

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3762

Appeal MA18-00842

York Regional Police Services Board

April 29, 2019

Summary: The York Regional Police (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records related to two incidents involving the appellant. At issue in this appeal is the police decision to partially withhold some information contained in a police officer's notes under the discretionary personal privacy exemption at section 38(b). In this order, the adjudicator finds that the section 38(b) exemption applies because the presumption at section 14(3)(b) (investigation into possible violation of law) applies, and no factors favouring disclosure apply. She, therefore, upholds the access decision of the police and dismisses the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of "personal information"), 14(1), 14(2), 14(3), and 38(b).

Orders Considered: Order PO-1833.

OVERVIEW:

[1] The York Regional Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to two separate incidents involving the requester (Incident 1 and Incident 2). The specific records that were requested are a police officer's notes relating to Incident 1, and an occurrence report and a police officer's notes relating to Incident 2.

[2] The police issued a decision, granting partial access to records relating to

Incident 1. The police withheld the remaining portions of it under the discretionary personal privacy exemption at section 38(b), relying on the presumption at section 14(3)(b) (investigation into possible violation of law) of the *Act*. The police withheld the records relating to Incident 2 in full, relying on the mandatory personal privacy exemption at section 14(1) and the presumption at section 14(3)(b) of the *Act* to do so.

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

[4] During mediation, the scope of the appeal was narrowed to include only records relating to Incident 1,¹ and only those portions that are responsive to the request. The appellant also advised that he is not seeking access to any telephone numbers, addresses, or dates of birth of any of the affected parties. Accordingly, this information is no longer at issue in the appeal.

[5] The appellant continued to pursue access to the remainder of the severed information, which appears on pages 1, 2 and 3 of one of the police officer's notes. The mediator contacted an affected party to determine if consent could be obtained for the disclosure of the information at issue. The affected party did not provide consent.

[6] The appellant advised that he wished to proceed to adjudication to obtain access to the remaining information at issue. Accordingly, this file moved to the adjudication stage.

[7] As the adjudicator of this case, I began an inquiry under the *Act* by sending a Notice of Inquiry, setting out the facts and issues on appeal, to the police. I received written representations from the police in response, which were shared with the appellant in full, on consent. The appellant provided written representations in response. On the basis of the record and the representations from the parties, I determined it was not necessary to seek further representations from the police.

[8] For the reasons that follow, I uphold the decision of the police to withhold the information at issue, because it is exempt under the discretionary personal privacy exemption at section 38(b) of the *Act*.

RECORDS:

[9] The only information at issue is contained in one police officer's notes, on pages 1, 2 and 3 of 6. Information deemed not responsive, as well as any telephone numbers, addresses and dates of birth are not at issue.

¹ The records originally identified as responsive to Incident 2 were determined to be non-responsive due to an erroneous incident number. A search for a different number resulted in full disclosure to the appellant of the responsive records, and his satisfaction with that portion of his request.

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?

DISCUSSION:

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

[10] The police withheld personal information under the personal privacy exemption at section 38(b) of the *Act*. Only personal information can be exempt under section 38(b). Therefore, I must decide whether the information withheld is personal information, as defined under the *Act* and, if so, to whom it relates. In this case, I find that the record contains the personal information of the appellant and another identifiable individual, for the reasons that follow.

[11] The term “personal information” in section 2(1) of the *Act* means “recorded information about an identifiable individual.” Section 2(1) also lists examples of “personal information” (such as name,² age,³ address,⁴ and personal views or opinions⁵), but the listed examples are not exhaustive. Therefore, information that does not fall under the listed examples may still qualify as personal information.⁶

[12] To qualify as personal information, the information must be about the individual in a personal capacity and it must be reasonable to expect that an individual may be identified if the information is disclosed.⁷ It is not disputed, and I find, that this case only involves individuals in their personal capacities.

[13] Having reviewed the record, I find that it contains the personal information of the appellant and an identifiable individual (an affected party). The personal information at issue in this record consists of the affected party’s statements to police, as recorded

² Section 2(1) (definition of “personal information”), paragraph (h).

³ *Ibid*, paragraph (a).

⁴ *Ibid*, paragraph (d).

⁵ *Ibid*, paragraphs (e) and (g).

⁶ Order 11.

⁷ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

in a police officer's notes. This is personal information within the meaning of paragraphs (e) and (g) of the definition of "personal information", and the introductory wording of that definition.

[14] Since the record at issue contains both the personal information of the appellant and another identifiable individual, I must assess any right of access under Part II of the *Act*, specifically under the discretionary personal privacy exemption at section 38(b).

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

[15] As explained below, I find that the police have met their burden, as the party resisting disclosure, to show that the information withheld is exempt from disclosure under the personal privacy exemption at section 38 (b) of the *Act*.

[16] 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.

[17] Under section 38(b), if 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.⁸

[18] 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.⁹ Section 14(4) lists situations that would not be an unjustified invasion of personal privacy, but, as the police submit, it does not apply in this case.

Section 14(3)(b) applies in this case

[19] The police submit that the presumption at section 14(3)(b) applies to all the information at issue. I will explain why I find that this is the case.

[20] Section 14(3)(b) says:

⁸ See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 38(b).

⁹ 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 [.]

[21] This means that unless disclosure of the information at issue is necessary to prosecute a violation of law or continue an investigation, disclosure will be presumed to be an unjustified invasion of personal privacy if the personal information at issue was compiled and is identifiable as part of an investigation into a possible violation of law.

[22] The police submit, and I find, the presumption at section 14(3)(b) applies because the personal information of the affected party was compiled and is identifiable as part of a law enforcement investigation into a complaint against the appellant regarding a possible violation of the *Criminal Code of Canada*¹⁰ (regarding mischief to property). The police submit, and I find, that the information at issue is identifiable as part of an investigation into a possible violation of law because it appears in the police officer's notes created for the purpose of the investigation into that possible violation of the *Criminal Code of Canada*.

[23] As the police argue, although no charges were laid, the presumption applies. The presumption only requires that there be an investigation into a possible violation of law.¹¹

[24] The fact that section 14(3)(b) applies to the information withheld in the record is a factor that weighs towards a finding that disclosure of the withheld personal information within it would be an unjustified invasion of personal privacy.

Section 14(2)(d)

[25] The appellant appears to argue that the factor favouring disclosure at section 14(2)(d) (fair determination of rights) applies. On the basis of the following, I find that the factor listed at section 14(2)(d) does not apply.

[26] Section 14(2) lists factors that may be relevant in determining whether disclosure would be an unjustified invasion of personal privacy under section 38(b).¹² Any circumstances that are relevant, even if they are not listed under section 14(2), must be considered.¹³

¹⁰ R.S.C., 1985, c. C-46.

¹¹ Orders P-242 and MO-2235.

¹² Order P-239.

¹³ Order P-99.

Factors weighing in favour of disclosure

[27] The police argue that the factors typically weighing in favour of disclosure at sections 14(2)(a), (b), (c), and (d) do not apply. Specifically with respect to section 14(2)(d), the police submit that this factor is not relevant because releasing the personal information at issue is not related to the rights of the appellant, and that the appellant has not indicated that he requires the information for any type of proceeding.

[28] While the appellant did not cite section 14(2)(d) (fair determination of rights) in response to the police's submissions, he states that he is in the process of civil litigation against the affected party (whose identity he is aware of). He submits that he is not interested in any "personal information", but wants a full copy of the police notes so that he can be aware of the allegations made against him by the affected party.

[29] The appellant did not address other factors that would favour disclosure. On my review of the record and consideration of the circumstances in this case, I find that no factors favouring disclosure apply.

[30] Regarding the appellant's implied submission that section 14(2)(d) applies, 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 which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
4. the personal information *is required* in order *to prepare for the proceeding or to ensure an impartial hearing*.¹⁴ [Emphasis added.]

[31] From the evidence before me, it is not clear that Part 4 of this test has been met. The appellant has not demonstrated that he requires the personal information of the affected party (consisting of the views or opinions expressed to the police and noted in the record) in order to prepare for the lawsuit he refers to, or to ensure an impartial hearing in court. I find that Part 4 of the section 14(2)(d) test has not been met. Since all four parts must be met for the factor at section 14(2)(d) to apply, I find that this factor does not apply.

¹⁴ Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).

[32] I note that even if section 14(2)(d) had been met, I would have given it minimal weight because the appellant would have had an alternate means of obtaining information at issue through the civil litigation process. There is certainly no evidence before me that that is not the case.

Weighing the presumption and factors

[33] Since I have found that the presumption at section 14(3)(b) applies and that no factors favouring disclosure apply, the information at issue is exempt under section 38(b) because disclosure would be an unjustified invasion of personal privacy.

[34] If a requester is aware of the personal information at issue, the information may not be exempt under section 38(b), because to withhold it would be absurd and inconsistent with the purpose of the exemption.¹⁵ The absurd result principle has been applied where, for example, the information is clearly within the requester's knowledge.¹⁶

[35] Here, the type of information at issue that is not within the knowledge of the appellant, by his own admission, consists of the allegations made by the affected party to the police. Therefore, I find that, as the police submit and the appellant admits, there is no basis for me to find that the information at issue is known to the appellant. As a result, it would not be absurd to withhold the affected party's personal information from the appellant in the circumstances.

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

[36] On the basis of the following, I find that the police properly exercised their discretion in deciding to withhold information under section 38(b).

[37] 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.

[38] 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

¹⁵ Orders M-444 and MO-1323.

¹⁶ Orders MO-1196, PO-1679 and MO-1755.

- it fails to take into account relevant considerations.

[39] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁷ This office may not, however, substitute its own discretion for that of the institution.¹⁸

[40] Here, the police considered and balanced the purpose of the *Act*, the right of an individual to have access to his own personal information, the need to protect the privacy and personal information of the affected party, and the significant level of disclosure already made to the appellant. The police submit, and I accept, that they disclosed as much information to the appellant as possible, withholding only information to the extent that it was required to protect the privacy and personal information of the affected party. These were proper and relevant considerations, and I am satisfied that they were made in good faith and not in bad faith. There is no evidence before me that the police took into consideration any irrelevant factors. Therefore, I uphold the exercise of discretion by the police.

ORDER:

I uphold the access decision of the police and dismiss this appeal.

Original Signed By: _____

Marian Sami
Adjudicator

April 29, 2019

¹⁷ Order MO-1573.

¹⁸ Section 43(2) of the *Act*.