

Information and Privacy Commissioner,
Ontario, Canada



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

RECONSIDERATION ORDER MO-4132-R

Appeal MA19-00349

Order MO-4017

Halton Regional Police Services Board

November 30, 2021

Summary: This order determines a request for reconsideration made by the Halton Regional Police Services Board (the police) regarding Order MO-4017, in which the adjudicator ordered disclosure of a 911 audio call recording to the appellant.

The appellant had made an access request to the police under the *Municipal Freedom of Information and Protection of Privacy Act* for records regarding a complaint made about his driving of his motorcycle with his minor stepson on board. The police denied access to the 911 audio call, relying on the discretionary personal privacy exemption in section 38(b). In Order MO-4017, the adjudicator did not uphold the denial of access and ordered disclosure of the record. The police sought a reconsideration of this order.

In this order, the adjudicator finds that there was a fundamental defect in the adjudication process when the police were not invited to make submissions on one of the appellant's arguments pertaining to the application of section 14(2)(d) to the record. The adjudicator considers the additional arguments made by the parties on the application of section 38(b) in their reconsideration request, and confirms her decision in Order MO-4017 to order disclosure of the record to the appellant.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 14(2)(d) and 38(b); the IPC's *Code of Procedure*, sections 18.01 and 18.05.

Orders Considered: Orders MO-4017, and PO-2602-R.

OVERVIEW:

[1] This order determines a request for reconsideration that was submitted by the Halton Regional Police Services Board (the police) regarding Order MO-4017, in which I ordered the police to disclose to the appellant a 911 audio call recording about the appellant.

[2] The appellant had made an access request to the police under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA or the Act)* for records regarding a complaint made about his driving of his motorcycle with his minor stepson on board. As the appellant knows, the 911 call was made by his stepson's father.

[3] The police issued an access decision granting partial access to certain records and denying access to the 911 audio call in full. The police relied on the discretionary personal privacy exemption in section 38(b) to deny access to the withheld portions of the records and the 911 audio call. Section 38(b) reads:

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

if the disclosure would constitute an unjustified invasion of another individual's personal privacy.

[4] The appellant appealed the police's decision to the Information and Privacy Commissioner of Ontario (the IPC), and a mediator was appointed to explore resolution. During the course of mediation, the mediator contacted the father of the child (the affected person), the individual who made the 911 audio call, to determine if consent could be obtained for the disclosure of the information at issue. The affected person¹ did not provide consent.

[5] No further mediation was possible and the appellant advised that he wished to proceed to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry, to try to obtain access to the 911 call recording.

[6] I decided to conduct an inquiry and sought the representations of the police and the affected person, initially. Only the police provided representations, which were provided to the appellant, except for the confidential portions.² The affected person,

¹ The affected person was also referred to as the affected party, the affected individual and the affected third party in the parties' representations. For consistency, in this order I have referred to the father of the requester's stepson as the affected person.

² In accordance with the IPC's *Practice Direction 7*, in this order, I will only be referring to the non-confidential representations, but I will consider the parties' representations in their entirety in my determination of the issues.

however, did indicate that he would prefer that the appellant not receive access to the record.³

[7] I then sought and received the representations of the appellant. Subsequently, I issued Order MO-4017, where I found that the 911 audio call was not exempt under section 38(b) and ordered it disclosed to the appellant.

[8] In ordering disclosure of the record in Order MO-4017, I considered and weighed the factors and presumptions in sections 14(2) and (3) and balanced the interests of the parties and found that disclosure of the record would not constitute an unjustified invasion of the personal privacy of the affected person.⁴ In particular, I relied on the factor at section 14(2)(d), raised by the appellant, which states:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

the personal information is relevant to a fair determination of rights affecting the person who made the request.

[9] The police then sought a reconsideration of that order and provided representations in support of the request.

[10] To determine the reconsideration request, I sought and received representations from the appellant and the affected person, which I sent to the police and I received their reply representations.

[11] In this reconsideration order, I find that there was a fundamental defect in my initial adjudication of the appeal when I relied on section 14(2)(d) without the police having the opportunity to make representations on its application. However, after reviewing the parties' additional representations filed in the context of the reconsideration request, I maintain my findings in Order MO-4017 and order disclosure of the record.

³ More detail as to what the affected person advised the IPC is set out below.

⁴ I also found that, even if I had found that the record is exempt under section 38(b), I would have applied the absurd result principle to order disclosure of the record.

DISCUSSION:

Does the request for reconsideration of Order MO-4017 meet any of the grounds for reconsideration in section 18.01 of the *Code of Procedure*?

[12] The police seek a reconsideration of my decision in Order MO-4017 to order disclosure of the 911 audio call.

[13] Section 18 of the IPC's *Code of Procedure* sets out this office's reconsideration process. Sections 18.01 and 18.02 address the grounds for reconsideration of an order or decision of this office:

18.01 The IPC may reconsider an order or other decision where it is established that there is:

- (a) a fundamental defect in the adjudication process;
- (b) some other jurisdictional defect in the decision; or
- (c) a clerical error, accidental error or omission or other similar error in the decision.

18.02 The IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision.

[14] The reconsideration process is not a forum for parties to re-argue their cases in an attempt to obtain a more favourable decision. Mere disagreement with a decision is not a ground for reconsideration under section 18.01 of the *Code of Procedure*.⁵

[15] I am *functus* unless the party requesting the reconsideration – in this case, the police – establishes one of the grounds in section 18.01 of the *Code*. *Functus officio* is a common law principle which means that, once a decision-maker has determined a matter, he or she has no jurisdiction to consider it further. The provisions in section 18.01 of the *Code*, however, summarize the common law position acknowledging that a decision-maker has the ability to re-open a matter to reconsider it in certain circumstances.⁶

The reconsideration request submitted by the police

[16] In seeking a reconsideration of Order MO-4017, the police did not specifically

⁵ Orders PO-2538-R and PO-3062-R.

⁶ Order PO-2839-R.

identify which ground under section 18.01 they are relying on in support of their reconsideration request. However, the police's reconsideration request appears to raise section 18.01(a) as grounds for reconsideration by their contention that there is a "functional defect" in the order regarding the facts that underlie my application of section 14(2)(d).

[17] The main focus of the police's reconsideration request is section 14(2)(d). The police make detailed representations on why I should not have relied on section 14(2)(d) in ordering disclosure of the record to the appellant. They submit that the appellant is not a named party to any child custody or access proceedings regarding his stepson. In any event, the police say, there is no evidence to suggest that the personal information in the 911 call to which the appellant is seeking access has any bearing on the determination of the proceeding, nor is the personal information in the call required to prepare for the proceeding or to ensure an impartial hearing.

[18] From my review of the police's representations, it appears that the "functional defect" that the police take issue with is the fact that they did not have the chance to provide reply representations on the factor at section 14(2)(d) during the initial inquiry. In other words, the police appear to be asserting that there was a fundamental defect in the adjudication process.

[19] After receiving the police's reconsideration request, I invited representations in response from the appellant and the affected person. In so doing, I provided them with:

- another copy of Order MO-4017,
- the police's reconsideration request and the family court document referred to in the police's reconsideration request, and
- a copy of the IPC's *Code of Procedure*, advising them that section 18 of the *Code of Procedure* details the process for reconsideration requests.

The appellant's reconsideration representations

[20] The appellant did not make reconsideration representations on whether the grounds in section 18.01 of the *Code* have been met. He made arguments addressing whether the record is exempt under section 38(b), which I will address below.

The affected party's reconsideration representations

[21] The affected person did not make representations prior to the issuance of Order MO-4017, although invited to do so. He did advise the Adjudication Review Officer that he objected to disclosure of the record.

[22] In response to the police's reconsideration representations, the affected person

did not provide representations on whether the grounds in section 18.01 of the *Code* have been met.

Reply representations of the police and the appellant's sur-reply

[23] The police's reply representations focus on whether the section 38(b) exemption applies, a matter I address in the next section. In sur-reply, the appellant reiterated his concerns about the effect of the 911 call on his reputation in the family court proceedings. The appellant's sur-reply did not raise any new issues to which I felt the police ought to have the opportunity to respond.

Analysis/Findings

[24] As stated, as the basis for the reconsideration request, the police appear to rely on section 18.01(a), claiming that there was a "functional defect" in the facts that underlie my application of section 14(2)(d) of *MFIPPA*.

[25] In Order MO-4017, I found that the factor favouring disclosure in section 14(2)(d) applied. In so finding, I relied on the representations of the appellant in which he provided information about the relevant legal proceedings. However, I did not afford the police the opportunity to respond to the appellant's representations on that issue.

[26] Section 18.01(a) of the *Code* states that the IPC may reconsider an order where it is established that there is a fundamental defect in the adjudication process. Prior IPC orders have recognized that a fundamental defect in the adjudication process may include a failure to notify an affected person,⁷ a failure to invite representations on the issue of invasion of privacy,⁸ or a failure to allow for sur-reply representations where new issues or evidence are provided in reply.⁹ These orders demonstrate that a breach of the rules of natural justice respecting procedural fairness qualifies as a fundamental defect in the adjudication process as described in section 18.01(a) of the *Code*.

[27] I find that my failure to invite reply representations from the police on the issue of the application of the factor in section 14(2)(d) raised by the appellant is a breach of the rules of natural justice respecting procedural fairness. This qualifies as a fundamental defect in the adjudication process as described in section 18.01(a) of the *Code*.

[28] In their initial representations, the police did not discuss the factors in section 14(2) of *MFIPPA*, just the application of the presumption in section 14(3)(b).¹⁰ In Order

⁷ Orders M-774, R-980023, PO-2879-R and PO-3062-R.

⁸ Orders M-775 and R-980023.

⁹ Orders PO-2602-R and PO-2590.

¹⁰ Section 14(3)(b) reads:

MO-4017, I found that the presumption in this section applied, however, I balanced it against the factor in section 14(2)(d), which favours disclosure. This factor was raised by the appellant in his representations made in response to the police's representations.

[29] In his representations prior to the issuance of Order MO-4017, the appellant provided evidence as to how the record is relevant to the family court custody proceedings. I determined in Order MO-4017 that the appellant was raising the factor favouring disclosure in section 14(2)(d). I found that this factor applied and relying on this, I determined that on balance, disclosure would not be an unjustified invasion of personal privacy under section 38(b).

[30] As stated in Order PO-2602-R, by their nature, reply submissions (including sur-reply submissions) are restricted to responding to the other party's case, and new issues or arguments cannot be raised in reply. As a result, reply representations are sought only in those instances where a party raises new issues or provides new evidence, to which the other party ought to be given an opportunity to respond.¹¹

[31] Based on the evidence before me, I find that my decision to not provide the police with an opportunity to respond to the appellant's representations on section 14(2)(d) constituted a fundamental defect in the adjudication process. And on that basis, as the ground in section 18.01(a) of the *Code* has been met, I will now consider whether my decision should be changed.

Should my findings in Order MO-4017 be changed?

[32] Only the police and the appellant provided representations prior to the issuance of Order MO-4017. The affected person did not provide representations prior to the issuance of Order MO-4017, despite being invited to do so.

[33] I have decided, above, that my decision in Order MO-4017 should be reconsidered on the basis that the police were not provided with an opportunity to provide reply representations to those of the appellant on whether the factor favouring disclosure in section 14(2)(d) applies.

[34] As required by section 18.05 of the *Code*,¹² during the reconsideration stage of

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.

¹¹ See PO-2590-R.

¹² Section 18.05 reads:

A reconsideration request should include all relevant information in support of the request, including:

this appeal, all parties, including the police, were given a full opportunity to make additional arguments on the application of the section 38(b) exemption, including whether the factor in section 14(2)(d) applies. I have taken those arguments, and the parties' initial arguments, into account in coming to my findings below.

[35] Section 14(2)(d) is one of the factors listed in section 14(2) that help decide whether disclosure of a record would be an unjustified invasion of person privacy under section 38(b). If this factor is established, it weighs in favour of allowing requesters to obtain someone else's personal information where the information is needed to allow them to participate in a court or tribunal process. The IPC uses a four-part test to decide whether this factor applies. For the factor to apply, all four parts of the test must be met:

1. Is the right in question a right existing in the law, as opposed to a non-legal right based solely on moral or ethical grounds?
2. Is the right related to a legal proceeding that is ongoing or might be brought, as opposed to one that has already been completed?
3. Is the personal information significant to the determination of the right in question?
4. Is the personal information required in order to prepare for the proceeding or to ensure an impartial hearing?¹³

Representations of the police

[36] The police submit that the appellant has not made clear what legal right he is claiming, as he is not a named party in the family court proceeding. The police state that although the affected person is the ex-husband of the appellant's wife, it is the affected person and the appellant's wife that are the named parties in the custody proceedings.

[37] The police state that even if the appellant passes the first two parts of the test, he does not pass the last two parts of the test under section 14(2)(d). They state that

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- (a) the relevant order and/or appeal number;
 - (b) the reasons why the party is making the reconsideration request;
 - (c) the reasons why the request fits within grounds for reconsideration listed in section 18.01;
 - (d) the desired outcome; and
 - (e) a request for a stay, if necessary.

¹³ See 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.).

the information that the appellant seeks was not requested by the actual parties to the proceedings to assist them in the determination of the issues before the court in any child custody or access case. Furthermore, they submit that the appellant has not provided any evidence to demonstrate that the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the appellant's own rights, or that the particulars of the appellant's conduct set out in the 911 call were ever made an issue by the affected person to this information request in the family court proceedings.

[38] The police also state that the appellant has only a partial, not a full, copy of the police report that resulted from the 911 call. However, the appellant has provided me with a full copy of the police report, consisting of the portion he received from the police and the remainder he received from the affected person in the family court proceedings.

Representations of the appellant

[39] The appellant states that there are multiple existing family court proceedings besides those referenced in the representations he submitted before Order MO-4017 was issued. He states that the affected person continues to use the courts to interfere with, or try to control, the appellant's wife's life. The appellant states that he (the appellant) has been a central figure in multiple family court disputes dating back to 2014. He maintains that the information at issue is relevant to ongoing court disputes.

[40] The appellant also argues that:

This is a never-ending litigation and this incident will continue to be used against me in future family court proceedings. As a final note, as a stepfather, there is no separation [between] my role as parent [and] my involvement in the ongoing litigation. These are my stepchildren and I am as entitled to a fair representation of character in court as the parents [in] this matter.

I am requesting that the Order be upheld... The other party did not submit representations and has acknowledged to me that he made the call. The report has been shared and this will continue to be used against me in court.

Representations of the affected person

[41] The affected person continues to object to the disclosure of the record to the appellant. He believes that the access request was made out of malice towards him. He also confirmed what he advised the Adjudication Review Officer prior to the issuance of Order MO-4017, that the record was discussed during the family court proceedings. In his reconsideration representations, he states that:

...everyone is aware that I have made the 911 phone call regarding my ... son riding on the back of the motorcycle. It was addressed in the court during our [date] hearing....

Reply representations of the police

[42] As part of the reconsideration process, I provided the police with a copy of the appellant's representations made prior to the issuance of Order MO-4017, as well as a copy of the appellant's and the affected person's reconsideration representations. I sought the police's reply representations.

[43] In reply, the police state that the appellant's notion that he has a right to access the 911 call audio for the protection of his personal reputation in future litigation is based on mere speculation. The police submit that the privacy of another individual cannot be compromised due to what may or may not occur in the future.

[44] The police agree that being the stepfather of the children involved in the custody dispute may have some bearing on the custody case, but they argue that the fact that the appellant is claiming that his personal reputation is being tarnished is not a significant factor favouring disclosure.

Analysis/Findings

[45] I now know from review the police's and the appellant's reconsideration representations, that the appellant was not a named party to the family court proceedings discussed by him in his representations, but rather played an integral role in these proceedings.

[46] Knowing now that the appellant was not a named party in the family court proceedings between his wife and the affected person, I find that the factor favouring disclosure in section 14(2)(d) does not weigh in favour of disclosure of the record. This is because the appellant, a non-party to the family court proceedings, does not have a right existing in law in relation to those proceedings. Therefore, the personal information is not relevant to a fair determination of rights affecting the person who made the request.

[47] In Order MO-4017, I found that, even though the presumption against disclosure in section 14(3)(b) applied, on balance, disclosure of the 911 audio call would not be an unjustified invasion of the personal privacy of the affected person under section 38(b).

[48] In finding that disclosure was not an unjustified invasion of personal privacy under section 38(b) in Order MO-4017, I considered and weighed the factors and presumptions in sections 14(2) and (3) and balanced the interests of the parties and found that disclosure of the record would not constitute an unjustified invasion of the personal privacy of the affected person.

[49] In balancing the interests of the parties under section 38(b) and ordering disclosure of the record, besides relying on the factor in section 14(2)(d) that favours disclosure applied, I also relied on the following additional considerations:

- the appellant had a copy of the police report that was generated from this 911 audio call, and
- the 911 audio call was discussed by the appellant and the affected person at Family Court.

[50] In making my findings under section 38(b) in this order, I continue to rely on these additional considerations.

[51] Although I have found that the factor in section 14(2)(d) favouring disclosure does not apply, it is clear that the appellant is an integral part of the family court proceedings in which the record is being discussed. His involvement in his stepson's life is a key factor in the custody decisions being made in the family court proceedings. There are numerous ongoing and contemplated family court proceedings involving the appellant, his wife and the affected person.

[52] Both the affected person and the appellant agree that the 911 call was discussed in the family court proceedings.

[53] Therefore, although the personal information at issue in the record is not relevant to a fair determination of the appellant's rights under section 14(2)(d), I find that information in the record is significant to the determination of the custody rights in the family court proceedings that the appellant, his wife and the affected person are involved in.

[54] The 911 call was used against the appellant in the family court custody proceedings. The appellant is an integral part of these proceedings and the call is significant to the determinations being made in those proceedings. The relevance of this call to the proceedings is an unlisted factor that favours disclosure of the record.

[55] On balance, weighing the factors and presumptions in sections 14(2) and (3) and balancing the interests of the parties, I maintain my finding that disclosure of the record would not constitute an unjustified invasion of the personal privacy of the affected person under section 38(b).

[56] Since I find that the record is not exempt under section 38(b), I do not need to determine whether the absurd result principle applies and I see no need to revisit my *obiter* finding on the absurd result in Order MO-4017.

Conclusion

[57] In this order, I have found that there was a fundamental defect in the

adjudication process under section 18.01(a) of the *Code* concerning my findings about the application of section 14(2)(d) to my determination under section 38(b).

[58] I have reviewed the evidence and representations afresh, including the new arguments provided during the reconsideration stage, and I confirm that section 38(b) does not apply to the 911 call audio record. Therefore, I maintain my finding that disclosure of the record would not constitute an unjustified invasion of the personal privacy of the affected person. Accordingly, it is not exempt under section 38(b).

[59] Accordingly, I will order the police to disclose the record to the appellant.

ORDER:

I order the police to disclose the record to the appellant by **January 4, 2022**, but not before **December 30, 2021**.

Original Signed by: _____
Diane Smith
Adjudicator

November 30, 2021