Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4142

Appeal MA19-00333

Timmins Police Services Board

December 22, 2021

Summary: The appellant made a request to the police under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of all incidents reported against her during a specified time period, including copies of all relevant reports. Relying on section 14(5) of the *Act*, the police refused to confirm or deny the existence of a record on the basis that to do so would be an unjustified invasion of the personal privacy of other individuals. The appellant appealed. In this order, the adjudicator finds that the police properly applied section 14(5) of the *Act* 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 38(b) and 14(5).

OVERVIEW:

[1] The appellant made a request to the Timmins Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

> A copy of all incidents reported against me either under the surname [specified surname] or[specified surname] by any person from May 30, 2016 to today's date April 12, 2013 as well as copies of all occurrence reports and supplementary reports.

[2] The police issued a decision in which it relied on section 14(5) of the *Act* to

refuse to confirm or deny the existence of any record.

[3] The appellant appealed the police's decision to the office of the Information and Privacy Commissioner (the IPC).

[4] Mediation did not resolve the appeal and the file was moved to the adjudication stage of the appeals process where the adjudicator may conduct an inquiry. As any responsive records, if they exist, would potentially relate to the appellant, I added the possible application of section 38(b) (personal privacy) to the issues on appeal. I decided to conduct an inquiry and I sought and received representations from the police and the appellant. I shared the non-confidential portions of the police's representations with the appellant in order for her to respond. I did not share the appellant's representations with the police as I determined that it was not necessary for the police to respond.

[5] In this order, I uphold the police's decision to refuse to confirm or deny the existence of records in accordance with section 38(b) and section 14(5) and I dismiss the appeal.

ISSUES:

1. Would the records, if they exist, contain "personal information" as defined in section 2(1)?

2. Does the discretionary exemption at section 38(b), read in conjunction with section 14(5) of the *Act*, apply in the circumstances?

DISCUSSION:

Issue A: Would the records, if they exist, contain "personal information" as defined in section 2(1)?

[6] The police have refused to confirm or deny the existence of records responsive to the request on the basis that section 14(5) of the *Act* applies because their disclosure would constitute an unjustified invasion of personal privacy. In order for an unjustified invasion of privacy to occur it must first be determined that the records, if they exist, would contain *personal information*.

[7] The term *personal information* is defined, in part, in section 2(1) of the *Act* as follows:

> "personal information" means recorded information about an identifiable individual, including,

> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

Representations

[8] The police submit that the records, if they exist, would contain information that qualifies as the personal information of affected parties and the appellant within the meaning of paragraph (h) of the definition above.

[9] The appellant submits that because the police identified affected parties, they have admitted that records exist.

Analysis and Finding

[10] Given the appellant's request for "all incidents reported against me", I find that responsive records, if they exist, would contain information that qualifies as the personal information of the appellant. In particular, I find that any alleged incident about the appellant would include her name and other information about her which qualifies as her personal information within the meaning of paragraphs (g) and (h) of the definition of personal information in section 2(1) of the *Act*.

[11] Furthermore, given the fact that the appellant is seeking incidents reported against her, I also find that records, if they exist, would contain the personal information of the individuals who reported the alleged incidents and potentially other individuals. I find that the records, if they exist, would contain the names of the complainants and details about the alleged incident or incidents. I find that this qualifies as the personal information of these individuals also within the meaning of paragraphs (g) and (h) of the definition of personal information.

[12] Accordingly, as I have found that the responsive records, if they exist, would contain the personal information of the appellant and other individuals, the police's refusal to confirm or deny the existence of records is made through section 38(b) of the *Act*, as I explain in further detail below.

B. Does the discretionary exemption at section 38(b), read in conjunction with section 14(5) of the *Act*, apply in the circumstances of this appeal?

[13] Under the *Act*, different exemptions may apply depending on whether or not a record contains the personal information of the requester. Where records contain the requester's own personal information, access to the records is addressed under Part II of the *Act* and the discretionary exemptions at section 38 may apply. Where the records contain the personal information of individuals other than the requester but not that of the requester, access to the records is addressed under Part 1 of the *Act* and the exemption at section 14(1) may apply.

[14] Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exceptions to this right. Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an *unjustified invasion* of the other individual's personal privacy, the institution may refuse to disclose that information to the requester, or may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

[15] The police rely on section 14(5), which is found in Part I of the *Act*, to refuse to confirm or deny the existence of responsive records on the basis that disclosure would constitute an unjustified invasion of personal privacy.

[16] Section 38 contains no parallel provision to section 14(5). Since I have found that any responsive records would contain the appellant's personal information as well as other individual's personal information, the issue is whether section 14(5) can apply in the context of a request for one's own personal information. This office has found that it can. Specifically, in Order M-615, Adjudicator John Higgins stated:

> Section 37(2) provides that certain sections from Part I of the *Act* (where section 14(5) is found) apply to requests under Part II (which deals with requests such as the present one, for records which contain the requester's own personal information). Section 14(5) is not one of the sections listed in section 37(2). This could lead to the conclusion that section 14(5) cannot apply to requests for records which contain one's own personal information. However, in my view, such an interpretation would thwart the legislative intention behind section 14(5). Like section 38(b), section 14(5) is intended to provide a means for institutions to protect the personal privacy of individuals other than the requester. Privacy protection is one of the primary aims of the *Act*.
>
> Therefore, in furtherance of the legislative aim of protecting personal privacy, I find that section 14(5) may be invoked to refuse to confirm or deny the existence of a record if its requirements are met, even if the record contains the requester's own personal information.

[17] This reasoning has been adopted in a number of subsequent orders.[1] I agree with this approach, and I adopt it in the circumstances of this appeal. Accordingly, I will consider whether section 14(5) applies in this case. This section reads:

> A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

[18] A requester in a section 14(5) situation is in a very different position from other requesters who have been denied access under the *Act*. By invoking section 14(5), the institution is denying the requester the right to know whether a record exists, even when one does not. This section provides institutions with a significant discretionary power that should be exercised only in rare cases.[2]

[19] Before an institution may exercise its discretion to invoke section 14(5), it must provide sufficient evidence to establish both of the following requirements:

1. Disclosure of the record (if it exists) would constitute an unjustified invasion of personal privacy; and

2. Disclosure of the fact that the record exists (or does not exist) would in itself convey information to the requester, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

[20] The Ontario Court of Appeal has upheld this approach to the interpretation of

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[1] Among them, Orders MO-2984, MO-3235 and MO-3293.
[2] Order P-339

section 21(5) of the *Freedom of Information and Protection of Privacy Act*, which is identical to section 14(5) of the *Act*, stating:

> The Commissioner's reading of s. 21(5) requires that in order to exercise his discretion to refuse to confirm or deny the report's existence the Minister must be able to show that disclosure of its mere existence would itself be an unjustified invasion of personal privacy.[3]

Part one: Would disclosure of the records (if they exist) be an unjustified invasion of personal privacy?

[21] 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). In this case the appellant has raised the possible application of section 14(1)(d).

[22] The factors and presumptions in sections 14(2) and (3)[4] help in determining whether disclosure would be an *unjustified invasion of privacy* under section 14(5).

[23] For records that contain the appellant's personal information, this office will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties in determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy.[5] The list of factors under section 14(2) is not exhaustive. The institution must also consider any other factors that are relevant in the circumstances of the case, even if they are not listed under section 14(2).[6]

Representations

[24] The police rely on the presumption in section 14(3)(b) and the factor favouring non-disclosure in section 14(2)(e). The appellant submits that section 14(1)(d) applies as well as the factor favouring disclosure in section 14(2)(d). These sections all state:

> 14. (1) A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
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> > (d) under an Act of Ontario or Canada that expressly authorizes the disclosure;

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[3] Orders PO-1809 and PO-1810, upheld on judicial review in *Ontario* (*Minister of Health and Long-Term Care*) *v. Ontario* (*Assistant Information and Privacy Commissioner*), [2004] O.J. No. 4813 (C.A.), leave to appeal to S.C.C. dismissed (May 19, 2005), S.C.C. 30802.

[4] Neither party has submitted that any of the circumstances listed in section 14(4) are present, and I find that they are not.

[5] Order MO-2954.

[6] Order P-99.

> (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,
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> > (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;
>
> (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;

Representations

[25] The police's representations contained some confidential information that was not shared with the appellant during the inquiry. I do not set out these portions of the representations due to confidentiality concerns but I have considered them for the purposes of my decision. The police submit that any responsive records, if they exist, could contain personal information obtained from individuals regarding a possible violation of law such that section 14(3)(b) is relevant to my determination. Regarding the application of section 14(2)(e), the police submit that disclosure of the records, if they exist, could expose individuals to pecuniary or other harm by the appellant.

[26] The appellant submits that she was informed about the existence of the records by other parties and the reports have subsequently had an impact on her rights and freedoms. She submits that she knows of the names on the reports and claims that the *concocted* information in the reports has resulted in her suffering suspended privileges and the fear of having her probation revoked. The appellant submits she has suffered years of *undeserved hardship* and in order for her to know the whole truth and pursue justice, disclosure of the reports is necessary. Accordingly, the appellant submits that section 14(2)(d) is relevant to my determination.

[27] The appellant challenges the police's claim of section 14(2)(e) and draws my attention to the fact that this factor requires the harm to be suffered by the individual is *unfair* which she notes would not be so in this case. The appellant submits that the individual who reported incidents against her is guilty of providing false information to the police. Regarding section 14(3)(b), the appellant submits that she was never found guilty of any *breaches or offences* but she was punished for them. On the other hand, the individual who reported the incidents has not had to face the consequences of filing false reports with the police. The appellant submits that the disclosure of the information at issue, if it exists, is necessary to prosecute the false information

violation.

[28] Regarding section 14(1)(d), the appellant submits that the *Victim's Bill of Rights* may be relevant. The appellant states that the content of any responsive records, if they exist, would be a violation of the *Victim's Bill of Rights*. The appellant notes that while the *Victim's Bill of Rights* does not expressly authorize the disclosure of disclosure of the information, "the false information provided via victim services by the individuals or parties was done so *by exercising rights that are not permitted by the Act*." The appellant submits:

> If it can be interpreted that under these specialized circumstances, the right to withhold information is forfeited, then disclosure would be indirectly authorized.

[29] The appellant cites sections 20(a)(i), (ii), (c) and (d) of the *Victim's Bill of Rights* and submits that there were a number of false reports and trivial complaints made under victim services that her parole officer had to become involved to put an end to them.

Analysis and finding

[30] To begin, I find that section 14(1)(d) does not apply in the circumstances. In order for section 14(1)(d) to apply, there must be either:

- a specific authorization in another act of Ontario or Canada that allows for the disclosure of the type of personal information at issue, or
- a general reference in the other act to the possibility of disclosure together with a specific reference in a regulation to the type of personal information at issue.

[31] The appellant acknowledges and I find that the *Victim Bill of Rights* does not expressly authorize the disclosure of the information at issue, if it exists. As such, I find that section 14(1)(d) does not apply.

[32] I agree with the police that the presumption in section 14(3)(b) applies in the circumstances of this appeal. The records, if they exist, relate to incidents reported against the appellant as this was the wording of the appellant's request. I find that these incidents would have been investigated as possible violations of law, including the *Criminal Code*. The fact that the appellant submits that she was never found guilty of any breaches or offences is not relevant to my consideration. This presumption requires only that there be an investigation into a *possible* violation of law.[7] So, even if criminal proceedings were never started against the individual, section 14(3)(b) may still apply.[8]

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[7] Orders P-242 and MO-2235.

[8] The presumption can also apply to records created as part of a law enforcement investigation where charges were laid but subsequently withdrawn (Orders MO-2213, PO-1849 and PO-2608).

Furthermore, I do not accept the appellant's submission that disclosure of the personal information in the records, if they exist, is necessary to prosecute a violation or continue an investigation. Therefore, I find section 14(3)(b) is a factor favouring non-disclosure of the personal information if it exists.

[33] I also find that section 14(2)(e) is relevant to my consideration of whether disclosure would be an unjustified invasion of personal privacy. I accept the police's submission that disclosure of the personal information may unfairly expose the individual who reported the incident to pecuniary or other harm. Given the appellant's request and the appellant's stated intent of seeking justice, I give some weight to this factor.

[34] On the other hand, I find that the factor favouring disclosure of the personal information in the records, if they exist, is not relevant to my determination. In order for section 14(2)(d) to apply the appellant must establish that disclosure of the personal information is needed to allow her to participate in a court or tribunal process. In particular, the appellant must establish:

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?

[35] The appellant submits that she requires the information in the records, if they exist, to seek justice for the hardship she has suffered due to alleged false claims made against her. While I am prepared to accept that the personal information in the records, if they exist, is significant to the determination of the appellant's rights in question, the appellant has not provided evidence or representations to substantiate parts 1, 3 and 4 of the test above. Accordingly, I find that section 14(2)(d) is not relevant but I am prepared to give some weight to the appellant's desire to know the claims made against her, as an unlisted but relevant factor under section 14(2).

[36] I have found that sections 14(3)(b) and 14(2)(e) apply and these factors both favour non-disclosure of the information in the records. I find that section 14(3)(b) should be given significant weight as the legislature chose to list this factor as a presumption.[9] I have also found that there is a factor favouring disclosure of the information. The appellant has claimed that she requires the information to know the

[9] Order MO-3293.

contents of the reports against her and I give this unlisted factor some weight. However, weighing the factors and presumptions, I find that the presumptions and factors against disclosure outweigh the appellant's interest in knowing the claims against her and I find that disclosure of the records, if they exist, would be an unjustified invasion of another individual's personal privacy. Part one of the test under section 14(5) has, therefore, been met.

Part two: Would disclosure of the fact that the records exist (or do not exist) be an unjustified invasion of personal privacy?

[37] Under part two of the section 14(5) test, the institution must demonstrate that disclosure of the fact that a record exists (or does not exist) would in itself convey information to the appellant, and that the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

Representations, analysis and findings

[38] As stated above, the police's representations contained confidential information which I considered for the purposes of my decision.

[39] The appellant's request was for incidents reported against her during a specified period. As a result of the wording of the appellant's request, and from my review off the parties' confidential and non-confidential representations, I find that information would be conveyed to the appellant if the police were either to confirm or deny the existence of the records. Confirming that there are responsive records would convey the fact that specific individuals reported incidents to the police about the appellant, while denying that there are responsive records would convey the fact that these individuals did not report such incidents to the police.

[40] I find that this constitutes the personal information of these other individuals. Whether the individuals did or did not report incidents about the appellant to the police constitutes the individuals' personal information, as it is information about identifiable individuals in their personal capacities.

[41] I also find that disclosure of this information (i.e. the fact that records exist or do not exist) would be an unjustified invasion of the individuals' personal privacy. I have found above in relation to the records themselves (if they exist) that the factor favouring disclosure of the records is outweighed by the factors favouring non-disclosure. For similar reasons, I also find this to be the case in relation to confirming or denying that records exist. Confirming or denying that records exist amounts to confirming that the individuals did or did not report incidents about the appellant to the police during the specified time.

[42] I find, therefore, that it would be an unjustified invasion the personal privacy of other individuals for the police to either confirm or deny the existence of records responsive to the appellant's request. In sum, I find the police have met the second

part of the section 14(5) test.

[43] I now turn to the question of whether the police properly exercised their discretion in claiming section 14(5). As noted above, this office has found that the discretionary power to refuse to confirm or deny the existence of a record should only be exercised in rare cases.[10]

[44] An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so. 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 in to account relevant considerations. Where an institution has failed to exercise its discretion or has exercised it improperly, the adjudicator may send the matter back to the institution for an exercise of discretion based on proper considerations.[11] This IPC may not, however, substitute its own discretion for that of the institution.[12]

[45] The police submit that they weighed the privacy interests of other individuals with the appellant's rights to access her personal information. In this case, given the circumstances of the appeal, the police determined that the privacy rights of other individuals outweighed the appellant's rights and thus the police exercised their discretion to claim section 14(5). The appellant did not directly address the police's exercise of discretion to claim section 14(5) but she appears to argue that the police improperly claimed the exemption in section 14(5) as her "case was poorly handled, duties were neglected, and inconvenient facts were swept under the rug." The appellant submits she should be granted access to the records, if they exist, so she can "set the record straight".

[46] Based on my review of the police's representations, I am satisfied that they properly exercised their discretion to claim section 14(5) and in doing so, took into account relevant considerations. I am also satisfied that they did not exercise their discretion in bad faith or for an improper purpose, nor is there any evidence that they took into consideration irrelevant considerations. I understand the appellant is seeking information about incident reports filed against her and believes the police should have granted her access to records, if they exist, for transparency purposes. However, I find the police properly considered the appellant's access rights when weighing her rights against those of the other individuals.

[47] I find that the police properly exercised their discretion in claiming section 38(b), in conjunction with 14(5), to refuse to confirm or deny the existence of responsive records.

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[10] Order P-339.
[11] Order MO-1573.
[12] Section 43(2).

ORDER:

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

Original signed by: December 22, 2021

Stephanie Haly
Adjudicator