

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4064

Appeal MA19-00533

Thunder Bay Police Services Board

June 11, 2021

Summary: An individual submitted a request to the Thunder Bay Police Services Board (the police) seeking access to the name of an individual who filed a complaint about him, as well as the names of two police officers who issued him with a trespass notice. The police granted access to the officers' names, but withheld the name of the complainant based on the discretionary personal privacy exemption in section 38(b) of the *Municipal Freedom of Information and Protection of Privacy Act*. In this order, the adjudicator upholds the police's 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), 14(3)(b), and 38(b).

OVERVIEW:

[1] An individual attended Thunder Bay City Hall in June 2019 to demand that the Thunder Bay Pride flags, which were erected in celebration of the annual Pride Week, be removed from the outside the building. City Hall security asked the individual to leave, but he refused to do so. The Thunder Bay Police Services Board (the police) were called to assist.

[2] The individual later submitted the following request to the police under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

I would like the names of the two officers responsible for filing and giving me a Notice to Trespass to Property Act RSO 1990, so I can sue them for

extortion & mischief and to one perjury & the other corruption. As well as the complainant's name so I can sue for mischief.

[3] The police issued a decision granting partial access to the information responsive to the request. Specifically, the police granted access to the names of the officers who issued the trespass notice, but denied access to the name of the complainant based on the discretionary personal privacy exemption at section 38(b), read in conjunction with section 14(3)(b) of the *Act*.

[4] The requester appealed the police's decision to withhold the complainant's name to the Information and Privacy Commissioner (IPC), thereby becoming the appellant in this appeal.

[5] During the mediation stage of the appeal process, the appellant asked the mediator to notify the complainant (now the affected party) of his request, and determine whether they would consent to the disclosure of their name. The mediator did so, but the affected party declined to provide their consent for the disclosure of their name to the appellant. The mediator advised the appellant of the results of notification.

[6] As a mediated resolution was not achieved, the file was moved to the adjudication stage of the appeal process and I decided to conduct an inquiry under the *Act*. I began my inquiry by inviting and receiving written representations from the police and affected party. A complete copy of the police's representations, and the non-confidential portions of the affected party's representations, were shared with the appellant in accordance with the IPC's *Code of Procedure and Practice Direction Number 7*. The appellant provided representations in reply.

[7] For the reasons that follow, I uphold the police's decision and dismiss this appeal.

RECORDS:

[8] The record is a two-page General Report that was prepared by the police. The only information at issue in this appeal is the affected party's name, which appears on page one of the record.

ISSUES:

- A. Does the information at issue constitute "personal information" as defined in section 2(1) 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 institution exercise its discretion under section 38(b)? If so, should the IPC uphold the exercise of discretion?

DISCUSSION:

Issue A: Does the information at issue constitute “personal information” as defined in section 2(1) and, if so, to whom does it relate?

[9] The police denied access to the affected party’s name based on the personal privacy exemption in section 38(b) of the *Act*. Before determining whether the personal privacy exemption applies, it is necessary to decide whether the record at issue constitutes “personal information” and, if so, to whom it relates. That term is defined in section 2(1) as “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 [...]

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

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

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

[10] 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.¹

[11] Sections 2(2), (2.1) and (2.2) also relate to the definition of personal information. Sections 2(2.1) and 2(2.2) may be relevant to this appeal. These sections state:

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

(2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their

¹ Order 11.

dwelling and the contact information for the individual relates to that dwelling.

[12] 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.² 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.³

[13] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁴

Representations

[14] The police maintain that the record contains the personal information of the affected party, who is an employee of the City of Thunder Bay, and the professional information of an unnamed security officer.⁵ According to the police, the information relating to the affected party is personal, not professional, information because the incident in question arose outside of the affected party’s professional duties. The police explain that the appellant was causing a disturbance because he was “irate and upset over Thunder Bay Pride flags being flown at City Hall.” The security officer requested that the appellant leave the premises and, when the appellant refused to do so, the affected party called the police for assistance. The police submit that the affected party was merely assisting the security officer by making the 911 call in order to maintain the safety of all parties within City Hall.

[15] The affected party provided both written representations and confidential affidavit evidence in support of their position. In the affidavit, the affected party attests to the nature of their employment duties at City Hall, as well as their recollection of the events that led to them calling 911 and requesting police assistance. The affected party also attests to their concerns about their name being disclosed to the appellant.

[16] In their representations, the affected party acknowledges that they are a city employee, but maintains that their call to the police was not as a result of their job functions. The affected party explains that while they are responsible for monitoring incoming calls, visitors, and public inquiries, and directing people appropriately, there is nothing in their job description “to do with offering safety or security for City Hall or for the issuing of trespass notices.” The affected party submits that they called the police

² Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

³ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁴ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

⁵ Information relating to the unnamed security officer is not at issue in this appeal.

because they “feared for their own personal safety while working at City Hall,” and not because of some professional duty. The affected party claims that, “it is clear that providing [their name] to the appellant would reveal something of a personal nature about them by way of putting a name to the face of the person who made the complaint to the police based on feelings of unsafety in their work place.” For these reasons, the affected party maintains that their name constitutes their personal information as defined in paragraph (h) of section 2(1) of the *Act*.

[17] The appellant’s representations do not address this issue.

Analysis and Findings

[18] Having reviewed the record at issue, I find that it contains the personal information of both the appellant and the affected party.

[19] The record contains information relating to the appellant’s name, sex, and personal views or opinions, as well as other individuals’ views or opinions about the appellant, which engage paragraphs (a), (e), (g) and (h) of the definition of “personal information” in section 2(1) of the *Act*.

[20] The record also contains the name and views or opinions of the affected party. Although the affected party called the police from their place of work, I am satisfied that the information relating to the affected party reveals something of a personal nature about them;⁶ namely, how the affected party felt about particular interactions they had with the appellant, which resulted in them calling the police. Accordingly, I find that the information at issue in this appeal is the affected party’s personal information as defined in section 2(1) of the *Act*, rather than their professional information as described in sections 2(2.1) and 2(2.2).

[21] Having found that the record contains the personal information of the appellant and affected party, I will now consider whether disclosure of the affected party’s name would be an unjustified invasion of personal privacy under section 38(b).

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

[22] Section 38 of the *Act* provides a number of exemptions from individuals’ general right of access under section 36(1) to their own personal information held by an institution. Under section 38(b), the police may refuse to disclose information in a record that contains the appellant’s personal information if disclosure of that information would be an “unjustified invasion” of the affected party’s personal privacy. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information at issue to the appellant.

⁶ Order PO-2225.

[23] Sections 14(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy for the purposes of section 38(b). If the information fits within any of paragraphs (a) to (e) of section 14(1), or any of paragraphs (a) to (c) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). None of paragraphs (a) to (e) of section 14(1), or paragraphs (a) to (c) of section 14(4) are applicable in this appeal.

[24] If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 38(b). Section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.⁷ 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).⁸

[25] In determining whether the disclosure of the personal information at issue 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.⁹

Section 14(3) presumptions

[26] In this appeal, the police and affected party claim that the presumption in section 14(3)(b) applies. This section reads:

(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

[27] Previous IPC orders have held that this presumption may apply even if no criminal proceedings were commenced against any individuals. The presumption only requires that there be an investigation into a possible violation of law.¹⁰ The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.¹¹

⁷ Order P-239.

⁸ Order P-99.

⁹ Order MO-2954.

¹⁰ Orders P-242 and MO-2235.

¹¹ Orders MO-2213, PO-1849 and PO-2608.

Representations

[28] The police maintain that the appellant attended City Hall, was aggressive toward City Hall employees, and refused to leave when asked. As a result, the police's assistance was requested in order to have the appellant removed from the property. The police explain that although the appellant eventually left City Hall on his own, the police subsequently located him nearby and issued him with a trespass notice under the *Trespass to Property Act*.¹² The police submit that the personal information of the parties was compiled as part of their investigation, and would be required should future charges be laid against the appellant under the *Trespass to Property Act*.

[29] The affected party submits that their name was collected along with a statement describing their interactions with the appellant, including the specific behaviour that led to the police being called. According to the affected party, the police then used this information in exercising their discretion to issue the appellant with a trespass notice. In the affected party's view, it is clear that the presumption in section 14(3)(b) applies.

[30] The appellant's representations do not specifically address the presumption in section 14(3)(b); however, he explains that he was at City Hall to inform certain individuals that he would be suing them because "advocating homosexuality through a flag is sexual abuse." The appellant maintains that he requested to see the mayor, and told City Hall staff that he could wait. He also claims that he was "very well mannered," and that the affected party "aggravated the situation for no reason other than [their] own."

Analysis and findings

[31] The record pertains to the police's investigation into a complaint about the appellant's behaviour at City Hall in June 2019. I find that the record was compiled as part of the police's law enforcement investigation into a possible violation of law, namely, a violation of the *Trespass to Property Act*, and that the presumption in section 14(3)(b) applies. As mentioned above, under section 38(b), this finding must be considered together with application of any relevant factors or considerations weighing in favour of or against disclosure under section 14(2).¹³

Section 14(2) factors

[32] Turning to section 14(2), the parties' representations refer or allude to the factors or considerations described in paragraphs (d), (e), (f), (h), and (i) of section 14(2), which state:

¹² R.S.O. 1990, c. T.21.

¹³ Order MO-2954.

(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,

[...]

(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;

[...]

(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.

Representations

[33] The police submit that their consistent practice is to treat the names of individuals who call 911 as confidential, unless they consent to the release of that information or disclosure is otherwise required by law (for example, pursuant to a court order). They submit that the information is highly sensitive, and that its release would cause the affected party distress because they may be exposed to retaliation by the appellant.

[34] The police note the appellant's intention to sue the affected party for mischief. The police maintain that the appellant could proceed without the affected party's name under a "John Doe" application. The police also maintain that disclosing the affected party's name would unfairly expose the affected party to pecuniary harm, or damage to their reputation, as a result of the lawsuit that the appellant intends to bring against them.

[35] The affected party maintains that the factors in sections 14(2)(e), (f), (h) and (i) are all relevant in this appeal. With respect to the considerations in section 14(2)(e) and (i), they claim that it is unfair that a person who has called the police in a situation that they perceived to be dangerous could subsequently have their name disclosed to the person whom they made a complaint about, and then be subjected to a "frivolous, but potentially expensive lawsuit."

[36] The affected party also notes that prior IPC orders have concluded that "the personal information of individuals who are 'complainants, witnesses or suspects' as part of their contact with the police is 'highly sensitive' for the purpose of section

14(2)(f)."¹⁴ They submit that the same principle should apply in this appeal.

[37] With respect to the factor in section 14(2)(h), the affected party observes that in order for information to have been "supplied in confidence," both the individual supplying the information and the recipient must have had an expectation of confidentiality. According to the affected party, the IPC has traditionally treated the relationship between complainants and the police as satisfying this requirement,¹⁵ and should continue to do so in this appeal.

[38] In the affected party's view, sections 14(2)(a) to (c) and section 14(2)(g) are not relevant in this appeal, and the appellant bears the onus of establishing the relevance of section 14(2)(d). They say that sections 14(2)(e), (f), (i), and (h), and the presumption in section 14(3)(b) weigh against disclosure of their name.

[39] The appellant submits that he was lawfully at City Hall on the day in question, and that he "neither shouted, yelled, interfered, obstructed, damaged, trespassed, deviated, loitered, nor in any other way committed an offence." He claims that he was approached by City Hall staff by their own volition, "which was an affront to [him]." The appellant maintains that it is not frivolous of him to sue. And, with respect to the expenses of the lawsuit, he says that if the affected party wins the case, they can have him pay the damages. In the appellant's view, the affected party is currently in contempt of court by refusing to give him the information that he requires to sue, because there is no basis under the *Act* to deny him that information.

Analysis and findings

[40] Considering the parties' representations and the nature of the information at issue, I am not persuaded that any of the listed or unlisted factors or considerations under section 14(2) weigh in favour of disclosing the affected party's name to the appellant. The appellant's representations allude to the factor in section 14(2)(d). In order for this factor to apply and weigh in favour of disclosure, the appellant must establish 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

¹⁴ The affected party refers to Order P-1618 as cited in Order MO-3696 at para 38.

¹⁵ The affected party refers to Orders MO-3526 and MO-3324.

4. the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.¹⁶

[41] The appellant's representations consist of his assertions of what happened, and his claims that the police and affected party are being frivolous in denying him the information that he believes he needs in order to pursue his claim of mischief against the affected party. These submissions do not establish the four requirements set out above, and they do not persuade me that the factor in section 14(2)(d) applies in this appeal.

[42] The police and affected party's representations and the nature of the record itself satisfy me that the factors favouring privacy protection in sections 14(2)(f) and (h) apply. The affected party's personal information relates to a complaint they made to the police due to circumstances in which they felt that their safety was jeopardized by the appellant's behaviour. Considering the circumstances under which the affected party called the police, I am satisfied that the affected party's personal information qualifies as highly sensitive.

[43] In my view, it is reasonable for complainants to expect that the personal information they provide to the police as part of a complaint remain confidential and not be shared with the individual about whose conduct they complained. I also note that the police have maintained the confidentiality of the affected party's personal information in the record, and indicated that they would only disclose it with consent or as required by law. Therefore, I accept that the affected party and police had reasonable expectations of confidentiality with respect to the affected party's personal information.

[44] I am less persuaded by the parties' arguments with respect to the factors weighing against disclosure in sections 14(2)(e) and (i); however, I am satisfied that I do not need to make a finding on whether they apply. Because I have found that no factors favouring disclosure apply, that the presumption in section 14(3)(b) applies, and that the factors favouring privacy protection in sections 14(2)(f) and (h) apply, I conclude that the balancing of interests is against disclosure of the affected party's name to the appellant. Accordingly, I find that the discretionary exemption in section 38(b) of the *Act* applies to the information at issue, subject to my review of the police's exercise of discretion below.

Issue C: Did the institution exercise its 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

¹⁶ 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.).

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.

[46] 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, 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. The IPC may not, however, substitute its own discretion for that of the institution.

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

- 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
- 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

[49] The police submit that they properly exercised their discretion in responding to the appellant's request. According to the police, the record revealed that the appellant received a trespass notice due to his behaviour at City Hall. The police explain that they regularly provide access to the names of officers acting in their professional capacity, as was done in this case. However, with respect to its decision to withhold the affected party's name, the police maintain that they considered the fact that the affected party called police at the request of City Hall security, and that they did so with the expectation that their personal information would remain confidential.

[50] The affected party submits that the police properly exercised their discretion in deciding to deny the appellant access to their name under section 38(b).

[51] The appellant's representations did not address this issue.

Analysis and findings

[52] I accept that the police exercised their discretion under section 38(b) in denying access to the affected party's name. The police considered the significance of the personal privacy exemption in section 38(b), the relevance of the presumption in section 14(3)(b), and the interests these sections of the *Act* are intended to protect, including the protection of individuals' privacy with respect to their personal information. There is no evidence before me that the police exercised their discretion in bad faith or for an improper purpose. For these reasons, I uphold the police's exercise of discretion in denying the appellant access to the withheld personal information.

ORDER:

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

Original signed by: _____

Jaime Cardy
Adjudicator

June 11, 2021 _____