

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4117

Appeal MA19-00838

Peel Regional Police Services Board

October 27, 2021

Summary: The Peel Regional Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records, including an audio recording, relating to a 911 call about a hostage situation at a specific address. The police granted partial access to responsive records, but withheld personal information of affected parties under the discretionary personal privacy exemption in section 38(b). In this order, the adjudicator finds that disclosure of the withheld information would constitute an unjustified invasion of the affected parties' personal privacy and upholds the police's decision. She finds that the police exercised their discretion properly in withholding this information 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(3)(b) and 38(b).

OVERVIEW:

[1] This appeal is about access to a 911 call and related records. The Peel Regional Police Services Board (the police) received a request for access under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to records relating to a call claiming that hostages were being held at a specific address. The requester sought access to a report of the call, officers' notes, and the call's audio recording and transcript.

[2] The police located responsive records and issued a decision granting partial access. The police withheld information from the records on the basis of the discretionary personal privacy exemption in section 38(b), with reference to the presumption against disclosure in section 14(3)(b) (investigation into possible violation of law).

[3] The requester, now the appellant, appealed the police's decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC). The parties participated in mediation to explore the possibility of resolution. The appellant indicated during mediation that he does not seek access to information relating to two specific individuals (identified as "Person #3" and "Person #4" on pages 0002 and 0003 of the records). The appellant confirmed that he seeks access to the remaining information withheld from the records, and to the audio recording of the 911 call.

[4] When no further mediation was possible, the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry. I decided to conduct an inquiry during which the police and the appellant submitted representations that were shared between them.¹

[5] In this order, I find that the records contain the personal information of the appellant and of other identifiable individuals, including the personal information of the caller to whose identity the appellant seeks access. I find that disclosure of this information would constitute an unjustified invasion of those individuals' personal privacy. I find that the police properly exercised their discretion in withholding this information under section 38(b), and I uphold the police's decision.

RECORDS:

[6] The records are an audio recording of a 911 call, as well as 20 pages consisting of an occurrence report (pages 0001-0005) and officers' notes (pages 0006-0020).

ISSUES:

- A. Does the record contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?
- B. Would disclosure of the information constitute an unjustified invasion of personal privacy under section 38(b)?

¹ In accordance with the IPC's *Practice Direction 7* on the sharing of representations.

C. Should the police's exercise of discretion be upheld?

DISCUSSION:

Issue A: Does the record contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

[7] In order to decide which sections of the *Act* may apply to a specific case, the IPC must first decide whether the record contains "personal information," and if so, to whom this personal information relates.

[8] Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual." Recorded information is information recorded in any format, including paper and electronic records.²

[9] Information is "about" the individual when it refers to them in their personal capacity, meaning that it reveals something of a personal nature about them. Generally, information about an individual in their professional, official, or business capacity is not considered to be "about" the individual if it does not reveal something of a personal nature about them.³

[10] Information is about an "identifiable individual" if it is reasonable to expect that an individual can be identified from the information either by itself or if combined with other information.⁴

[11] Section 2(1) of the *Act* gives a list of examples of personal information. The examples relevant to this appeal are the following:

"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,

...

² The definition of "records" in section 2(1) includes paper records, electronic records, digital photographs, videos and maps. The records before me include paper records located by searching a police database, and an audio recording.

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.).

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the 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.

[12] The list of examples of personal information under section 2(1) is not a complete list. This means that other kinds of information could also be "personal information."⁵

[13] It is important to know whose personal information is in the record. If the record contains the requester's own personal information, their access rights are greater than if it does not.⁶ Also, if the record contains the personal information of other individuals, one of the personal privacy exemptions might apply.⁷

Representations

[14] The police submit that the records contain names, home addresses, dates of birth and ethnic origins of identifiable individuals (the affected parties), including the appellant, and that this information qualifies as personal information as defined in paragraphs (a), (c), (d), (g) and (h) of section 2(1). The police say that this information is about these individuals in a personal capacity.

[15] The appellant submits that the records "might contain personal information." He says that the audio recording of the 911 call should be disclosed so that he can identify the caller by voice. The appellant's representations set out the reasons he believes he should have access to the call audio, which I discuss in greater detail below, under Issue B.

⁵ Order 11.

⁶ Under sections 36(1) and 38 of the *Act*, a requester has a right of access to their own personal information, and any exemptions from that right are discretionary, meaning that the institution can still choose to disclose the information even if the exemption applies.

⁷ See sections 14(1) and 38(b).

Analysis and findings

[16] I have reviewed the records and find that they contain the appellant's personal information as well as the personal information of other identifiable individuals.

[17] The occurrence report and officers' notes contain information about identifiable individuals that includes their names, dates of birth, sex, race, home addresses, telephone numbers, and statements of their views and opinions about the event under investigation.

[18] As for the audio recording of the 911 call, I find that it contains the caller's name and voice.

[19] I find that the caller's name qualifies as their personal information under paragraph (h) of section 2(1), because its disclosure would reveal other personal information about them, namely their involvement in the incident. I also find that disclosure of the caller's voice would render them identifiable to the appellant, especially where the appellant has said that identifying the caller is his goal, and has speculated about the caller's identity and involvement with occupants of the home at the time of the call. In the circumstances, I find that the caller's voice is their personal information pursuant to section 2(1) of the *Act*.

[20] In coming to this conclusion, I have also considered that prior IPC orders have found a 911's caller's voice to be their personal information.⁸ I am satisfied that the caller's voice is recorded information and that it is reasonable to expect that the caller's voice renders them identifiable in the circumstances.

[21] Collectively, therefore, I find that the records contain information that fits within the definition of "personal information" in paragraphs (a), (c), (d), (g) and (h) of section 2(1) of the *Act*.

Issue B: Would disclosure of the information constitute an unjustified invasion of personal privacy under section 38(b)?

[22] 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 some exemptions from this right.

[23] Under the section 38(b) exemption, if a record contains the personal information of both the requester and another individual, the institution may refuse to disclose the other individual's personal information to the requester if disclosing that information

⁸ See, for example, Orders MO-3699, PO-4020, PO-4027 and PO-4190.

would be an “unjustified invasion” of the other individual’s personal privacy.

[24] The section 38(b) exemption is discretionary. This means that the institution can decide to disclose another individual’s personal information to a requester even if doing so would result in an unjustified invasion of the other individual’s personal privacy.⁹

[25] If disclosing another individual’s personal information would not be an unjustified invasion of personal privacy, then the information is not exempt under section 38(b).

[26] Also, the requester’s own personal information, standing alone, cannot be exempt under section 38(b) as its disclosure could not, by definition, be an unjustified invasion of another individual’s personal privacy.¹⁰

[27] Sections 14(1) to (4) provide guidance in deciding whether disclosure would be an unjustified invasion of the other individual’s personal privacy. If any of the section 14(1)(a) to (e) exceptions apply, disclosure would not be an unjustified invasion of personal privacy and the information is not exempt from disclosure under section 38(b).

[28] Sections 14(2), (3) and (4) also help in deciding whether disclosure would or would not be an unjustified invasion of personal privacy under section 38(b). Section 14(4) lists situations where disclosure would not be an unjustified invasion of personal privacy, in which case it is not necessary to decide if any of the factors or presumptions in sections 14(2) or (3) apply. The parties do not rely on section 14(4), and I find that it does not apply in this appeal.

[29] In deciding whether the disclosure of 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 section 14(2) and (3) and balance the interests of the parties.¹¹

Representations

The police’s representations

[30] The police submit that the records were created as part of an investigation into allegations of a hostage situation. They say that, even though legal proceedings have not been initiated as a result of the investigation, the investigation “has not yet been closed and remains outstanding.”¹² The police argue that the presumption against

⁹ See below in the “Exercise of Discretion” section for a more detailed discussion of the institution’s exercise of discretion under section 38(b).

¹⁰ Order PO-2560.

¹¹ Order MO-2954.

¹² The police submit that the investigation has moved to alleged offences of public mischief and perjury.

disclosure in section 14(3)(b) applies to the information at issue because it was documented during an investigation of a possible violation of law.

[31] The police say that even if the 911 call was a hoax, as the appellant submits, the presumption in section 14(3)(b) cannot be displaced by an allegation of malicious intent.

[32] The police also submit that disclosing the 911 call even with the caller's personal information removed and voice dubbed would be inappropriate in the circumstances because of the nature of the allegations and the presumption in section 14(3)(b). The police argue that the presumption is intended to preserve the integrity of ongoing police investigations, and that, in any event, severing the personal information from the 911 call and dubbing the voice would not satisfy the appellant, whose "submissions to date suggest that they must know the identity of the caller, be it for court or other personal purposes."

The appellant's representations

[33] The appellant's representations focus on access to the 911 call recording. He seeks access to the call audio in order to help him identify the caller. He says that the call was a hoax and that there was no hostage situation. He says that the caller's identity should not be protected in circumstances where the information reported to the police was false and that protecting privacy interests would only be good "...if the person who made this call has a good intention" in trying to prevent injuries. He submits that there is no expectation of privacy where information was falsely provided to the police and that, because the call was false, disclosure of the caller's identity should not be considered to be an invasion of privacy.

[34] The appellant submits that if the caller is a party engaged with one of the home's occupants in ongoing divorce proceedings, then the call should not be treated as truthful or in the same way as a call by a concerned citizen who just wants to help. He also says that, if the caller is involved with one of the home's occupants, then his or her identity should be revealed to allow the appellant to press charges since the call could have endangered others and resulted in an accidental police shooting.

[35] Finally, the appellant also says that disclosure of the audio recording would serve the interests of justice: if the police do not know the caller's identity, the occupants of the home at the time of the 911 call should be allowed to listen to the recording to see if they could recognize the voice and therefore help the police to identify the caller.¹³

¹³ Above I have found, under Issue A, that the audio recording contains the caller's name and voice, both of which I have found to be their personal information under section 2(1) of the *Act*.

Analysis and findings

[36] Section 14(3)(b) states that:

(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.

[37] Even if no criminal proceedings were commenced against any individuals (which appears to be the case here as the police say that the investigation remains open), section 14(3)(b) may still apply. The presumption only requires that there be an *investigation* into a possible violation of law.¹⁴

[38] I have reviewed the records and find that the personal information in them was compiled and is identifiable as part of an investigation to a possible violation of law. Based on a call to 911 of a hostage situation underway, the police began an investigation that could have resulted in criminal charges. My finding is not altered by the fact that no charges have thus far been laid (or may not be laid), since the presumption only requires that there be an investigation into a possible violation of law. As a result, I find that disclosure of the personal information in the records would result in a presumed unjustified invasion of personal privacy under section 14(3)(b).

[39] Under section 38(b), the presumption in section 14(3)(b) must be weighed and balanced with any factors in section 14(2) that are relevant. The police submit that the factors in section 14(2) are not relevant and do not apply.¹⁵ Although the appellant has not specifically identified any of the factors listed in section 14(2), it appears that he is arguing that the factor at section 14(2)(d) applies to favour disclosure.

[40] Section 14(2)(d) states that:

(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.

¹⁴ Orders P-242 and MO-2235.

¹⁵ Specifically, the police say in their representations that they "will not make any submissions regarding the applicability of the section 14(2) factors, save and except to say that they are not relevant and are not applicable based on the facts" in this appeal.

[41] In order to establish that the factor in section 14(2)(d) applies, the appellant must show 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;
2. The right is related to a proceeding, which is either existing or contemplated, not one that has already been completed;
3. The personal information to which the appellant seeks access 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.¹⁶

[42] All four parts must be established for section 14(2)(d) to apply. Although the appellant submits that he should have the right to press charges because the fake call could have endangered a life or resulted in a police shooting, and that the caller may be somehow associated with divorce proceedings with one of the home's occupants, I find that this factor does not apply in the circumstances. The appellant's submissions do not disclose an existing or contemplated proceeding in which he is involved. The appellant suggests that he should have access to the caller's identity in order to pursue charges. Meanwhile, according to the police's representations, an investigation is already underway that may yet result in charges.

[43] The appellant has provided no information to support that the information at issue is related to an ongoing divorce proceeding, what bearing it has on the rights of the parties to such a proceeding, or that it is required to prepare for or ensure an impartial hearing.

[44] I therefore find that the four-part test of section 14(2)(d) has not been met, and that section 14(2)(d) does not apply.

[45] The parties did not submit that any unlisted factors favouring disclosure or non-disclosure apply, and I find that none do.

[46] For the reasons set out above, I find that the presumption against disclosure in section 14(3)(b) applies to the information at issue in the occurrence report, officers'

¹⁶ Order PO-1764, in which the relevant considerations for the application of section 14(3)(d) were adopted from the test set out in 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.).

notes and audio recording of the 911 call, and that no factors in favour of disclosure apply. I therefore find that disclosure of the withheld information would constitute an unjustified invasion of the affected parties' personal privacy under section 38(b).

Issue C: Should the police's exercise of discretion under section 38(b) be upheld?

[47] The section 38(b) exemption is discretionary, meaning that the institution can decide to disclose information even if it qualifies for exemption. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[48] 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.

[49] 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 cannot, however, substitute its own discretion for that of the institution.¹⁸

[50] Some examples of relevant considerations are listed below. However, not all of these will necessarily be relevant, and additional considerations may be relevant:¹⁹

- 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, and
 - the privacy of individuals should be protected,
- the wording of the exemption and the interests it seeks to protect,

¹⁷ Order MO-1573.

¹⁸ Section 43(2).

¹⁹ Orders P-344 and MO-1573.

- whether the requester is seeking their 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, and
- the historic practice of the institution with respect to similar information.

Representations

[51] The police submit that they appropriately exercised their discretion by considering the circumstances under which the records were created, by balancing the right of access to information under the *Act* with protecting the privacy of individuals, and the need to protect sensitive information.

[52] The appellant did not make representations on the police's exercise of discretion.

Analysis and findings

[53] I find that the police properly exercised their discretion under section 38(b) to withhold personal information of identifiable individuals other than the appellant. In withholding this information, I find that the police took into account that the records contain the appellant's own information and weighed it against the fact that the information at issue is the personal information of identifiable individuals which, if disclosed, would identify them, reveal other personal information about them, and describe their involvement in a police investigation. I also find that the police considered that exemptions from the right of access should be limited and specific, and that, in granting partial access, the police withheld only the personal information belonging to other identifiable individuals.

[54] I am satisfied that the police did not take into account irrelevant factors in exercising their discretion, and there is no evidence before me that the police acted in bad faith. Therefore, I uphold the police's exercise of discretion to withhold the affected parties' personal information under section 38(b) of the *Act*.

[55] For the reasons above, I find that the withheld information is exempt from

disclosure under section 38(b) and I dismiss this appeal.

ORDER:

I uphold the police's decision to deny access to the withheld portions of the records at issue and to the 911 call in its entirety and dismiss this appeal.

Original Signed by: _____
Jessica Kowalski
Adjudicator

_____ October 27, 2021