disclosure of the affected party's name and address unduly impairs the appellant's ability to pursue his right to seek damages. Therefore, I find that this unlisted factor weighs in favour of disclosure.

[59] Although I have given the section 14(3)(b) and section 14(2)(h) some weight, I find that they are outweighed in the circumstances of this particular appeal by the factor at section 14(2)(d) and the unlisted factor discussed above, both of which strongly weigh in favour of disclosure of some of the affected party's personal information. In particular, I find that disclosure of the affected party's name and address would not be an unjustified invasion of his personal privacy.

[60] After considering and weighing the factors, and balancing the interests of the parties, I find that disclosing the affected party's name and address would not constitute an unjustified invasion of his personal privacy under section 38(b) in this particular case. I will order this information disclosed to the appellant.

[61] However, I do not find that the factors favouring disclosure apply to the affected party's remaining personal information, such as his birthdate and ethnicity. The appellant does not require the affected party's remaining personal information to be able to commence and serve his claim against him. After considering section 14(2)(h) and section 14(3)(b), and balancing the interests of the parties, I find that the disclosure of the remaining personal information would constitute an unjustified invasion of the affected party's personal privacy under section 38(b), subject to my finding on the police's exercise of discretion below.

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

[62] As I found that the section 38(b) exemption applies to the affected party's remaining personal information, I will consider whether the police exercised their discretion under this section.

[63] 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.

[64] 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.

[65] 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

[66] In their representations, the police submit that they properly exercised their discretion not to disclose the exempt personal information. The police submit that they took into account all relevant factors and did not take into account any irrelevant factors. They submit that they did not exercise their discretion in bad faith or for an improper purpose. The police also submit that they took into account the spirit of the *Act*, which is to balance privacy protection with the public's right to know. They explain that as the majority of their records contain sensitive material they must balance the access interests of the appellant with the privacy rights of the affected party. The police finally submit that they considered the interaction between sections 28 and 29 of the *Act*.

[67] In his representations, the appellant submits that the police erred in exercising their discretion as they failed to take into account all the relevant circumstances, as set out in section 14(2) of the *Act*. He submits that more specifically the police did not take into account that the personal information at issue is relevant to a fair determination of rights affecting the person who made the request.

[68] Based on my review of the parties' representations and the nature and the content of the exempt personal information, I find that the police properly exercised their discretion to withhold the exempt personal information of the affected party 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 nature of the information and the extent to which it is significant and sensitive to the law enforcement institution 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 exempt personal information pursuant to the section 38(b) exemption.

¹¹ Order MO-1573.

¹² Section 43(2).

ORDER:

1. I order the police to disclose the name and address of the affected party from the records in accordance with the highlighted copy enclosed with this order. To be clear, only the highlighted parts of the record must be disclosed to the appellant. The police are to disclose to the appellant by **April 8, 2020** but not before **April 1, 2020** a copy of the severed records.
2. I reserve the right to require the police to provide me with a copy of the records disclosed to the appellant.

Original signed by: _____

Lan An
Adjudicator

March 4, 2020 _____