

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4155

Appeal MA19-00839

Toronto Police Services Board

January 31, 2022

Summary: The Toronto 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 relating to specific occurrences. The police issued a decision granting partial access to the responsive records. The police withheld the personal information of affected parties under the discretionary personal privacy exemption in section 38(b). The requester appealed the police's decision to deny access to statements made by one affected party. In this order, the adjudicator finds that disclosure of the information at issue would constitute an unjustified invasion of the affected party's 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(2)(d), 14(2)(f), 14(2)(h), 14(3)(b) and 38(b).

OVERVIEW:

[1] This appeal is about access to witness statements made by a specific individual to police officers who responded to calls for assistance involving ongoing disputes between two tenants at a residential dwelling. After vacating the property, one tenant made a request to the Toronto Police Services Board (the police) for access under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to all records related to him from February 27, 2019 to the date of the request, including for seven

specific incidents identified by date, occurrence number and officers involved. Specifically, the request was for access to:

...ALL AVAILABLE RECORDS related to me [requester's name and date of birth], for period Feb 27, 2019 to current date inclusively. Previous address [specific address]. These may include but are not limited to: general occurrences, incident and investigation reports; witness statements; Crown or police briefs, officers' memorandum book notes, police-related 911 calls. Please include ALL available records, but I am aware of the following:

[7 occurrence reports listed between April and June 2019, with corresponding occurrence numbers and officers' names and badge numbers listed].

[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). The police also withheld some information on the basis that it was non-responsive to the request.¹

[3] The requester, now the appellant, appealed the police's decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC). A mediator was appointed to explore the possibility of resolution. During mediation, the appellant confirmed that he is seeking access to witness statements provided to the police by one specific individual (the affected party) that the police withheld from the records. At the appellant's request, the mediator sought the affected party's consent to disclose withheld portions of the record that contain information relating to her. The affected party did not consent.

[4] The appellant informed the mediator that he was also appealing the police's decision to withhold portions of the record on the basis that they are non-responsive to the request. As a result, the issues of the scope of the request and responsiveness of the records were added to the appeal.

[5] 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, the appellant, and the affected party submitted representations that were shared among them in accordance with the

¹ Information was withheld from officers' memorandum book notes about other incidents not related to the appellant.

IPC's *Practice Direction 7* on the sharing of representations.²

[6] Because the appellant challenged the police's claim that some portions of the records were withheld on the basis that they were non-responsive to the request, I asked the parties to make submissions on this issue, which I included in a Notice of Inquiry. In his representations, which were submitted after he reviewed those provided by the police, the appellant indicated that he was no longer challenging the police's withholding of information on the basis that it was non-responsive to the request. Accordingly, questions regarding the scope of the request and what records are responsive to it are not at issue and are not considered in this order.

[7] The appellant submits that he only seeks access to the affected party's witness statements, and, specifically, to any statements about him that the affected party may have made to the police. The appellant does not seek access to the affected party's name or other identifying information, stating that he already knows who the affected party is. As a result, this order addresses the appellant's request for access to the affected party's witness statements only. Access to other personal information, such as the identifying information or statements of other individuals named in the records, is not before me in this appeal.

[8] 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 affected party to which the appellant seeks access. I find that disclosure of the information at issue would constitute an unjustified invasion of the affected party's 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:

[9] The records are police occurrence reports, event details reports, and officers' memorandum book notes. The information at issue consists of the statements a specific affected party made to the police and that the police withheld from the records.

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1) of the *Act*, 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)?

² This included reply and sur-reply representations from the police and the affected party, and the appellant, respectively. A summary of the affected party's representations was shared with the appellant because of confidentiality concerns.

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

DISCUSSION:

Issue A: Do the records contain "personal information" as defined in section 2(1) of the *Act*, and if so, whose personal information is it?

[10] Before considering the personal privacy exemption in section 38(b) claimed by the police, I must first determine whether the records contain "personal information." If they do, I must determine whether the personal information is the appellant's, that of other identifiable individuals, or both.

[11] 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.

[12] 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.³

[13] In some situations, even if information relates to an individual in a professional, official or business capacity, it may still be "personal information" if it reveals something of a personal nature about the individual.⁴

[14] 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.⁵

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

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

³ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225. According to section 2(2.1) *Act*, personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity. Section 2(2.2) of the *Act* states that subsection 2(2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

⁴ Orders P-1409, R-9800015, PO-2225 and MO-2344.

⁵ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

(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.

[16] 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."⁶

[17] If the records contain the requester's own personal information, their access rights are greater than if they do not.⁷ Also, if the records contain the personal information of other individuals, one of the personal privacy exemptions might apply.⁸

Representations

The police's representations

[18] The police submit that the records contain personal information of a number of identifiable individuals, including their home addresses, dates of birth, and ethnic origins. The police submit that this information falls into the definition of personal information in paragraphs (a) and (d) of section 2(1). The police also submit that the affected party is a landlord but that the records contain her personal views that she provided to the police in confidence and that disclosure would reveal something of a

⁶ Order 11.

⁷ 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.

⁸ See section 14(1) and 38(b).

personal nature about her.

The affected party's representations

[19] The affected party submits that the records contain her personal information. She submits that she is not the landlord, but lives next door and assists the landlord. She says she spoke to the police as a "private citizen" and cooperated with them independent of the landlord, to help with the police in their investigations. The affected party says she was not promoting the landlord's business interests when she spoke to the police, and that her statements to the police did not involve her position as an agent of the landlord, but as a witness to the events under investigation. She submits that even if some of the information may have been provided to the police because she manages the property, it would reveal something of a personal nature about her if disclosed.

The appellant's representations

[20] The appellant submits that the information at issue is not the affected party's personal information. He submits that the affected party is the landlord's agent and property manager, and that she was acting in a business or professional capacity when she spoke to the police. He says that the affected party managed all aspects of his tenancy on the landlord's behalf. He says that the information at issue is his personal information because it contains the affected party's views and opinions about him.

[21] The appellant says that the police attended the residence on several occasions in response to calls by both him and the basement tenant. He says that, when the police attended, they spoke to the appellant and his family, to the basement tenant, and then typically also with the affected party. The appellant says that while most of the calls to the police involved disputes between both tenants, he also contacted the police about the affected party's alleged failure to comply with her obligations as a landlord. He submits that, on one occasion when the affected party called the police, she did so "in her role as property manager."⁹

[22] The appellant also says that any views or opinions the affected party expressed about him or his family or about their conduct as tenants were gained from her position as the landlord's agent. He says that the affected party used the opportunity to speak to the police to advance the landlord's interests, including trying to stop the appellant's complaints about the other tenant, harassing the appellant, and trying to drive him out of his home.

[23] Finally, the appellant reiterates that he does not seek access to the affected party's age, sex, address or telephone number, only to her witness statements.

⁹ The records before me identify the appellant and the other tenant as complainants about each other's conduct.

Analysis and findings

[24] The records contain information about ongoing tensions between the appellant and another tenant (whose information is not at issue in this appeal). I find that they contain the personal information of the appellant as well as that of other identifiable individuals, including members of the appellant's family, the other tenant, and the affected party. The records contain these individuals' names, dates of birth, sex, race, driver's license numbers, home addresses, telephone numbers, and their views or opinions, including their personal views about the events under investigation and about the conduct of other individuals allegedly involved in the incidents that prompted the calls for police assistance. Collectively, I find that this is information that falls within the definition of "personal information" in paragraphs (a), (c), (d), (e), (g) and (h) of section 2(1) of the *Act*.

[25] I am not persuaded that the affected party's witness statements are about her in a business and not personal capacity. The IPC has held that even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.¹⁰

[26] In the circumstances, I am not persuaded that the affected party was acting in a professional capacity to advance the landlord's interest when the police spoke with her, or that the information in the records is about her in a professional, official or business capacity. Although the records identify the affected party as a landlord or property manager, I find this to be incidental to the information about her in the records and to the statements she provided to the police about the incidents that were under investigation. Based on my review of the records, the affected party spoke to the police as a witness.

[27] Because I have found that the records contain both the appellant's personal information and that of other identifiable individuals, I must consider the application of the discretionary personal privacy exemption in section 38(b) to the personal information at issue that the police have not disclosed.

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

[28] 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.

[29] 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

¹⁰ Orders P-1409, R-980015, PO-2225 and MO-2344.

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

[30] 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 this would result in an unjustified invasion of the other individual’s personal privacy.

[31] 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).

[32] 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.

[33] Section 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).

[34] Section 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.

[35] The parties do not rely on section 14(4), and I find that it does not apply in this appeal.

[36] 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.

Representations

The police’s representations

[37] The police submit that the records were created as part of investigations into possible violations of law. They say that the information at issue was compiled by officers in the course of their investigations, and that disclosure would be an unjustified invasion of the affected party’s personal privacy. The police submit their investigations included collecting the views and opinions of witnesses about the incidents under investigation and that, although the incidents were determined to be non-criminal, the calls to which officers responded alleged unlawful activity.

[38] The police argue that the factor at section 14(2)(h) (supplied in confidence) applies and weighs against disclosure of the information at issue. They say that, even

though there was no explicit assurance of confidentiality when officers approached the affected party in the course of their investigations, a presumption of such an assurance was present. They say that the expectation of confidentiality is implicit when speaking to police, and elicits a degree of candour which witnesses may not otherwise feel safe to assume. The police submit that it is pivotal to the investigative process and that the preservation of trust in this confidentiality outweighs the appellant's concerns about access to the information at issue.

[39] The police acknowledge that the appellant submits in his representations that his request for access is without malice. However, they say that the relationship between the appellant and the affected party was volatile and that, not only did the affected party not consent to disclosure, she explicitly and repeatedly denied her consent.

The affected party's representations

[40] The affected party submits that the presumption in section 14(3)(b) applies and that the information at issue involves "sensitive criminal allegations."¹¹ She submits that she spoke to the police in confidence to assist with their investigations and expected that her statements were taken in confidence.

[41] The affected party submits that the appellant initially wanted access to bolster his position in an application he brought before the Landlord and Tenant Board (the LTB). She says that the appellant no longer needs access for the LTB proceeding, because the parties settled the LTB matter and executed a Full and Final Release (the release) discharging each other from any and all actions and applications for damages arising from any incidents that occurred during the appellant's tenancy. She argues that by continuing to seek access to her personal information, the appellant is in breach of the release. She questions the appellant's motivation in continuing to seek access when he no longer needs it, and is concerned that he may be prompted by some sort of malice given the parties' history. She maintains that her relationship with the appellant remains adversarial because of the appellant's continued alleged threats of possible future litigation, despite the release.

The appellant's representations

[42] The appellant submits that disclosure of the information at issue cannot be an unjustified invasion of the affected party's personal privacy since the affected party was acting as the landlord's agent when she spoke to the police.

[43] The appellant submits that he has reason to believe that the affected party "intentionally provided misleading and erroneous information" to the police about him and his family to benefit the landlord's interests (such as avoiding obligations to respond to tenant complaints and trying to terminate the appellant's tenancy by driving him out of the house) and that disclosure is desirable in the interests of justice.

¹¹ As discussed later in this order, no criminal charges were laid.

[44] The appellant submits that none of the factors listed in section 14(2) apply. In the alternative, he says that the factor in section 14(2)(d) (fair determination of rights) applies in favour of disclosure.

[45] The appellant initially submitted that disclosure of the information at issue is justified because his request related to "the administration of justice through a tribunal proceeding and potentially other legal proceedings." In response to the affected party's representations, the appellant conceded that the LTB matter had since settled. He says that while he no longer needs access for the LTB matter, he continues to seek it in the interests of justice and for psychological closure (discussed below, as an unlisted factor).

[46] The appellant maintains that the affected party made negative comments and lied about him to the police. He says that, although the release (in the LTB matter) may make further civil remedies unavailable, his "rights to pursue [a] possible criminal complaint" are less clear and that "definitive interpretation of this would require further expert legal research and opinion."

[47] The appellant disputes that the factor in section 14(2)(h) applies. He says that the police gave no assurance of confidentiality when they took the affected party's statements. He submits that the affected party could not reasonably have expected that her statements would be confidential because she was acting as a landlord's agent. He says that the affected party is experienced, knows that tenant disputes often find their way to the LTB, and that a landlord's statements are evidence. The appellant says that the affected party simply wanted confidentiality after the fact for fear that her alleged deceptions would be scrutinized by the LTB.

[48] The appellant argues that, even if the affected party had a reasonable expectation of confidentiality when she provided her statements to the police, it unreasonable to expect this confidentiality to extend long after the tensions between the parties have ended. The appellant says that, despite its previous volatility, his relationship with the affected party is now "guarded yet civil," so that disclosure has little or no risk.

[49] With his representations, the appellant provided copies of emails he exchanged with the affected party after he vacated the property to show that their relationship has become cordial. He submits that the affected party should not have any outstanding concerns about his motivations and that, if she had any reason to be concerned about the appellant before, "these concerns, other than, presumably the likelihood of our seeking legal remedy," were eliminated once he says she discovered that the basement tenant was the instigator. He says that disclosure of the information at issue "would not be inflammatory in any concerning fashion" and that it is "entirely unreasonable and entirely without logic and evidence" to suspect that he would react uncivilly or unlawfully if the information at issue were disclosed to him.

[50] Finally, the appellant submits that the affected party harassed him and allowed the other tenant to harass him. He submits that he was left clinically traumatized and his family's health was negatively impacted. He says that disclosure would bring closure and help him heal from the harassment he endured, and he wants to fully understand what happened to him and what the affected party told police.

Analysis and findings

[51] 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.

[52] Even if no criminal proceedings were commenced against any individuals, which is the case here, section 14(3)(b) may still apply. The presumption only requires that there be an *investigation* into a possible violation of law.¹²

[53] I have reviewed the records and find that the personal information in them was compiled and is identifiable as part of investigations into possible violations of law. In each instance, the police responded to and investigated incidents that began with allegations of conduct that could have resulted in charges being laid. At the conclusion of those investigations, the police determined that the matters under investigation were not criminal, but those determinations were the result of their investigations into alleged violations of law. My finding is not altered by the fact that no charges were 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).

[54] As noted above, under section 38(b), the presumption in section 14(3)(b) must be weighed and balanced with any factors in section 14(2) that apply in the circumstances.

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

[55] 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.¹³ The listed factors relevant to this appeal are the following:

¹² Orders P-242 and MO-2235.

¹³ Order P-239.

(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;

...

(f) the personal information is highly sensitive;

...

(h) the personal information has been supplied by the individual to whom the information relates in confidence;

[56] Of these, the factor in paragraph (d) generally weighs in favour of disclosure, while the factors in paragraphs (f) and (h) weigh in favour of privacy protection.¹⁴

[57] 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).¹⁵

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

[58] In determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, section 14(2)(d) considers whether the personal information is relevant to a fair determination of rights affecting the person who made the request. If found to apply, this factor weighs in favour of disclosing the personal information.

[59] There is no dispute that the appellant initially sought access to the information at issue in order to use it in a hearing before the LTB or that the LTB matter settled. The appellant submits that, while the release he signed may prohibit future civil claims, the status of possible criminal complaints is less clear.

[60] The IPC has found that 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

¹⁴ Order PO-2265.

¹⁵ Order P-99.

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 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

[61] All four parts must be established for section 14(2)(d) to apply. Because the matter before the LTB has settled and there is no evidence before me of another legal proceeding for which access to the information at issue is required, I find that the four-part test of section 14(2)(d) has not been met. The appellant's speculation that, if disclosed, the affected party's statements might reveal dishonest conduct that might warrant future criminal proceedings does not meet the four-part test in section 14(2)(d). I find that section 14(2)(d) does not apply to weigh in favour of disclosure of the affected party's personal information.

Section 14(2)(f): highly sensitive

[62] The affected party appears to be arguing that the factor at section 14(2)(f) applies to weigh against disclosure when she describes her concerns about the appellant's motivation for seeking access. In determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, section 14(2)(f) requires the police to consider whether the personal information is highly sensitive. To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.¹⁷

[63] Although the appellant concedes that further civil proceedings arising from the tenancy are no longer possible, he appears not to have foreclosed the possibility of future criminal ones, something he submits requires further investigation. I also note the police's submission that, despite the current purported civility between the parties, the appellant's intentions cannot be confirmed. Despite the appellant's representations and the emails that he provided to show that his relationship with the affected party has evolved from a tense and volatile one into a civil and cordial one, the affected party continues to question the appellant's motivations and expressly opposes disclosure of the personal information at issue. The records reveal that the affected party is elderly (which the parties do not dispute), and she submits she is concerned about the appellant's continued "threats" of legal action. Based on all of the representations before me, I accept that disclosure of the personal information at issue could reasonably be expected to cause the affected party significant personal distress. I

¹⁶ Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839239 (Ont. Div. Ct.).

¹⁷ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

therefore find that the factor in section 14(2)(f) applies to weigh against its disclosure.

Section 14(2)(h): supplied in confidence

[64] For the factor at section 14(2)(h) to apply, I must be satisfied that the individual supplying the information and the recipient had an expectation that the information would be treated confidentially and that this expectation is reasonable in the circumstances. As such, section 14(2)(h) requires an objective assessment of the reasonableness of the expectation of confidentiality.¹⁸

[65] Although the attending police officers may not have given express assurances of confidentiality, I find that it was reasonable in the circumstances for the affected party to expect that she provided her personal information to them in confidence. In my view, the context of the affected party's statements to the police, especially where they do not contain the appellant's personal information, and the surrounding circumstances are such that a reasonable person would expect that the information would be subject to a degree of confidentiality. I have reviewed the statements at issue and, while I have not summarized those statements because to do so would disclose their contents, I accept the police's and the affected party's submission that they were provided in circumstances where there existed a reasonable expectation of confidentiality. The statements describe the affected party's views and opinions of the events under investigation, and also contain her views about things other than the appellant. I find that this factor applies in the circumstances and weighs against disclosure of the affected party's personal information.

Unlisted factors

[66] I have also considered the appellant's representations that the change in his relationship with the affected party and his need for psychological favour of disclosure of the information at issue.

[67] First, regardless of the cordiality of the parties' relationship described by the appellant, I am not persuaded that civil communications between individuals are a factor that applies to weigh in favour of disclosure, especially where one party explicitly opposes that disclosure.

[68] Second, the appellant submits that he should have access in the interests of psychological closure. He says that he has been clinically traumatized by events that transpired after the basement tenant moved in. In support, the appellant submitted a report prepared by a social worker for the LTB hearing. I have read the entire report, but have not summarized any portions of it in my reasons because to do so would disclose its contents. However, while I am sympathetic to the difficulties and tensions experienced by the parties and their effect on the appellant and his family, in the circumstances I am not persuaded that the appellant's desire for closure is an unlisted

¹⁸ Order PO-1670.

factor that weighs in favour of disclosure in this appeal. In coming to this conclusion, I have also considered that the information at issue makes up a relatively small portion of the information in the 60 pages of records and withheld by the police.

[69] For the reasons set out above, I find that the presumption in section 14(3)(b) applies to the information at issue. I find that the factors at section 14(2)(f) and 14(2)(h) apply in favour of non-disclosure, and that no factors, listed or unlisted, apply to favour disclosure of the affected party's personal information to the appellant. I therefore find that disclosure of the information at issue would constitute an unjustified invasion of the affected party's personal privacy under section 38(b), subject to my findings below regarding the police's exercise of discretion.

Absurd result

[70] Past IPC orders have held that denying a requester access to information that he may have originally supplied, or is otherwise aware of, could lead to an absurd result. In certain cases, the information may not be exempt under section 38(b), because to withhold it would be absurd and inconsistent with the purpose of the exemption.¹⁹ The absurd result principle has been applied where, for example, the requester sought access to his own witness statement,²⁰ was present when the information was provided to the institution,²¹ or where the information is clearly within the requester's knowledge.²²

Representations

[71] The police submit that the absurd result principle does not apply to the personal information at issue. They say that "it can be extrapolated from the claims put forth by the appellant in this appeal that he seeks access to the affected party's communication with the police simply because he desires it, and not because he was present when the information was provided to the institution [or because] the information is already within his knowledge."

[72] The appellant submits that he concurs with the police's submission that withholding words such as "landlord" or "property manager" from his witness statements would be absurd in the circumstances, however the appellant's witness statements are not at issue in this appeal. Elsewhere in his representations, the appellant submits that the police revealed some of the affected party's statements when they spoke to him during their attendances at the house and that "[h]ints are available within portions of the police notes and reports [already] provided that were not redacted." The appellant says that he knows who the affected party is, is aware that the police spoke to her, and can deduce which of the redacted text portions

¹⁹ Orders M-444 and MO-1323.

²⁰ Orders M-444 and M-451.

²¹ Orders M-444 and P-1414.

²² Orders MO-1196, PO-1679 and MO-1755.

contain her statements. He also says that the affected party told him some of the things she allegedly told to the police.

[73] The affected party submits that the absurd result principle does not apply to the information at issue because, while the appellant may be aware of his own actions, he may not have knowledge of the contents of her witness statements.

Analysis and findings

[74] Although the appellant suspects that the affected party made negative comments about him, there is no evidence before me that he is aware of the contents of her actual statements to the police. It is apparent from the records that the police spoke to witnesses separately. There is no indication in any of the records that the appellant was present or nearby when the police took statements from any parties other than his family members, including those at issue in this appeal.

[75] In these circumstances, I find that disclosure under the absurd result principle would be inconsistent with the purpose of the section 38(b) exemption. I therefore find that the absurd result principle does not apply. Given my finding, disclosure of the withheld information would be an unjustified invasion of personal privacy under section 38(b).

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

[76] 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.

[77] 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 into account relevant considerations.

[78] In either case, the IPC may send the matter back to the institution for an exercise of discretion on proper considerations.²³ The IPC cannot, however, substitute its own discretion for the institution's.²⁴

[79] Some examples of relevant considerations are listed below. However, not all of these will necessarily be relevant, while other considerations may be relevant:²⁵

- the purpose of the *Act*, including the principles that:

²³ Order MO-1573.

²⁴ Section 43(2) of the *Act*.

²⁵ Orders P-344 and MO-1573.

- 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,
 - whether the requester is seeking their own personal information,
 - whether the requester has a sympathetic or compelling need to receive the information,
 - 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, and
 - the historic practice of the institution with respect to similar information.

Representations

The police's representations

[80] The police submit that they exercised their discretion properly, not in bad faith, and considered relevant factors in making their decision. The police say that they determined from their review of the records that withholding the affected party's statements would not impede the appellant's right to access his own personal information. They say the information at issue consists of the affected party's personal views and they considered that the appellant does not have a sympathetic or compelling need to have access to this information.

[81] The police say they considered the fact that withholding the information at issue served to safeguard the affected party's expectation of confidentiality and that disclosure in the absence of consent would compromise public confidence, which the police say is vital to their ability to conduct investigations and ensure public safety.

[82] Finally, the police say that they also took into account concerns about the implications of disclosure in the circumstances. They say that it could have potentially aggravated an already volatile situation, which they say tipped the scale in favour of non-disclosure when combined with all other relevant considerations.

The appellant's representations

[83] The appellant submits that, while the police acted in good faith in exercising their discretion, they did not take into account all relevant facts because they did not have the (new) information the appellant set out in his representations.

[84] In particular, the appellant says that the police were not aware that the appellant's relationship with the affected party improved after he moved out and that it is now civil and cordial. The appellant says that with this new information, the police can "be reassured that release of the information would not be inflammatory in any concerning fashion." He says that previous hostilities between the parties are now an irrelevant consideration because they no longer exist.

[85] The appellant submits that the police also failed to take into account other relevant considerations. The appellant says that the police did not consider that he never acted in any threatening or inappropriate way toward the affected party. He submits that the police failed to consider that he has a sympathetic and compelling need for disclosure given the psychological suffering and physical illness he and his family experienced at the hands of the affected party and the other tenant.

[86] The appellant also submits that the police did not consider the affected parties' alleged deceptions. He says failure to re-exercise their discretion will allow "dishonest actors to mislead and deceive" the police, but that a re-exercise of their discretion in favour of disclosure would shed light on the affected party's alleged deceit and would increase public confidence in the police by demonstrating a willingness to review a decision.

[87] Finally, the appellant says that the police failed to consider that the landlord-tenant relationship is a business relationship and that the affected party may have used the police to advance the landlord's business by deliberately misleading them in an effort to end the appellant's tenancy.

The affected party's representations

[88] The affected party submits simply that the police exercised their discretion properly and that their exercise of discretion should be upheld.

Analysis and Findings

[89] I find that the police properly exercised their discretion under section 38(b) to withhold the information at issue. I find that the police considered that the records contain the appellant's own personal information and weighed this against the fact that the information at issue is the personal information of the affected party which, if disclosed, would identify her and reveal other personal information about her, including her involvement in the disputes between the tenants and ensuing police investigations. I am satisfied that the police were aware of the affected party's status as the landlord's

representative when they considered the withheld portions of the witness statements at issue and whether they should be disclosed.

[90] I am satisfied that the police did not consider irrelevant factors in exercising their discretion. I find that the police considered that exemptions from the right of access should be limited and specific. In this regard I have considered that the police disclosed the appellant's personal information to him, and that, as noted above, the information at issue makes up a relatively small portion of the information in the 60 pages of responsive records withheld by the police.

[91] I have also considered the appellant's submission that the police have not considered the evolution of his relationship with the affected party. In their representations, the police addressed the appellant's submissions that the relationship is no longer volatile and that his motivations are without malice. They concluded that the appellant's motivations could not be substantiated and that, despite the appellant's representations about the change in the relationship, the affected party continues to oppose disclosure.

[92] I find that the police properly exercised their discretion using information available to them at the time they made their decision. I am satisfied that the police's consideration of the private nature of the parties' disputes and what the police believed to be the implications of disclosure were relevant considerations in the circumstances.

[93] As for the alleged change in the relationship, I find that this is not a relevant consideration, especially in circumstances where the affected party continues to expressly oppose disclosure of any information relating to her. The change in the relationship was first raised in the appellant's representations in this appeal. As long as the police exercised their discretion properly using the information available to them at the time of their decision, the IPC will not disturb the exercise of discretion where a disputed change in circumstances occurs after the decision was made and where the exercise of discretion was reasonable in the circumstances.

[94] In conclusion, I am satisfied that the police did not consider irrelevant factors in exercising their discretion, and there is no evidence before me that they acted in bad faith. I therefore uphold the police's exercise of discretion to withhold the personal information at issue under section 38(b) of the *Act*.

[95] For the reasons above, I find that the withheld portions of the affected party's witness statements at issue are exempt from disclosure under section 38(b) and I dismiss this appeal.

ORDER:

I uphold the police's decision under section 38(b) and dismiss this appeal.

Original signed by: _____
Jessica Kowalski
Adjudicator

_____ January 31, 2022