

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-4010

Appeal MA19-00324

Niagara Regional Police Services Board

February 10, 2021

**Summary:** The appellant sought access to police records of a specific incident. The police granted the appellant partial access to the records, relying on the discretionary exemption in section 38(b) (personal privacy) of the *Municipal Freedom of Information and Protection of Privacy Act* to deny access to the remaining information in the records. The police did not provide representations during the inquiry into this appeal. As a result, the adjudicator notified the affected parties, whose information is contained in the records, and invited their submissions on the application of section 38(b) to the records. The affected parties objected to disclosure of any of their personal information, arguing it would be an unjustified invasion of their personal privacy. In this Order, the adjudicator upholds the police's decision to withhold the affected parties' personal information from the appellant under section 38(b) of the *Act*.

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

### OVERVIEW:

[1] This appeal considers an individual's right to access the personal information of other individuals in police records relating to him. The Niagara Regional Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records related to a specific incident. In response, the police located two records—the investigating officer's handwritten duty book notes and a call hardcopy—and they issued a decision granting the appellant partial access to the officer's notes but denying the appellant access to the call hardcopy. The police relied on the discretionary exemption in section 38(b) (personal privacy) of the *Act* to withhold the call hardcopy and some information in the officer's

duty notes. They also referenced the personal privacy provisions at sections 14(1) and 14(3) of the *Act*.<sup>1</sup>

[2] The appellant was not satisfied with the police's decision and appealed it to the Information and Privacy Commissioner of Ontario (the IPC). The IPC attempted to mediate the appeal, but a mediated resolution was not possible. The appeal was then transferred to the adjudication stage of the appeal process.

[3] As the adjudicator of this appeal, I decided to conduct an inquiry under the *Act* and I sent a Notice of Inquiry to the police, initially. In the Notice of Inquiry, I asked the police to provide representations regarding their claim that section 38(b) applies to the withheld information, including the details of how they exercised their discretion under section 38(b) of the *Act*. The police did not provide representations in response to my Notice of Inquiry.

[4] I subsequently sought and received representations from the appellant. Because the police did not submit representations on section 38(b), I notified two individuals whose interests might be affected by disclosure (the affected parties), since the records at issue contain their personal information. The affected parties provided representations asserting that disclosure of the information in the records relating to them would constitute an unjustified invasion of their personal privacy.

[5] In this order, I uphold the police's decision to withhold the affected parties' personal information from the appellant under section 38(b) of the *Act*.

## **RECORDS:**

[6] The two records at issue are the police officer's duty notes (two pages) and the call hardcopy (two pages) of the incident.

## **ISSUES:**

- A. Do the records contain "personal information" as defined in section 2(1)? If so, to whom does it relate?
- B. Does the discretionary personal privacy exemption at section 38(b) apply to the information at issue?

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<sup>1</sup> The police also relied on the discretionary exemption in section 38(a) (discretion to refuse requester's own information), in conjunction with section 8(1)(l) (law enforcement), to withhold the police call codes in the duty notes. However, this exemption is not at issue in this appeal because the appellant does not seek access to the police call codes.

C. Did the police properly exercise their discretion under section 38(b)?

## **DISCUSSION:**

### **A. Do the records contain “personal information” as defined in section 2(1)? If so, to whom does it relate?**

[7] In order to determine which sections of the *Act* apply, I must first determine whether the records contain “personal information” and, if so, to whom it relates. “Personal information” is defined in section 2(1) of the *Act* as recorded information about an identifiable individual, and includes the types of information specified at paragraphs (a) through (h) of the definition. Both the appellant and the affected parties submit that the records contain their personal information, and I agree.

[8] The records at issue contain recorded information about the appellant and the affected parties that falls within the following paragraphs of the definition of personal information in section 2(1) of the *Act*:

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

(g) the views or opinions of another individual about 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[.]

[9] I find that the records contain the personal information of the appellant and the affected parties. Accordingly, the appellant’s access to the record is appropriately determined under section 38(b) of the *Act*, the discretionary exemption relied on by the police.

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

[10] Section 38 provides a number of exemptions from an individual’s general right under section 36(1) 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. Thus, the police must exercise their discretion in claiming the application of section 38(b) to the records.

[11] In determining whether disclosure of the withheld information in the 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). None of these exceptions in sections 14(1) and 14(4) applies in this appeal.

[12] Sections 14(2) and (3) also help in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 38(b). 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). The presumption in paragraph (b) of section 14(3) appears to apply to the records at issue in this appeal. It states:

14(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

(b) 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[.]

[13] 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.<sup>2</sup> In determining whether disclosure of the personal information in the records would constitute an invasion of personal privacy under section 38(b), the IPC considers and weighs factors and presumptions in sections 14(2) and (3) and balances the interests of the parties.<sup>3</sup>

### ***The appellant’s and the affected parties’ representations***

[14] In his representations, the appellant states that the only information he seeks is the information given to the officer to prompt the officer’s visit to his home. The appellant asserts he is entitled to know why the police were contacted. The appellant states that he does not seek the opinions or personal information of others in the records.

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<sup>2</sup> Order P-239.

<sup>3</sup> Order MO-2954.

[15] In their representations, the affected parties object to the disclosure of any of their personal information, arguing it would be an unjustified invasion of their personal privacy. The affected parties assert that the factors in sections 14(2)(g) and (h) apply in regards to their personal information and they allude to the factor in section 14(2)(f). These sections state:

14(2) 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,

(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[.]

### ***Analysis and findings***

[16] Having reviewed the records, I am satisfied that the presumption in section 14(3)(b) applies. The section 14(3)(b) presumption only requires that there be an investigation into a possible violation of law.<sup>4</sup> The parties' personal information in the police officer's duty notes and the call hardcopy were compiled and are identifiable as part of an investigation into a possible violation of law, namely, a Criminal Code offence. This is enough to engage the presumption. I have considered the affected parties' representations on the factors in sections 14(2)(f), (g) and (h) of the *Act*. Given my finding that disclosure of the affected parties' personal information is presumed to be an unjustified invasion of their personal privacy under section 14(3)(b), and the absence of evidence that any section 14(2) factor favouring disclosure applies, I need not decide whether the factors favouring privacy protection claimed by the affected parties also apply.

[17] Section 38(b) permits the police to refuse to disclose to the appellant personal information about him if the disclosure would constitute an unjustified invasion of another individual's personal privacy. Although the police did not provide representations, I have considered the affected parties' submissions, and I am also satisfied that the records, on their face, establish that disclosure of the affected parties' personal information is presumed to be an unjustified invasion of privacy under section 14(3)(b) and, therefore, section 38(b) applies. Based on the records themselves, I uphold the police's decision to withhold the affected parties' personal information in the records, subject to my review of the police's exercise of discretion.

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<sup>4</sup> Orders P-242 and MO-2235.

**C. Did the police properly exercise their discretion under section 38(b)?**

[18] The section 38(b) exemption is discretionary and permits the police to disclose information, despite the fact that they could withhold it. The police must exercise their discretion, having regard to the principles of the *Act* and considerations that are relevant in this appeal. For example: the principles that individuals should have a right of access to their own personal information and that exemptions from the right of access should be limited and specific; and consideration of the wording of the exemption and the interests it seeks to protect, and 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. Even in the absence of representations from the police on this issue, it is evident that they exercised their discretion in deciding to grant the appellant access to his personal information in the duty notes and to withhold the affected parties' personal information, and to withhold the call hardcopy.

[19] My authority on this issue is limited to deciding whether the police failed to exercise their discretion or if they erred in exercising their discretion where, for example: they did so in bad faith or for an improper purpose; they took into account irrelevant considerations; or they failed to take into account relevant considerations. There are no representations before me suggesting that the police exercised their discretion improperly or in bad faith, or that they took into account irrelevant considerations. As there is no basis to interfere with the police's exercise of discretion on appeal, I uphold it.

**ORDER:**

I uphold the police's decision to withhold portions of the duty notes and the complete call hardcopy under section 38(b), and I dismiss this appeal.

Original Signed by: \_\_\_\_\_

Stella Ball  
Adjudicator

February 10, 2021 \_\_\_\_\_