

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3998

Appeal MA19-00444

Waterloo Regional Police Services Board

January 25, 2021

Summary: The appellant submitted an access request to the Waterloo Regional Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for an occurrence report. The police provided him with access to some of his own personal information in parts of this record but denied access to other information under section 38(b) (personal privacy) of the *Act*, including a summary of statements that a complainant and several witnesses made about him. In this order, the adjudicator finds that the personal information of individuals other than the appellant is exempt from disclosure under section 38(b). In addition, he finds that the appellant's personal information in this part of the occurrence report cannot be disclosed to him because this part cannot reasonably be severed under section 4(2) without disclosing the other individuals' personal information that falls under section 38(b). He upholds the police's access decision 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(2)(h), 14(3)(b) and 38(b).

OVERVIEW:

[1] The main issue to be decided in this appeal is whether a summary of statements that a complainant and several witnesses made to the Waterloo Regional Police Service (the police) about the appellant contains personal information that is exempt from disclosure under section 38(b) (personal privacy) of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

[2] By way of background, a complainant called the police to make an allegation

against the appellant. After speaking to the appellant, the complainant and several witnesses, the officers who investigated the allegation concluded that there was insufficient evidence to proceed with any criminal charges.

[3] The appellant then submitted an access request to the police¹ under the *Act* for an occurrence report relating to this incident. In response, the police located a three-page occurrence report, which contains information relating to the appellant, the complainant and the witnesses.

[4] The police then sent a decision letter to the appellant stating that they were providing him with partial access to this record. In particular, they disclosed some information relating to him but denied access to other information, including that relating to other individuals, under the discretionary exemption in section 38(b), with reference to the factor in section 14(2)(h) and the presumption in section 14(3)(b) of the *Act*.

[5] The appellant appealed the police's decision to the Information and Privacy Commissioner of Ontario (IPC), which assigned a mediator to assist the parties in resolving the issues in dispute.

[6] During mediation, the appellant advised the mediator that he was only seeking access to the statements of the individuals who spoke to the police. These statements are summarized on page 3 of the occurrence report. Consequently, the summary of these statements is the only information remaining at issue in this appeal.

[7] The appellant also asked the mediator to notify these individuals of his access request and to ask them if they would consent to disclosing their statements to him. The mediator successfully notified two individuals, who both refused to consent to such disclosure. The mediator was unable to contact other individuals whose statements are also summarized in the occurrence report.

[8] This appeal was not resolved during mediation and was moved to adjudication, where an adjudicator may conduct an inquiry under the *Act*. I decided to conduct an inquiry and sought representations from both the police and the appellant on the issues to be resolved. I received representations from the police but not from the appellant.

[9] In this order, I find that:

- the summary of the statements that the complainant and several witnesses made to the police about the appellant contains the personal information of both the appellant and these other individuals;

¹ For the purposes of the *Act*, the Waterloo Regional Police Services Board is the institution.

- the personal information of these other individuals is exempt from disclosure under section 38(b) of the *Act*, because disclosing it to the appellant would constitute an unjustified invasion of their personal privacy;
- the personal information of the appellant in this part of the record cannot be disclosed to him because this part cannot be reasonably severed under section 4(2) of the *Act* without disclosing the personal information of the complainant and the witnesses that falls under the section 38(b) exemption; and
- the police exercised their discretion in denying access to the personal information of the complainant and the witnesses under section 38(b) and did so appropriately.

[10] I uphold the police's access decision and dismiss the appeal.

RECORDS:

[11] The information at issue in this appeal is a summary of the statements that a complainant and several witnesses made to the police about the appellant, which appears on page 3 of the occurrence report.

ISSUES:

- A. Does the record contain "personal information" as defined in section 2(1) of the *Act* 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 the IPC uphold the exercise of discretion?

DISCUSSION:

A. Does the record contain "personal information" as defined in section 2(1) of the *Act* and, if so, to whom does it relate?

[12] The discretionary personal privacy exemption in section 38(b) of the *Act* only applies to "personal information." Consequently, it must first be determined whether the summary of the statements that the complainant and several witnesses made to the police about the appellant 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 where 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;

[13] 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.²

[14] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.³

² Order 11.

³ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[15] For the reasons that follow, I find that the summary of the statements that the complainant and several witnesses made to the police about the appellant contains the "personal information" of both the appellant and these other individuals.

[16] The police state that when conducting investigations, their officers speak to individuals and record personal information about those individuals. It submits that the records identify involved parties by their name, date of birth, address, and other information. In addition, these records contain statements provided by those parties, including their views and opinions of the appellant. It submits that all of this information constitutes the "personal information" of these individuals.

[17] The only information at issue in this appeal is the summary of the statements that a complainant and several witnesses made to the police about the appellant. Paragraph (g) of the definition of "personal information" in section 2(1) states that this term means recorded information about an identifiable individual including "the views or opinions of another individual about the individual." In line with the wording of this paragraph, I find that the comments that the complainant and witnesses made about the appellant in their statements to the police are his personal information, because they are the views or opinions of another individual about him.

[18] However, these statements also include the names of the complainant and witnesses and reveal other information about them, such as their family status, as well as their views and observations of the incident. In my view, this information qualifies as their "personal information" under paragraph (h) of the definition of that term in section 2(1) and the introductory wording of the definition.

[19] In short, I find that the summary of the statements that the complainant and several witnesses made to the police about the appellant contains the "personal information" of both the appellant and these other individuals.

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

[20] The personal privacy exemption in section 38(b) of the *Act* states:

A head may refuse to disclose to the individual to whom the information relates personal information,

if the disclosure would constitute an unjustified invasion of another individual's personal privacy.

[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. However, only the personal information of individuals other than the requester can be exempt from disclosure

under section 38(b).⁴

[22] I have found that the summary of the statements that the complainant and several witnesses made to the police about the appellant contains the “personal information” of both the appellant and these other individuals. In the circumstances of this appeal, it must be determined whether disclosing the personal information of the complainant and the witnesses to the appellant would constitute an unjustified invasion of these individuals’ personal privacy under section 38(b).

[23] Sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold under section 38(b) is met:

- if the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b);
- section 14(2) lists “relevant circumstances” or factors that must be considered;
- section 14(3) lists circumstances in which the disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy; and
- section 14(4) lists circumstances in which the disclosure of personal information does not constitute an unjustified invasion of personal privacy, despite section 14(3).

[24] There is no evidence before me to suggest that the exceptions in section 14(1)(a) to (e) or the circumstances in section 14(4) apply to the personal information in the records. I find that none of these provisions is applicable in the circumstances of this appeal.

Sections 14(2) and (3)

[25] In determining whether the disclosure of the personal information in the record would be an unjustified invasion of personal privacy under section 38(b), I must consider and weigh the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.⁵

⁴ See Order PO-3672 at para 58, which addresses the equivalent provision in section 49(b) of the *Freedom of Information and Protection of Privacy Act*. See also Order PO-2560, which found that a requester’s personal information cannot be exempt under section 49(b) as its disclosure could not, by definition, be an unjustified invasion of another individual’s personal privacy.

⁵ Order MO-2954.

Section 14(3)

[26] I will start by examining the presumptions in section 14(3). This provision lists circumstances in which the disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy.

[27] The police claim that the section 14(3)(b) presumption applies to the personal information of the complainant and the witnesses in the occurrence report. This provision 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;

[28] 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.⁶

[29] The police state that the personal information in the occurrence report was compiled for the purpose of investigating an occurrence involving the appellant. They further state that although in this instance there were no grounds for charges pursuant to the *Criminal Code of Canada*, the officers collected the personal information in order to determine whether or not a violation of the law had occurred. They submit that although no criminal proceedings were commenced against the appellant, the presumption only requires that there be an investigation into a possible violation of law.

[30] Based on my review of the occurrence report, I am satisfied that the personal information of the complainant and the witnesses was compiled and is identifiable as part of an investigation into a possible violation of the *Criminal Code*. In these circumstances, I find that this personal information falls within the section 14(3)(b) presumption and its disclosure to the appellant is presumed to constitute an unjustified invasion of these other individuals' personal privacy.

Section 14(2)

[31] Section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal

⁶ Orders P-242 and MO-2235.

privacy.⁷ This provision states:

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,

- (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;
- (b) access to the personal information may promote public health and safety;
- (c) access to the personal information will promote informed choice in the purchase of goods and services;
- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
- (f) the personal information is highly sensitive;
- (g) the personal information is unlikely to be accurate or reliable;
- (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.

[32] The factors in paragraphs (a), (b), (c) and (d) of section 14(2) generally weigh in favour of disclosure, while those in paragraphs (e), (f), (g), (h) and (i) weigh in favour of privacy protection.⁸ 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).⁹

[33] The police claim that the factor weighing in favour of privacy in section 14(2)(h) applies to the personal information of the complainant and witnesses in the occurrence report. Under section 14(2)(h), the police are required, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal

⁷ Order P-239.

⁸ Order PO-2265.

⁹ Order P-99.

privacy, to consider whether the personal information has been supplied by the individual to whom the information relates in confidence.

[34] 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.¹⁰

[35] In my view, whether an individual supplied his or her personal information to the police in confidence during an investigation is contingent on the particular facts, and such a determination must be made on a case-by-case basis.

[36] In the particular circumstances of this appeal, the personal information of the complainant and witnesses is found in the summary of the statements that they made to the police. I am satisfied that these individuals and the police expected that this personal information would be treated confidentially, and that this expectation of confidentiality was reasonable in the circumstances. I find, therefore, that the factor weighing in favour of privacy in section 14(2)(h) applies to the personal information of the complainant and witnesses in the occurrence report.

[37] Because the appellant did not submit any representations in this appeal, I do not have any evidence before me to suggest that any of the factors in section 14(2) that weigh in favour of disclosure would apply to this personal information, and it is not evident to me on my review of the occurrence report that any such factors would apply.

Conclusion

[38] In assessing whether the personal information of the complainant and witnesses qualifies for exemption under section 38(b), I have found that it fits within the section 14(3)(b) presumption and disclosing it to the appellant is presumed to be an unjustified invasion of their personal privacy. In addition, I have found that in the particular circumstances of this case, this personal information was supplied by the complainant and witnesses in confidence under the factor in section 14(2)(f), which weighs in favour of privacy protection.

[39] In considering and weighing the factors and presumptions in sections 14(2) and (3) and balancing the interests of the parties, I find that the presumption in section 14(3)(b) and the factor in section 14(2)(h) weigh heavily in favour of protecting the privacy of the complainant and witnesses whose personal information is found in the summary of the statements that they provided to the police. Subject to my assessment below as to whether the police exercised their discretion appropriately, I find that this

¹⁰ Order PO-1670.

personal information is exempt from disclosure under section 38(b), because disclosing it to the appellant would constitute an unjustified invasion of these other individuals' personal privacy.

Section 4(2) – severability obligation

[40] The summary of the statements that the complainant and the witnesses provided to the police also contains comments that they made about the appellant, which constitutes his personal information. As noted above, the appellant's own personal information cannot be exempt from disclosure under section 38(b).¹¹ However, the personal information of the appellant, the complainant and the witnesses is closely intertwined in this part of the occurrence report.

[41] Section 4(2) of the *Act* states, in part:

If an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 6 to 15, . . . the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.

[42] In other words, section 4(2) requires the police to disclose as much of the occurrence report as can reasonably be severed without disclosing the information that falls under one of the exemptions. Consequently, the appellant's personal information in the summary of these statements can only be disclosed to him if this part of the occurrence report can reasonably be severed without disclosing the personal information of the other individuals that falls under the section 38(b) exemption.

[43] The police submit that there is no undisclosed information which should be disclosed under section 4(2).

[44] Because the personal information of the appellant, the complainant and the witnesses is closely intertwined, I find that this part of the occurrence report cannot be reasonably severed without disclosing the personal information of the complainant and the witnesses that falls under the section 38(b) exemption. In short, the appellant's personal information in this part of the occurrence report cannot be disclosed to him.

C. Did the police exercise their discretion under section 38(b)? If so, should the IPC 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

¹¹ *Supra* note 4.

exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[46] In addition, the IPC 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; or
- it fails to take into account relevant considerations.

[47] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.¹² The IPC may not, however, substitute its own discretion for that of the institution.¹³

[48] The police state that in applying the section 38(b) exemption, they considered the following relevant factors in good faith:

1. The purpose of the *Act*, including 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;
2. the wording of the exemptions and the interests they seek to protect (as guided by past Commission Orders);
3. to what extent the appellant was seeking his own personal information;
4. whether the appellant had or lacked sympathetic or compelling need to receive the information;
5. the relationship between the requester and the affected persons;
6. 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;
7. the relatively recent nature of the information; and
8. the historic practice of the institution (and other police institutions) with respect to similar information.

¹² Order MO-1573.

¹³ Section 43(2).

[49] Based on this evidence, I am satisfied that the police exercised their discretion in denying access to the personal information at issue under section 38(b) and did so appropriately. I find that they took relevant factors into account in exercising their discretion, and there is no evidence before me to suggest that they exercised their discretion in bad faith or for an improper purpose or that they took into account irrelevant considerations. In short, I uphold the police's exercise of discretion under section 38(b).

ORDER:

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

Original Signed by: _____
Colin Bhattacharjee
Adjudicator

_____ January 25, 2021