

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4077

Appeal MA19-00227

St. Thomas Police Services Board

June 30, 2021

Summary: The appellant sought access under the *Municipal Freedom of Information and Protection of Privacy Act* to records of the St. Thomas Police Services Board relating to complaints he made to the police. The police granted partial access to the records, withholding some of the information on the basis that its disclosure would be an unjustified invasion of the personal privacy of other individuals under the discretionary exemption in section 38(b) of the *Act*.

In this order, the adjudicator finds that small portions of the records do not constitute the personal information of the appellant or other identifiable individuals, and she orders these portions of the records to be disclosed to the appellant. The adjudicator upholds the police's decision to withhold the remaining personal information under section 38(b).

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. c. M.56, sections 2(1) definition of "personal information", 14(2)(d), 14(3)(b) and 38(b).

OVERVIEW:

[1] This order addresses a decision of the St. Thomas Police Services Board (the police) to deny the appellant access to records under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

[2] The appellant requested records relating to complaints he filed with the police during a specified time-period.

[3] The police located responsive records in which the appellant was identified as a

complainant or co-complainant and granted the appellant partial access. The police claimed that the withheld portions of the records qualified for exemption under section 38(a) (discretion to refuse access to requester's own personal information) in conjunction with various law enforcement provisions under section 8(1). The police also claimed that some portions of the records were related to an ongoing prosecution and thus were excluded from the *Act* under section 52(2.1).¹

[4] The appellant appealed the police's decision to the Information and Privacy Commissioner of Ontario (the IPC) and a mediator was assigned to the appeal to explore settlement with the parties. The police subsequently issued a revised decision letter in which they added a claim that disclosure of information relating to other individuals to the appellant would constitute an unjustified invasion of personal privacy under the discretionary exemption in section 38(b), taking into consideration the presumption at section 14(3)(b) (investigation into a possible violation of law).

[5] During mediation, the police confirmed that some of the information withheld in the officer's notebooks was withheld on the basis that it was not responsive to the request. The appellant, in turn, agreed not to pursue access to this information.

[6] The appellant also confirmed that he was not interested in pursuing access to the portions of the records withheld under section 38(a) in conjunction with the law enforcement provisions under section 8(1) or records excluded under section 52(2.1).

[7] However, the appellant continued to seek access to the portions of the records withheld under the discretionary personal privacy exemption in section 38(b). At the end of mediation, the police confirmed that they were relying on the presumption at section 14(3)(b) in addition to the factors favouring privacy protection at sections 14(2)(e) (pecuniary or other harm) and 14(2)(f) (highly sensitive) to withhold this information.

[8] No further mediation was possible and the file was transferred to the adjudication stage of the appeal process in which an adjudicator may conduct an inquiry. I decided to conduct an inquiry and invited the parties to make written representations in support of their positions. The non-confidential portions of the police's and appellant's representations were exchanged in accordance with the IPC's *Code of Procedure and Practice Direction 7*.

[9] After submitting his initial representations, the appellant wrote to the IPC to indicate that all pending prosecution matters arising from some of the complaints he filed against a named individual had been concluded in the courts. I subsequently contacted the police who confirmed that it was no longer claiming that the prosecution

¹ In the alternative, the police claimed that the information on pages 138, 139, 140 and 170 qualified for exemption under section 38(b)(personal privacy) if the exclusion at section 52(2.1) was found not to apply.

exclusion at section 52(2.1) applies. Given that the prosecution exclusion is no longer at issue in this matter, I have added pages 138, 139, 140 and 170 back to the scope of this appeal and will determine whether disclosure to the appellant would constitute an unjustified invasion of personal privacy under section 38(b).

[10] The appellant was also invited to make supplemental representations on the potential application of the factor favouring disclosure at section 14(2)(d) and the absurd result principle. The appellant requested that his entire supplemental representations be withheld from the police for confidentiality reasons.

[11] In this order, I uphold the police's decision to withhold most of the withheld portions of the records at issue. However, I order the police to disclose small portions of the records to the appellant, which contain police officer notations I find do not constitute the personal information of any identifiable individual. I also order the police to disclose portions of the records previously withheld under the exclusion under section 52(2.1) which do not qualify for exemption under section 38(b).

RECORDS:

[12] The records at issue consist of the information the police withheld under section 38(b) contained in general reports, occurrence summaries and police notebooks totalling 170 pages.

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Would disclosure of the personal information at issue constitute an unjustified invasion of personal privacy under section 38(b)?
- C. Did the police exercise its 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) and, if so, to whom does it relate?

[13] The police take the position that, during its investigation, they spoke to the appellant and other individuals, and that:

Information such as addresses, telephone numbers, dates of birth, gender, vehicle information and statements were collected from these

individuals. Clearly, the records at issue contain the personal information of identifiable individuals, including the Appellant.

The records at issue contain the name, address, age, date of birth, telephone number, statements made by and advice given to the affected parties. All of the records contain information about individuals in a personal capacity, not in a professional, official or business capacity. The records are in regards to an ongoing residential neighbour dispute.

[14] The appellant takes the position that the records relate solely to himself. The appellant states that the information sought relates "solely to any and all information as it pertains to myself specifically and more specifically, any statements as made against me by any civilian or Police Officer."

[15] The appellant disagrees with the police's characterization of the matter as investigations related to a "neighbour dispute" and he argues that the request seeks to access information relating to "[a]ny statement made against me, by anyone, to a Police Officer that prompts/promoted an investigation into my life whatsoever."

[16] The appellant states that the withheld information "[is] specific to me and no one else." The appellant goes on to submit that a crime was committed against him and an individual was found guilty. The appellant names the individual he says was found guilty and submits that this individual's name, birthdate and address have already been provided to him by the courts. The appellant also takes the position that "no reasonable expectation of privacy" exists with respect to any statements made against him. He cites paragraph (e) of the definition of "personal information" in section 2(1), which states that "personal information includes recorded information about an identifiable individual, including, the personal opinions or views of the individual except if they relate to another individual."

Findings

[17] Having reviewed the records, I am satisfied that the portions of the records withheld by the police under section 38(b) contain the personal information of the appellant and other individuals, as defined in paragraphs (a), (c), (d), (e), (g) or (h).² I

² The term "personal information" is defined, in part, 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,
- (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,
- (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;

note that the records before me relate solely to complaints the appellant filed with the police. Accordingly, most of notations made by the police officers that relate to other individuals are the result of information the police gathered when they spoke to other individuals about the complaints filed by the appellant.

[18] However, I note that small portions of some of the records contain notations made by officers regarding their views. I find that the officers' notations on pages 125, 128, 131, and 132 do not constitute the personal information of the appellant or another identifiable individual. As such, the personal privacy exemption under section 38(b) cannot apply to this information. As the police have not claimed that any other exemption applies to this information, I will order the police to disclose this information to the appellant.

[19] I will now consider whether the personal information at issue should be disclosed to the appellant in the circumstance of this appeal.

B. Would disclosure of the personal information at issue constitute an unjustified invasion of personal privacy under section 38(b)?

[20] Since I found that the records contain the personal information of the appellant and other individuals, section 36(1) of the *Act* applies to the appellant's access request. 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.

[21] Under section 38(b), where a record contains personal information of the appellant and another individual, and disclosure of the information would be an "unjustified invasion" of the other's 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.

[22] Sections 14(1) to (4) provide guidance in determining whether disclosure of the information would be an unjustified invasion of personal privacy under section 38(b).

[23] If the information fits within any of the paragraphs (a) to (f) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). The parties have not claimed that any of the exceptions in paragraphs (a) to (e) apply, and I am satisfied that none applies in the circumstances of this appeal.³

³ Section 14(1)(a) contemplates the disclosure of an individual's personal information to another person upon their prior written request or consent, if the record is one which the individual is entitled to have access. The police explain that during the request and mediation stage of this appeal, the appellant

[24] Sections 14(2) and (3) also help in determining whether disclosure would or would not be an unjustified invasion of personal privacy. Also, section 14(4) lists situations that would not be an unjustified invasion of personal privacy, but I find that none of the section 14(4) exceptions are relevant in this appeal.

[25] 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.⁴

Does the presumption at section 14(3)(b) apply?

[26] If any of the paragraphs (a) to (h) of section 14(3) apply, disclosure of the personal information is presumed to be an unjustified invasion of personal privacy.

[27] The police take the position that the presumption at section 14(3)(b) applies because the records were created during the course of its investigation into a possible violation of law. Section 14(3)(b) states:

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

was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

[28] Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.⁵ The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.⁶

[29] Having regard to the records along with the representations of the parties, I am satisfied that the records were created as part of the police's investigation into a possible violation of law, namely a *Criminal Code* offence. Despite the appellant's evidence that the prosecution matters related to his complaints have concluded, section 14(3)(b) can still apply in the circumstances as the records were created during the

confirmed that he did not want the police to notify the affected individuals to make inquiries as to whether they were prepared to consent to the release of their information.

⁴ Order PO-2954.

⁵ Orders P-242 and MO-2235.

⁶ Orders MO-2213, PO-1849 and PO-2608.

police's investigation.⁷

[30] Having regard to the above, I find that the presumption at section 14(3)(b) applies to the withheld personal information.

Do any of the section 14(2) factors apply?

[31] Section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.⁸

[32] The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2).⁹

[33] The police claim that the factors weighing in favour of privacy protection at section 14(2)(e) and (f) apply. The appellant argues that the factor favouring disclosure in section 14(2)(d) applies and that it is absurd to withhold the portions of the records relating to the individual he complained about to the police.

14(2)(d): fair determination of rights

[34] Throughout his representations, the appellant argues that he has a right to information about himself that others may have provided to the police. The appellant states that:

... it is my Right to defend myself under Section 7 of the *Charter of Rights and Freedoms* and am therefore seeking full access to the statements made against me.

[35] In the non-confidential portions of his original representations, the appellant states that he requires the withheld records to defend his character and protect himself and his family and tenants from reprisal. The appellant also indicates that there are ongoing or contemplated proceedings.

[36] The confidential portions of his supplemental representations provide details about the nature of the ongoing or contemplated proceedings. The appellant also provides an explanation as to why he believes he is entitled to obtain copies of records that contain information about matters that have personally affected him.

⁷ Orders M-734, M-841, M-1086, PO-1819 and MO-2019 stand for the proposition that section 14(3)(b) does not apply if the records were created after the completion of an investigation into a possible violation of law.

⁸ Order P-239.

⁹ Order P-99.

[37] For section 14(2)(d) to apply, 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
4. the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing¹⁰

[38] For section 14(2)(d) to be found to be a relevant consideration, the appellant must establish that all four parts of the test have been met.

[39] I have reviewed the records along with the submissions of the parties, including the appellant's confidential submissions, and am not satisfied that the personal information at issue has some bearing on or is significant to the determination of the right in question. Without revealing the content of the appellant's confidential submissions, I note that his arguments point to broader issues beyond the actual personal information at issue gathered by the police during its investigation. Accordingly, I find that part 3 of the test in section 14(2)(d) has not been met.

[40] Even if I found that parts 1, 2 and 4 of the test were met, the factor at section 14(2)(d) could not apply because all four parts of the test must be met. As a result, I find that the factor at section 14(2)(d) has no application in the circumstances of this appeal.

Absurd result

[41] Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may not be exempt under sections 14(1) or 38(b), because to withhold the information would be absurd and inconsistent with the purpose of the exemption.¹¹

[42] The absurd result principle has been applied where, for example:

¹⁰ 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.).

¹¹ Orders M-444 and MO-1323.

- the requester sought access to his or her own witness statement¹²
- the requester was present when the information was provided to the institution¹³
- the information is clearly within the requester's knowledge¹⁴

[43] 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.¹⁵

[44] The appellant argues that the absurd result principle applies in the circumstances of this appeal and asserts that he knows what is contained in the withheld portions of the records. I previously found that the remaining information at issue consists of personal information the police gathered when they spoke to other individuals about complaints filed against a named individual. Though it would make sense that the appellant and others who filed complaints about this individual may have discussed their concerns about the perceived problem with each other, there is no evidence in the records themselves that support the appellant's assertion that he is aware of the exact nature of the personal information other individuals provided to the police. For instance, there is no evidence that the appellant was physically present when other individuals, including the individual complained about, provided information to the police. In addition, I am not satisfied that the appellant adduced sufficient evidence to establish that the withheld personal information is clearly within his knowledge.

[45] Though the appellant maintains that he is aware of the name, birthdate and address of the individual he complained about to the police, the information the police gathered in the course of its investigation goes far beyond the collection of that limited personal information. In my view, there would be no useful purpose served by my ordering the police to disclose that individual's name, birthdate and address to the appellant where this information appears in the records. Previous IPC decisions have consistently held that an institution is not required to sever the record and disclose portions where to do so would reveal only "disconnected snippets," or "worthless" or "meaningless" information.¹⁶

[46] Having regard to the above, I find that the absurd result principle does not apply to the circumstances of this appeal.

¹² Orders M-444 and M-451.

¹³ Orders M-444 and P-1414.

¹⁴ Orders MO-1196, PO-1679 and MO-1755.

¹⁵ Orders M-757, MO-1323 and MO-1378.

¹⁶ See Order PO-1663, Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner), (1997), 2004 CanLII 39011 (ON CA), 192 O.A.C. 71 (Div. Ct.).

Summary

[47] I find that the presumption at section 14(3)(b) applies and that the factor weighing in favour of disclosure at section 14(2)(d) does not apply. Given my findings, it is not necessary that I also find that the factors weighing in favour of privacy protection at sections 14(2)(e) and (f) also apply.

[48] I also find that the absurd result principle does not apply to the withheld personal information.

[49] Accordingly, subject to my assessment of whether the police properly exercised its discretion, the personal information remaining at issue is exempt under section 38(b).

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

[50] 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.

[51] 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
- it fails to take into account relevant considerations.

[52] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁷ The IPC may not, however, substitute its own discretion for that of the institution.¹⁸

[53] The information I found exempt under section 38(b) constitutes the personal information of other individuals contained in the records.

[54] The police take the position that they properly exercised its discretion and in doing so took into consideration relevant factors. The police also submit that they exercised their discretion in good faith and did not take into account irrelevant factors. In support of this position, the police indicate that they took into account the following

¹⁷ Order MO-1573.

¹⁸ Section 43(2).

factors in deciding to protect the privacy of the other individuals identified in the records:

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

[55] In addition, the police submit that the exemption at section 38(b) was applied in a limited and specific manner with the result being that the majority of the records were disclosed to the appellant.

[56] The appellant takes the position that the police failed to exercise its discretion properly and asserts that he, his family and his friends have been the subject of unwarranted investigations. As I noted above, however, the records before me relate solely to matters the police investigated in response to complaints the appellant is listed as the complainant or co-complainant.

[57] Having regard to the submissions of the parties, I am satisfied that the police balanced the principle that individuals should have a right of access to their own personal information with the principle that the privacy of individuals should be protected. In making my decision, I considered the appellant's position, but find that there is insufficient evidence to demonstrate that the police exercised its discretion to withhold the personal information at issue in bad faith or for an improper purpose.

[58] For these reasons, I find that the police properly exercised its discretion to withhold the personal information I found exempt under section 38(b).

ORDER:

1. I order the police to disclose to the appellant the portions of the records consisting of notations made by police officers regarding their views that I found do not constitute personal information on pages 125, 128, 131 and 132. I also order the police disclose portions of pages 138, 139, 140 and 170 previously

withheld under the exclusion under section 52(2.1) that I found do not qualify for exemption under section 38(b).

The police is to disclose these portions of the records to the appellant by August 4, 2021 but not before July 28, 2021. For the sake of clarity, I have highlighted or severed these portions of the records in the copy of the records provided to the police with this order.

2. I uphold the police's decision to withhold the remaining portions of records at issue under section 38(b).
3. In order to verify compliance with provision 1 of this order, I reserve the right to require the police to provide me with a copy of the records that are disclosed to the appellant.

Original signed by: _____
Jennifer James
Adjudicator

_____ June 30, 2021