

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3976

Appeal MA17-399

Windsor Police Services Board

November 26, 2020

Summary: The appellants sought access to information in various police records related to incidents involving them. The police granted the appellants access to their personal information in the records, but denied them access to the personal information of other individuals under the discretionary personal privacy exemption in section 38(b) with reference to the presumption in section 14(3)(b). The police also withheld information relating to its officers and 911 dispatchers under section 8(1)(e) (endanger life or physical safety), and some information in the officers' handwritten notes because it did not relate to incidents involving the appellants and was non-responsive. The adjudicator upholds the police's decision and dismisses the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, sections 2(1) (definition of "personal information"), 2(2.1), 14(1), 14(3)(b), 8(1)(e) and 38(b).

Cases Considered: *Ontario (Attorney General) v Fineberg* (1994), 19 OR (3d) 197 (Div. Ct.), *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII).

OVERVIEW:

[1] At the heart of this appeal is an acrimonious, years-long neighbour dispute requiring police involvement. The appellants, who represent one side of the dispute, have filed many appeals with the Information and Privacy Commissioner of Ontario (the IPC) for access to records relating to their dispute. This appeal arises from the appellants' request to the Windsor Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a number of records related to a specific occurrence. In their request, the appellants

stated and sought:

All records including but not limited to reports, statements, call logs, audio recordings, records of mobile data terminal communications and officer notebook entries generated, considered, or linked to occurrence # [specified number and date]. The senior responding officer [named officer], stated he was not investigating a possible violation of the law.

The following day, [specified date], when the requester was attempting to follow up on the incident, [named officer] stated that the call was not dispatched as an investigation into a possible violation of the law and that the events described in the report are not criminal in nature.

An index, including names, rank, and badge numbers of the officers on duty during the shift(s) encompassing this call for service.

An index, including names, title, and identification numbers of the dispatchers on duty during the shift(s) encompassing this call for service.

All records including but not limited to reports, statements, call logs, audio recordings, and officer notebook entries generated, considered or linked to the discussion of occurrence [specified number] between the requester and [named officer] of the Windsor Police Service on the morning of [specified date].

[2] The police located records responsive to the request and issued an access decision granting the appellants partial access. The police relied on the discretionary exemptions in section 38(a) (discretion to refuse requester's information), in conjunction with section 8(1)(l) (law enforcement) and 13 (danger to safety or health), and in section 38(b) (personal privacy), with reference to the presumption in section 14(3)(b) (investigation into possible violation of law). The appellants were not satisfied with the police's decision and appealed it to the IPC.

[3] The IPC attempted to mediate the appeal. During mediation, the appellants confirmed that they seek access to the withheld records and to records of a second related occurrence referenced in the records. In response, the police issued a revised decision including the records of the second related occurrence and granting the appellants partial access. The police relied on the same exemptions listed in their original decision letter, and added section 38(a), in conjunction with section 8(1)(e) (endanger life or physical safety). The police also noted that they withheld some information in the records because it is not responsive to the request.

[4] Also during mediation, the police provided an index of the records to the appellants. The appellants subsequently confirmed that they sought access to all of the withheld information in the records, except for the dates of birth and telephone numbers of other individuals in the records, and any CPIC information or police codes.

As a result, the dates of birth and telephone numbers of affected parties, the CPIC information and all of the police codes in the records are excluded from the scope of this appeal and are no longer at issue.

[5] A mediated resolution was not possible and the appeal was moved to the adjudication stage of the appeals process. An IPC adjudicator conducted an inquiry and sought written representations from the police and the appellants. The police submitted written representations but the appellants did not. The appellants had multiple opportunities to submit written representations in accordance with their requests for deadline extensions; however, they ultimately submitted only video surveillance footage from their home and one news article, none of which addressed any of the issues set out in the Notice of Inquiry. The appeal was then transferred to me to continue the adjudication process. In this order, I uphold the decision of the police and dismiss the appeal.

RECORDS:

[6] There are 11 records at issue, withheld in part or in full. Record 1 (pages 1-7) is a General Occurrence Hardcopy. Records 2 and 8 (pages 8-11 and 22-24, respectively) are Call Hardcopies. Record 3 (page 12) is titled MDT Transmissions. Records 4, 5, 6 and 9 (pages 13-18 and 25-27) are the handwritten notes of three police officers. Record 7 (pages 19-21) is a list of officers' and dispatchers' names and badge/identification numbers. Records 10 and 11 are audio recordings of 911 calls made to the police by individuals who are not the appellants.

DISCUSSION:

A. What is the scope of the request and does it include the information withheld by the police as non-responsive?

[7] To be considered responsive to a request, records must "reasonably relate" to the request.¹ The request in this appeal is for records related to an occurrence involving the appellants. The police claim that portions of four officers' handwritten notes at pages 14 (Record 4), 18 (Record 5), 25, 26 and 27 (Record 9), and all of pages 15-17 (Record 5), contain information that is not responsive to the appellants' request. They also claim that Record 11 contains an audio recording of a second non-responsive call that follows the recording of another call that is responsive to the request.

[8] In their representations, the police submit that the withheld portions and pages

¹ Orders P-880 and PO-2661.

of officers' handwritten notes are not responsive because they relate to individuals and incidents that are completely unrelated to the appellants and the occurrence in question. Regarding the audio recording, they explain that they copied the second call to the CD ROM in error and that it is non-responsive because it does not involve the appellants and is not linked to calls for service at their residence. As noted above, the appellants did not provide representations on any of the issues in this appeal.

[9] I have reviewed the second call on the second audio recording, pages 15-17 of the records, and the portions of the records at pages 14, 18, 25, 26 and 27 that the police have withheld as non-responsive. All of the information withheld by the police as non-responsive relates solely to other individuals who contacted the police on the dates in question regarding other incidents and does not relate to the appellants in any way. The withheld information does not reasonably relate to the appellants' request. On this basis, I find these withheld records and portions of records are not responsive to the request and fall outside its scope. I uphold the police's decision to withhold them.

B. 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 parts of the *Act* apply, I must first determine whether the records contain "personal information" and, if so, to whom it relates. That term is defined in section 2(1) of the *Act* and the parts of the definition that are relevant in this appeal are the following:

"personal information" means recorded information about an identifiable individual, including,

(a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except if they relate to another individual,

(g) the views or opinions of another individual about the individual, and

(h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual[.]

[11] Paragraph 2(2.1) of the *Act* is also relevant in this appeal, and the parties were invited to provide representations on its application to the information at issue. Paragraph 2(2.1) of the *Act* states:

Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

[12] In their representations, the police submit that the records contain the personal information of the appellants and other identifiable individuals, including the individuals' names, genders, addresses, ethnicities, and personal views or opinions communicated to officers during the police's investigation. The police also submit that the records contain the personal information of their employees, including their names, ranks or titles, employee numbers and shifts worked. The police do not identify which paragraphs of the definition of personal information they rely on in support of their submission that the officers' information in the records qualifies as personal information. In addition, they do not address section 2(2.1) of the *Act* in their representations.

[13] Based on my review of the records, I find that all but two of them—Records 3 and 7—contain the personal information of the appellants and other individuals. Records 1, 2, 4-6, and 8-11, contain, variously, information about the appellants and other individuals that fits within paragraphs (a), (b), (d), (e), (g) and (h) of the definition of personal information in section 2(1) of the *Act*. Accordingly, the appellants' access to the withheld portions of these records must be determined under the discretionary exemption in section 38(b) of the *Act*.

[14] Records 3 and 7 do not contain any information about the appellants at all. In addition to not containing personal information about the appellants, Records 3 and 7 do not contain any personal information about the police officers and 911 dispatchers. Record 3 contains some personal information of an individual other than the appellants that fits within paragraphs (g) and (h) of the definition in section 2(1). However, Record 7 does not contain any personal information at all. The police officers' and 911 dispatchers' names, and badge or identification numbers listed in Record 7 appear in a professional context and do not reveal something of a personal nature about them. I find that the information relating to police officers and 911 dispatchers in Record 7 qualifies as business identity information in section 2(2.1) of the *Act*.

[15] Because Records 3 and 7 do not contain personal information about the appellants, the discretionary exemption in section 38(b) cannot apply to them. As a result, the appellants' access to the withheld portions of these records must be determined under the remaining exemptions claimed by the police: under section

14(3)(b) for Record 3, and under section 8(1)(e) for Record 7.

C. Does the discretionary exemption at section 38(b) apply to the withheld personal information in Records 1, 2, 4, 8, 9 and all of Records 10 and 11?

[16] Section 38 provides a number of exemptions from the general right of individuals under section 36(1) of the *Act* to access their own personal information held by an institution. 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.

[17] The police claim that the presumption in section 14(3)(b) applies in this appeal. 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[.]

[18] In determining whether disclosure of the withheld information and records would be an unjustified invasion of personal privacy, sections 14(1) to (4) provide guidance. If the information fits within any of paragraphs (a) to (e) of section 14(1) or if any of the situations listed under section 14(4) applies, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). There is no suggestion that any of paragraphs (a) to (e) of section 14(1) or paragraphs (a) to (c) of section 14(4) applies in this appeal, and I find that none does.

[19] Sections 14(2) and (3) also help in determining whether disclosure would be an unjustified invasion of personal privacy under section 38(b). If any presumption in paragraphs (a) to (h) of section 14(3) applies, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 38(b). 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.² In determining whether disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), the IPC considers and weighs the factors and presumptions in sections 14(2) and (3) and balances the interests of the

² Order P-239.

parties.³

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

[20] For section 14(3)(b) to apply, the presumption only requires that there be an investigation into a possible violation of law.⁴ The presumption can apply to a variety of investigations, including those relating to by-law enforcement.⁵ In their representations, the police submit that Records 1, 2, 4 and 8-11 were compiled and are identifiable as part of an investigation into a possible violation of law under the Criminal Code. They explain that all of the information they have withheld from the appellants in these records relates to individuals other than the appellants and its disclosure to the appellants is presumed to be an unjustified invasion of personal privacy.

[21] In respect of the factors in section 14(2), the police allude to four of them in their representations on their exercise of discretion. Specifically, the police argue that the factors weighing against disclosure in sections 14(2)(e), (f), (h) and (i) apply. These factors state:

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

- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
- (f) the personal information is highly sensitive;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

[22] The police explain that the withheld information in the records relates to other individuals who provided personal information to them during their investigation of incidents involving the appellants. The police state that these individuals have a reasonable expectation that their personal information will be kept confidential by the police. The police also explain that the appellants maintain a website that contains personal information about private citizens and police officers, including names, genders, dates of birth, addresses, marital status, licence plate numbers and other

³ Order MO-2954.

⁴ Orders P-242 and MO-2235.

⁵ Order MO-2147.

details, and photographs of these individuals. Along with their representations, the police provide printed screenshots from the website. The police submit that they appropriately withheld the personal information of other individuals with whom the appellants are engaged in a dispute because the appellants are not entitled to know what these other individuals communicated to the police during their investigation.

[23] I have reviewed Records 1, 2, 4 and 8-11 along with the police's representations, and I agree with the police's position. All of records 1, 2, 4, and 8-11 were compiled in response to the police being called by the appellants and other individuals for assistance during two specific occurrences. On this basis, I find that all of these records were compiled and are identifiable as part of an investigation into a possible violation of law within the meaning of section 14(3)(b). I am also satisfied that the factors in sections 14(2)(e), (f), (h) and (i) apply in the circumstances of this appeal and that they weigh in favour of protecting the privacy of the individuals whose personal information has been withheld. As noted above, the appellants have provided no representations in this appeal.

[24] I have found that the presumption against disclosure in section 14(3)(b) applies to the withheld information and that the only factors in section 14(2) that apply weigh in favour of privacy protection. I have no submissions before me that any factor favouring disclosure applies in this appeal and I find that none does. As a result, I further find that Records 1, 2, 4 and 8-11 are exempt from disclosure under section 38(b) of the *Act*, subject to my consideration of the police's exercise of discretion below.

D. Does the mandatory exemption at section 14(1) apply to the withheld information in Record 3?

[25] The police claim that Record 3 is exempt from disclosure under section 38(b); however, as noted above, Record 3 does not contain personal information belonging to the appellants. Rather, it contains personal information relating to another individual and, therefore, the appellants' right of access to this record must be determined under section 14(1) of the *Act*. Section 14(1) requires the police to refuse to disclose personal information to any person other than the individual to whom the information relates. The police submit that Record 3 was compiled and is identifiable as part of an investigation into a possible violation of law. I agree that the presumption in section 14(3)(b) applies to Record 3 and, therefore, disclosure of the personal information in Record 3 is presumed to be an unjustified invasion of personal privacy. Accordingly, I find that the withheld information in Record 3 is exempt from disclosure under the mandatory exemption in section 14(1) of the *Act*.

E. Does the discretionary law exemption in section 8(1)(e) apply to Record 7?

[26] Section 8(1)(e) states:

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

(e) endanger the life or physical safety of a law enforcement officer or any other person[.]

[27] Recognizing the difficulty of predicting future events in a law enforcement context, the Divisional Court has confirmed that, generally, the law enforcement exemption must be approached in a sensitive manner.⁶ To establish the application of the section 8(1)(e) exemption, the institution must provide detailed and convincing 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.⁷

[28] The police claim that section 8(1)(e) applies to Record 7 because its disclosure could reasonably be expected to endanger the life or physical safety of the police officers and 911 dispatchers whose personal information is included in it. They explain that many aspects of police work are inherently dangerous to the physical safety of police officers and that the identification of individuals as police officers could reasonably be expected to make police work more dangerous in many situations. The police state that officers diligently guard their personal information for their own protection and the protection of their families. For example, they maintain unlisted telephone numbers, they ensure that their residential address is not included in records that will later appear in court, and they commute to and from their place of employment in plain clothes. The police submit that identification of police officers could facilitate dangerous interventions in their lives and facilitate the identification of their homes where guns may be stored, endangering them and their families. They add that identification could also pose a risk to its officers who are assigned to plain-clothes units, such as drug, intelligence and morality units, who may be put in harm's way if they are readily identified in public as police officers.

[29] The police connect all of their submissions on harms to the website maintained by the appellants. They state that the website contains detailed information about its officers and civilian employees, including their names, ranks, badge or identification numbers and photographs. They add that the website categorizes their officers and employees in sections entitled "Dirty Cops," "Offenders behind a blue wall," and "Dangerous Dispatchers," among others. The police submit that the information appears to have been compiled for creating a public resource for anyone wishing to

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

⁷ *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

obtain details about its employees. They add that the website has entries that include the name of an employee and a blank space where a photograph would be placed, which indicates to them that the author is waiting to complete these details as they become available. Considering the existence and nature of this website, the police submit that disclosure of Record 7 would allow the appellants to collect additional information about its employees, putting the safety of more of its employees at risk.

[30] The police's representations, supported by the printed screenshots of the website that they submitted, are convincing. The website is detailed and disturbing, clearly targeting police officers and 911 dispatchers with inflammatory recriminations. Against the backdrop of this troubling website and recognizing the sensitive manner in which the law enforcement exemption must be approached, I accept the police's harm claims. I am satisfied that the disclosure of Record 7, which contains the names and details of additional employees who could be targeted on the website, could reasonably be expected to endanger the physical safety of law enforcement officers and other persons listed in the record by exposing their details to the appellants who will likely upload it to their website. I am satisfied that having the detailed information of police officers and dispatchers publicly posted with corresponding inflammatory remarks, endangers the physical safety of these individuals by exposing them publicly to any individuals who wish them harm. I find that section 8(1)(e) applies to Record 7 and I uphold the police's decision to withhold this record in its entirety, subject to my review of the police's exercise of discretion below.

F. Did the police exercise their discretion under sections 8(1)(e) and 38(b) appropriately?

[31] The section 8(1)(e) and 38(b) 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 exercise its discretion. In addition, the Commissioner may find that the institution erred in exercising its discretion where it does so in bad faith or for an improper purpose, takes irrelevant considerations into account, or fails to take relevant considerations into account.

[32] Relevant considerations include 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, and the privacy of individuals should be protected. Relevant considerations also include the wording of the exemption and the interests it seeks to protect, whether the requesters are seeking their own personal information, the relationship between the requesters and any affected persons, and the nature of the information and the extent to which it is significant or sensitive to the institution, the requesters or any affected persons.

[33] The police submit that they exercised their discretion properly after carefully balancing the appellants' right of access to their own personal information against the

privacy rights of other individuals whose personal information appears in the records. The police state that they considered the nature of the withheld information at issue and the fact that it belongs to individuals other than the appellants, the exemptions and the personal privacy and law enforcement interests they protect, and the contentious relationship between the appellants and the individuals whose personal information comprises the withheld information.

[34] The police add that they considered the circumstances of the appeal, including the fact that the website includes a section dedicated to private citizens listing these individuals' names, genders, dates of birth, addresses, marital status, images, licence plate numbers and details regarding their activities. They state that the website is an example of what can occur when someone is intent on collecting personal information about other individuals, and for this reason, the withheld information relating to other individuals should not be disclosed to the appellants. Finally, the police state that they provided the appellants access to the portions of the records relating exclusively to them, including the names, ranks, and badge numbers of the officers who attended the call for service at the appellants' residence.

[35] I am satisfied that the police exercised their discretion under sections 8(1)(e) and 38(b) of the *Act* when they decided to withhold the information at issue under those two exemptions. I am also satisfied that the police did not exercise their discretion in bad faith and did not take irrelevant considerations into account. The relevant considerations that the police took into account included the principles of the *Act* that individuals' privacy should be protected and that individuals should have a right of access to their own personal information subject to limited and specific exemptions. This is reflected in the police's decision to disclose the appellants' personal information to them and to disclose information about the officers who attended the appellants' residence.

[36] The police also properly took into account the wording of the section 8(1)(e) and 38(b) exemptions and the important law enforcement and personal privacy interests they protect. Finally, the police appropriately considered the sensitive nature of the personal information in the records of individuals with whom the appellants have carried on a years-long, acrimonious neighbour feud, and the fact of the contentious neighbour relationship. I find that the police exercised their discretion under sections 8(1)(e) and 38(b) appropriately, and I uphold the police's exercise of discretion.

ORDER:

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

Original Signed by: _____

Stella Ball
Adjudicator

November 26, 2020