

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-4046

Appeal MA19-00622

Durham Regional Police Services Board

April 30, 2021

**Summary:** The appellant submitted an access request to the Durham Regional Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to a family dispute. The records at issue are “call hard copies” and police officers’ notes that contain the personal information of both the individual who contacted the police (the complainant) and the appellant. The police provided the appellant with access to some of his own personal information in parts of these records but denied access to other information under the discretionary exemption in section 38(b) (personal privacy) of the *Act*. In this order, the adjudicator finds that the personal information of the complainant is exempt from disclosure under section 38(b). In addition, he finds that the appellant’s personal information in the complainant’s statement to the police cannot be disclosed to him because the records cannot reasonably be severed under section 4(2) without disclosing the complainant’s 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”), 4(1), 14(1)(b), 14(2)(d), 14(2)(g), 14(2)(h), 14(3)(b) and 38(b).

### OVERVIEW:

[1] The main issue to be decided in this appeal is whether information that a complainant provided to the Durham Regional Police Service (the police) about a family dispute constitutes 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, the appellant had visited his parents, who live with his sister. A family dispute took place, and a complainant made a statement to the police about the appellant. Later that day, the police came to the appellant's house, told him about the complaint, and advised him not to visit his sister's house anymore. No criminal charges were laid against the appellant.

[3] The appellant then submitted an access request to the police<sup>1</sup> for the following:

June 29, 2019, family dispute at [specific address]. [Specific incident number] notes and report of officer at address.

[4] In response, the police located records that are responsive to the appellant's access request, including "call hard copies" and police officers' notes. They then sent him a decision letter that provided him with partial access to these records. They denied access to those parts of the records that contain information that was provided by the complainant under the discretionary exemption in section 38(b), with reference to 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] 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.

[7] In this order, I find that:

- the records contain the "personal information" of both the appellant and the complainant;
- the personal information of the complainant is exempt from disclosure under section 38(b) of the *Act*, because disclosing it to the appellant would constitute an unjustified invasion of the complainant's personal privacy;
- the personal information of the appellant in the complainant's statement to the police cannot be disclosed to him because the records cannot be reasonably severed under section 4(2) of the *Act* without disclosing the personal information of the complainant that falls under the section 38(b) exemption; and

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<sup>1</sup> For the purposes of the *Act*, the Durham Regional Police Services Board is the institution.

- the police exercised their discretion in denying access to the personal information of the complainant under section 38(b) and did so appropriately.

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

## **RECORDS:**

[9] The information at issue in this appeal was provided to the police by the complainant and is found in "call hard copies" and police officers' notes.

## **ISSUES:**

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

[10] 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 records contain "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;

[11] 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.<sup>2</sup>

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

[13] For the reasons that follow, I find that the records contain the "personal information" of both the appellant and the complainant.

[14] The police state that the "call hard copies" and police officers' notes contain the names, addresses, dates of birth, telephone numbers, personal views and statements of individuals, including the complainant and the appellant. They submit that these records contain recorded information about identifiable individuals and thus, meet the section 2(1) definition of "personal information."

[15] The appellant does not dispute that the information at issue is "personal information" and argues that he is entitled to full disclosure of the personal views and statements of the other people involved in the records because the allegations that they

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<sup>2</sup> Order 11.

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

made led to a breach of his rights under the *Canadian Charter of Rights and Freedoms* (the *Charter*) particularly sections 6(1) and 7.

[16] The only information at issue in this appeal is the information that the complainant provided to the police. This information includes the complainant's name, telephone number, date of birth and family status, which falls under paragraphs (a), (c) and (h) of the definition of "personal information" in section 2(1).

[17] The complainant also made a statement to the police about the appellant. Paragraph (g) of the definition in section 2(1) states that "personal information" includes "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 made about the appellant in their statement to the police are the appellant's personal information, because they are the views or opinions of another individual about him.

[18] The statement that the complainant made to the police also includes the complainant's own name and reveals other information about them, such as their family status and their views and observations of the family dispute. In my view, this information qualifies as the complainant's "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 records contain the "personal information" of both the appellant and the complainant.

**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 the 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.

[22] In the circumstances of this appeal, the "call hard copies" and police officers' notes contain the personal information of both the appellant (requester) and the complainant who made a statement to the police. It must be determined, therefore, whether disclosing the complainant's personal information to the appellant would constitute an unjustified invasion of the complainant's personal privacy under section

38(b). I will also determine, with respect to the appellant's undisclosed personal information, whether the police have complied with their obligations under section 4(2) of the *Act* to disclose as much of the records as can reasonably be severed without disclosing the information that falls under one of the exemptions.

[23] With respect to the complainant's personal information, 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).

### ***Section 14(1) exceptions***

[24] There is no evidence before me to suggest that the exceptions in sections 14(1)(a) or (c) to (e) apply, and I find that none of these provisions is applicable in the circumstances of this appeal. However, the appellant submits that the exception in section 14(1)(b) applies to the personal information at issue.

#### *Section 14(1)(b)*

[25] This provision 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;

[26] The purpose of this exception is to allow for the disclosure of personal information to a requester in compelling circumstances where the health and safety of an individual is at risk unless the individual is notified of the existence of certain

information, for example, in the case where an individual requires significant or potentially lifesaving medical information.<sup>4</sup>

[27] The appellant submits that the personal information at issue must be disclosed to protect the safety of his father, his mother and himself. He appears to be basing this argument, at least with respect to his parents, on allegations that he makes elsewhere in his representations that they live in an abusive environment at his sister's house.

[28] Even if I were to accept that there are compelling circumstances affecting the health or safety of the appellant's parents and himself, I find that disclosing the complainant's personal information to the appellant would not serve to address those compelling circumstances. I find, therefore, that the section 14(1)(b) exception does not apply to this personal information.

***Sections 14(2) and (3)***

[29] In determining whether disclosing the complainant's personal information to the appellant would constitute an unjustified invasion of the complainant's personal privacy under section 38(b), I must also consider and weigh the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.<sup>5</sup>

*Section 14(3)*

[30] 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.

[31] The police claim that the section 14(3)(b) presumption applies to the complainant's personal information in the records. 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;

[32] The appellant submits that the section 14(3)(b) presumption does not apply to the personal information at issue. He asserts that this personal information was not compiled and is not identifiable as part of an investigation by the police into a possible violation of law but rather as a "keep the peace" effort in a family dispute. To support

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<sup>4</sup> Order PO-3608.

<sup>5</sup> Order MO-2954.

this position, he further submits that the police did not allege that he had committed any criminal offenses, nor did they charge him with any such offences.

[33] I am not persuaded by the appellant's submissions with respect to section 14(3)(b). The IPC has found in previous orders that 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.<sup>6</sup>

[34] The police are a law enforcement agency that is responsible for investigating possible violations of the *Criminal Code* and other offence-based statutes. Although the police's role in this matter may have included "keeping the peace" with respect to a family dispute, it is implicit in the records that the officers who spoke to the complainant undertook the basic step of at least briefly investigating whether there were any possible violations of the *Criminal Code*.

[35] I am satisfied, therefore, that the complainant's personal information 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 the complainant's personal privacy.

#### *Section 14(2)*

[36] 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>7</sup> 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;

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<sup>6</sup> Orders P-242 and MO-2235.

<sup>7</sup> Order P-239.

- (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.

[37] 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.<sup>8</sup> 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).<sup>9</sup>

[38] The police claim that the factor in section 14(2)(h) applies to the complainant's personal information, whereas the appellant submits that the factors in sections 14(2)(d) and (g) are applicable.

#### Section 14(2)(h)

[39] Under section 14(2)(h), in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, it must be considered whether the personal information has been supplied by the individual to whom the information relates in confidence.

[40] 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.<sup>10</sup>

[41] The police submit that the complainant provided their views, feelings and opinions to the officers in confidence.

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<sup>8</sup> Order PO-2265.

<sup>9</sup> Order P-99.

<sup>10</sup> Order PO-1670.

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

[43] In the particular circumstances of this appeal, I am satisfied that both the complainant and the police expected that the personal information supplied by the complainant would be treated confidentially, and that this expectation of confidentiality was reasonable in the circumstances, particularly because of the adversarial nature of the family dispute. I find, therefore, that the section 14(2)(h) factor, which weighs in favour of privacy protection, applies to the complainant's personal information in the records.

#### Section 14(2)(d)

[44] Under section 14(2)(d), in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, it must be considered whether the personal information is relevant to a fair determination of rights affecting the person who made the request.

[45] For section 14(2)(d) to apply, it must be established 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.<sup>11</sup>

[46] The appellant submits that the personal information he is seeking is relevant to a fair determination of his rights. To support his position, he claims that a number of his rights under the *Charter*, such as sections 11 and 12, have been breached as a result of the complaint and particularly the direction from the police that he no longer go to his sister's house to visit his parents.

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<sup>11</sup> 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.).

[47] Even if I were to accept that the appellant has established that his *Charter* rights are at stake, he has not provided any evidence to show that those rights are related to a proceeding which is either existing or contemplated, nor has he shown that the complainant's personal information is required in order to prepare for the proceeding or to ensure an impartial hearing. I find, therefore, that the section 14(2)(d) factor, which weighs in favour of disclosure, does not apply because it has not been established that the complainant's personal information is relevant to a fair determination of the appellant's rights.

#### Section 14(2)(g)

[48] Under section 14(2)(g), in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, it must be considered whether the personal information is unlikely to be accurate or reliable.

[49] The appellant states that any information his parents gave to the police was "forced" and given "under duress" due to his sister and therefore the complainant's personal information is unlikely to be accurate or reliable. Although the section 14(2)(g) factor typically weighs in favour of privacy protection, the appellant appears to be arguing that it should weigh in favour of disclosure in the circumstances of this appeal.

[50] In my view, the appellant's position that the personal information that the complainant provided to the police is unlikely to be accurate or reliable because it was given under duress, is speculative. I find, therefore, that the section 14(2)(g) factor does not apply because there is insufficient evidence to establish that the complainant's personal information is unlikely to be accurate or reliable.

#### ***Section 14(4)***

[51] If any of paragraphs (a) to (c) of section 14(4) apply, disclosing the complainant's personal information to the appellant does not constitute an unjustified invasion of the complainant's personal privacy and this information is not exempt from disclosure under section 38(b).

[52] Neither of the parties has raised any of the circumstances set out in section 14(4) and I find that none of them applies to the complainant's personal information.

#### ***Conclusion***

[53] In assessing whether the complainant's personal information 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 the complainant's personal privacy. In addition, I have found that in the particular circumstances of this case, this personal information was supplied by the complainant to the police in confidence under the factor in section 14(2)(h), which weighs in favour of privacy protection. I have also found the factors in sections 14(2)(d) and (g), which

were cited by the appellant, do not apply.

[54] 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, whose personal information is found in the records. In these circumstances, I find that this personal information is exempt from disclosure under section 38(b), because disclosing it to the appellant would constitute an unjustified invasion of the complainant's personal privacy.

***Absurd result***

[55] Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may not be exempt under section 38(b), because to withhold the information would be absurd and inconsistent with the purpose of the exemption.<sup>12</sup>

[56] However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.<sup>13</sup>

[57] The appellant submits that the absurd result principle applies to the complainant's personal information because:

- the appellant is familiar with and knows the names, addresses, dates of birth and telephone numbers of the other parties involved in the family dispute;
- he knows the views of the other parties because his father and mother have confided in him when his sister is not present; and
- his father's refusal to consent to disclosing his personal information resulted from duress and was not of his own free will.

[58] The records at issue in this appeal were created as a result of a highly contentious family dispute. Although the appellant may know the contact information of his family members, he has not provided any evidence to show that he knows what the complainant said to the police. In these circumstances, I find that it would be inconsistent with the privacy protection purpose of the section 38(b) exemption to disclose any of the complainant's personal information to the appellant, even if the appellant might have some knowledge of this information, such as the complainant's contact information.

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<sup>12</sup> Orders M-444 and MO-1323.

<sup>13</sup> Orders M-757, MO-1323 and MO-1378.

### ***Section 4(2) – severability obligation***

[59] The police severed the records and disclosed the appellant’s own personal information to him, except for the comments that the complainant made about the appellant in their statement to the police. These comments contain the personal information of both the complainant and the appellant and this information is closely intertwined.

[60] Section 4(2) of the *Act* requires the police to disclose as much of the “call hard copies” and police officers’ notes to the appellant as can reasonably be severed without disclosing the information that falls under section 38(b). This provision 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.

[61] I have found that the complainant’s personal information is exempt from disclosure under section 38(b) of the *Act* because disclosing it to the appellant would constitute an unjustified invasion of the complainant’s personal privacy. In accordance with section 4(2), the appellant’s personal information that is found in the complainant’s statement to the police must be disclosed to him if those parts of the records can reasonably be severed without disclosing the complainant’s personal information that falls under section 38(b).

[62] Because the personal information of the complainant and the appellant in the complainant’s statement to the police is closely intertwined, I find that those parts of the records cannot reasonably be severed without disclosing the personal information of the complainant that falls under section 38(b). In these circumstances, I find that the police have disclosed as much of “call hard copies” and police officers’ notes as reasonably can be severed and I uphold their decision to refuse disclosure of the appellant’s personal information in the complainant’s statement to the police.

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

[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 IPC may determine whether the institution failed to do so.

[64] 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.

[65] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>14</sup> The IPC may not, however, substitute its own discretion for that of the institution.<sup>15</sup>

[66] The police submit that in exercising their discretion under section 38(b), they weighed the appellant's right of access to his own personal information against the complainant's right to the protection of their privacy. They submit that although the appellant has a right of access to his own personal information, they took into account that disclosing parts of the records would identify and violate the privacy of another individual.

[67] The appellant submits that in exercising their discretion under section 38(b), the police failed to take into account the following factors:

- the mental and physical well-being of the appellant and particularly his parents, who are suffering from documented abuse from the appellant's sister;
- the personal safety of the appellant and his parents;
- the fact that his father's refusal to consent to disclosing his personal information resulted from duress; and
- the personal information is relevant to a fair determination of rights affecting the person who made the request (the appellant).

[68] The appellant further submits that a person's expectation to privacy must be balanced with an assessment of reasonableness and that it is reasonable for a person to know what allegations have been made against them, particularly if those allegations have led to the loss of a person's freedoms and rights.

[69] In my view, the police's exercise of discretion to withhold the personal information of the complainant under section 38(b) is consistent with the purposes of the *Act* and previous IPC jurisprudence. In exercising their discretion to apply that exemption and withhold the complainant's personal information, the police properly weighed the appellant's right of access to his own personal information against the complainant's right to privacy.

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<sup>14</sup> Order MO-1573.

<sup>15</sup> Section 43(2).

[70] In these circumstances, I am satisfied that the police exercised their discretion in denying access to the complainant's personal information 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

\_\_\_\_\_ April 30, 2021