

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4073

Appeal MA19-00820

Halton Regional Police Services Board

June 23, 2021

Summary: The requester was the subject of a police investigation where no charges were laid against him. He sought access to the related records from the Halton Regional Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

The police issued a decision granting partial access to the information responsive to the request. Access to the withheld information was denied pursuant to section 38(a) (discretion to refuse access to requester's own personal information), with section 8 (law enforcement), and section 38(b) (personal privacy) of the *Act*.

In this order, the adjudicator upholds the police's decision and finds the records exempt under section 38(a), in conjunction with section 8, and section 38(b) of the *Act*.

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

Orders Considered: Order MO-2871, PO-1665, PO-3013 and PO-3650.

OVERVIEW:

[1] The requester was the subject of a police investigation where no charges were laid against him. He sought access to the related records from the Halton Regional Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

[2] In particular, the appellant sought access to the following information:

1. Telephone transcripts of any call to 911 or [phone #] regarding me or my address with no redactions other than the name or address of the complainant. Please identify the officers dispatched with badge numbers and provide any transcript of their communications with the dispatcher or duty Sergeant.
2. The names of the officer who attended at my address on [date] around 7:00 pm and that officer's related notebooks and computer entries regarding the visit;
3. Officer [name and #], who attended at my address on [date] around 9:00 pm and that officer's related notebook and computer entries regarding the visit
4. Copy of the Police Data network on myself that is shown when enquires are made regarding my name, driver's license and home address
5. Internal emails that mention this incident.

[3] The police issued a decision granting partial access to the information responsive to the request. Access to the withheld information was denied pursuant to section 38(a) (discretion to refuse access to requester's own personal information), in conjunction with section 8 (law enforcement), and section 38(b) (personal privacy) of the *Act*.

[4] The requester (now the appellant) appealed the police's decision to the Information and Privacy Commissioner of Ontario (the IPC).

[5] Mediation did not resolve the issues in this appeal and this file proceeded to adjudication, where an adjudicator may conduct an inquiry. I decided to conduct an inquiry and I sought the police's representations initially, which were sent to the appellant, with the confidential portions removed.¹ The appellant provided representations in response.

[6] In this order, I uphold the police's decision and find the records are exempt under section 38(a), in conjunction with section 8, and 38(b) of the *Act*.

RECORDS:

[7] The records at issue consist of a CD with the audio of a 911 call, an occurrence report, and police officers' handwritten notes.

¹ In making my decision, I have considered both the police's confidential and non-confidential representations, although I will only be referring to the police's non-confidential representations in this order.

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the discretionary personal privacy exemption at section 38(b) apply to the information at issue?
- C. Does the discretionary exemption at section 38(a) (discretion to refuse access to requester's own personal information), in conjunction with the section 8(1) law enforcement exemption, apply to the information at issue?
- D. Did the police exercise its discretion under sections 38(a) and 38(b)? If so, should I uphold the exercise of discretion?

DISCUSSION:

Issue A: Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[8] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record 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 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] 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

[10] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.³

[11] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.⁴

[12] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁵

Representations

[13] The police state that the records contain information relating to the age, sex, address, telephone number, and views or opinions of involved individuals, including the appellant.

[14] They also state that parts of the records contain the personal views and opinions of the complainant.

[15] The appellant did not address this issue in his representations.

Analysis/Findings

[16] I agree with the police, and I find, that the records, which consist of police

² Order 11.

³ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁴ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁵ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

reports, police notes and a 911 call, contain the personal information of the appellant and other identifiable individuals in their personal capacity. This information consists of their ages, sexes, addresses, telephone numbers, and these individuals' views or opinions, in accordance with paragraphs (a), (d), (e), (g), and (h) of the definition of personal information in section 2(1) of the *Act*.

[17] I will now consider the application of the discretionary personal privacy exemption in section 38(b) to the personal information in the records.

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

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

[19] 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.⁶

[20] Sections 14(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy.

[21] If the information fits within any of paragraphs (a) to (e) of section 14(1) or paragraphs (a) to (c) of section 14(4), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). The personal information at issue in this appeal does not fit within these paragraphs of section 14(1) or 14(4).

[22] 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).

[23] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), the IPC will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.⁷

[24] If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the

⁶ See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 38(b).

⁷ Order MO-2954.

information is presumed to be an unjustified invasion of personal privacy under section 38(b).

Representations

[25] The police state that the records include the personal information of the appellant and that some of the appellant's personal information is blended together with that of other identifiable individuals. They state that this is specifically the case in parts of the records that are about what other individuals said to the police, especially during the 911 call about the appellant.

[26] The police further state that the personal information of the appellant has already been disclosed to him and the personal information remaining at issue does not relate to the appellant.

[27] The police submit that disclosure of the personal information of the other individuals in the records would unjustifiably invade their personal privacy.

[28] The police rely on the presumption in section 14(3)(b), which reads:

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.

[29] The police state that the personal information was compiled and is identifiable as part of an investigation into a possible violation of law. In particular, the police were investigating a call, where the initial allegations may have led to charges.

[30] The police state that, following the investigation, officers determined that there were no grounds to support a criminal offence. However, the police maintain that this does not change the fact that the occurrence was still investigated in regard to a possible violation of law, therefore meaning that section 14(3)(b) applies to the records.

[31] The appellant did not provide representations that specifically address the personal privacy exemption.

Analysis/Findings

[32] I agree with the police, and I find, that the records were compiled and are identifiable as part of an investigation into a possible violation of law. A complaint was made to the police about a possible violation of law by the appellant and this complaint was investigated by the police. No charges were laid as a result of this investigation.

[33] 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.⁸

[34] 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.⁹ In balancing the interests of the parties under section 38(b), therefore, I must also consider whether any factors in section 14(2) weighing for, or against, disclosure apply.

[35] 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).¹⁰

[36] The appellant submits that the records should not be severed and that the information about him in the records should be corrected. He is worried that it will damage his reputation. He appears to be relying on the factors in sections 14(2)(g) and 14(2)(i) that, if found to apply, normally weigh against disclosure. These factors read:

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,

(g) the personal information is unlikely to be accurate or reliable;

(i) the disclosure may unfairly damage the reputation of any person referred to in the record.

[37] The section 14(2) factors typically favouring disclosure are listed at sections 14(2)(a) to (d), whereas those favouring privacy protection are listed at sections 14(2)(e) to (i).

[38] Although the appellant appears to have raised two factors that are considered to weigh against disclosure, I have considered his arguments and respond to them below.

[39] Concerning the factor in section 14(2)(g), the appellant submits that the information at issue in the records may be inaccurate. As noted, this factor, if established, would apply to weigh against disclosure of the personal information of other individuals.¹¹

[40] The IPC mediator explained to the appellant the process for requesting that a statement of disagreement be attached to his police records under section 36(2)(b) of

⁸ Orders P-242 and MO-2235.

⁹ Order P-239.

¹⁰ Order P-99.

¹¹ See Order PO-2271.

the *Act*.¹² This section sets out the steps to add a statement of disagreement to his file. The appellant was advised that statements of disagreement are not processed by the IPC and he would need to follow-up with the police to file this document.

[41] I find that this factor that favours privacy protection in section 14(2)(g) does not weigh in favour of disclosure to the appellant. The appellant has had partial disclosure of the records and has not identified what he believes may be inaccurate in the records and he is able to have attached to the records a statement of disagreement. Nevertheless, the records are accurate as to the fact that the appellant did not commit any criminal act and clearly show that the police investigation did not reveal any criminal wrongdoing by the appellant.

[42] Concerning the factor in section 14(2)(i), the appellant is concerned that the records may unfairly damage his reputation when a police background check is requested for employment, volunteer, or other reasons.

[43] The applicability of section 14(2)(i) is not dependent on whether the damage or harm envisioned by the clauses is present or foreseeable, but whether this damage or harm would be "unfair" to the individual involved.¹³

[44] Both the police's representations and the records show that, following a law enforcement investigation, the officers who conducted the investigation determined that there were no grounds to support that the appellant had committed a criminal offence and, therefore, no charges were laid against the appellant.

[45] The appellant was advised by the mediator, who had communicated with the police, that the incident in the records would not appear on a police background check done on him and that a potential employer, a volunteer organization, or a private citizen could not view the records. Therefore, the records could not be used to unfairly damage the appellant's reputation.

[46] The factor in section 14(2)(i) favours privacy protection of affected persons, not disclosure to a requester, as it is about not disclosing information to others that may unfairly damage the reputation of the person the information is about. As this factor favours privacy protection, I find that the factor in section 14(2)(i) does not weigh in favour of the appellant's request for disclosure of this information.

[47] As set out above, in determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under

¹² Section 36(2)(b) reads:

Every individual who is given access under subsection (1) to personal information is entitled to, require that a statement of disagreement be attached to the information reflecting any correction that was requested but not made;

¹³ Order P-256.

section 38(b), the IPC will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties. I have found that the presumption against disclosure in section 14(3)(b) applies and no factors in section 14(2) favouring disclosure apply.

[48] Therefore, on balance, I find that disclosure of the personal information in the records would be an unjustified invasion of personal privacy of the other individuals in the records. I find that the discretionary personal privacy exemption in section 38(b) applies. Subject to my review of the police's exercise of discretion, the personal information at issue in the records is exempt under section 38(b).

Issue C: Does the discretionary exemption at section 38(a) (discretion to refuse access to requester's own personal information), in conjunction with the section 8(1) law enforcement exemption, apply to the information at issue?

[49] Section 36(1) gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right.

[50] Section 38(a) reads:

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

if section 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

[51] Section 38(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.¹⁴

[52] Where access is denied under section 38(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

[53] In this case, the institution relies on section 38(a) in conjunction with sections 8(1)(e) and (l), which read:

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

¹⁴ Order M-352.

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

(l) facilitate the commission of an unlawful act or hamper the control of crime.

[54] The term "law enforcement" is used in several parts of section 8, and is defined in section 2(1) as follows:

"law enforcement" means,

(a) policing,

(b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or

(c) the conduct of proceedings referred to in clause (b)

[55] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.¹⁵

[56] It is not enough for an institution to take the position that the harms under section 8 are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter.¹⁶ The institution must provide detailed 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.¹⁷

Representations

[57] This police state that they have applied section 38(a), in conjunction with section 8(1)(l), to the "ten codes" in the records as they are specific codes used while sending radio transmissions that are not generally known to the public.

[58] The police rely on Order MO-2871, where I stated:

This office has issued numerous orders with respect to the disclosure of police codes and has consistently found that section 8(1)(l) applies to "10

¹⁵ *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

¹⁶ Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

¹⁷ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

codes" (see Orders M-93, M-757, MO-1715 and PO-1665), as well as other coded information such as "900 codes" (see Order MO-2014). These orders adopted the reasoning of Adjudicator Laurel Cropley in Order PO-1665:

In my view, disclosure of the "ten-codes" would leave OPP officers more vulnerable and compromise their ability to provide effective policing services as it would be easier for individuals engaged in illegal activities to carry them out and would jeopardize the safety of OPP officers who communicate with each other on publicly accessible radio transmission space... Concerning section 8(1)(l), I also agree with Adjudicator Bhattacharjee in Order MO-2112 that this office has issued numerous orders with respect to the disclosure of police codes and has consistently found that section 8(1)(l) applies to "10 codes". Adopting this reasoning, I find that disclosure of the 10 codes in the records could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime and that section 38(a) read in conjunction with section 8(1)(l) applies to this information.

[59] This police state that they have applied section 38(a), in conjunction with section 8(1)(e), to withhold police codes that identify specific police zones and beats within the municipality, as well as emergency service zones used by the police. They state that these codes are assigned to all addresses in the same geographical area of the city by the computer aided dispatch software system that generates and dispatches police calls. The police state:

There is a significant risk that persons participating in (or who wish to engage in) criminal activity could use this information to predict police response time and resources for any given call. This could compromise the effectiveness of policing services, endanger the life or physical safety of a law enforcement officer, and potentially facilitate the commission of an unlawful act or hamper the control of crime.

[60] The appellant did not provide representations on the application of section 8.

Analysis/Findings

[61] The police "ten codes" in the records are specific codes used while sending radio transmissions. These codes are not generally known to the public.

[62] I adopt my findings in Order MO-2871, and I find that section 38(a), in conjunction with section 8(1)(l) apply to the police "ten codes" in the records.

[63] I am satisfied that disclosure of the "ten codes" in the records could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of

crime.

[64] I also find that section 38(a), in conjunction with section 8(1)(l), also applies to the remaining police code information in the records. As set out in Order PO-3650 and PO-3013, police codes, specifically codes that identify specific police zones and beats, as well as emergency service zones, qualify for exemption under section 8(1)(l). In Order PO-3013, the adjudicator stated that:

A number of previous orders have found that police codes qualify for exemption under section 14(1)(l),¹⁸ because of the reasonable expectation of harm which may result from their release (see, for example, M-393, M-757, M-781, MO-1428, PO-1665, PO-1777, PO-1877, PO-2209, and PO-2339). This includes 10-codes, as well as codes which reveal identifiable zones from which officers are dispatched for patrol and other law enforcement activities. In the circumstances of this appeal, I am satisfied that the ministry has provided sufficient evidence to establish that disclosure of the operational codes, found on the listed pages, could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime.

[65] I agree with these findings and find that section 38(a), in conjunction with section 8(1)(l), apply to the police codes that identify specific police zones and beats within the municipality, as well as emergency service zones used by the police. Disclosure of this information could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime.¹⁹

[66] As I have found that section 38(a), in conjunction with section 8(1)(l), applies to police codes, emergency zones and police beats, it is unnecessary for me to determine whether section 8(1)(e) also applies.

[67] I will now consider whether the police properly exercised their discretion under section 38(a) with section 8(1)(l) to withhold this information, along with the personal information I found exempt above under section 38(b).

Issue D: Did the police exercise its discretion under sections 38(a) and 38(b)? If so, should I uphold the exercise of discretion?

[68] The sections 38(a) 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 do so.

¹⁸ Section 14(1)(l) of the *Freedom of Information and Protection of Privacy Act (FIPPA)*, the provincial equivalent to section 8(1)(l) of *MFIPPA*.

¹⁹ See for example, Orders MO-2795, PO-3013 and PO-3650.

[69] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[70] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.²⁰ The IPC may not, however, substitute its own discretion for that of the institution.²¹

[71] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:²²

- 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
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution

²⁰ Order MO-1573.

²¹ Section 43(2).

²² Orders P-344 and MO-1573.

- 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
- the age of the information
- the historic practice of the institution with respect to similar information.

Representations

[72] The police reviewed the considerations listed above in their representations. They state that they exercised their discretion under sections 38(a) and 38(b), taking into account these considerations recommended by the IPC in order to exercise discretion in a proper manner.

[73] The police state that to release additional information to the appellant would be an unjustified invasion of personal privacy of other involved individuals and may endanger the safety of a law enforcement officer or divulge investigative techniques used by the police service.

[74] The appellant did not provide representations on this issue.

Analysis/Findings

[75] Based on my review of the parties' representations in their entirety, including the confidential representations of the police, and the information at issue in the records, I find that the police exercised their discretion in a proper manner under sections 38(a), in conjunction with section 8(1)(l), and section 38(b). I find that the police took into account relevant considerations and did not take into account irrelevant considerations.

[76] The police, in particular, took into account the purpose of the exemptions at issue as they relate to the circumstances set out in the records. In the case of section 38(a) with section 8(1)(l), that is to protect the safety of law enforcement officers, and in the case of section 38(b), that is to protect the privacy of other individuals in the records.

[77] Therefore, I am upholding the police's exercise of discretion and find that the information at issue in the records is exempt under either section 38(a), in conjunction with section 8(1)(l), and section 38(b).

ORDER:

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

Original Signed by: _____

Diane Smith
Adjudicator

June 23, 2021 _____