

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4204

Appeal MA19-00594

York Regional Police Services Board

May 27, 2022

Summary: The York Regional Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of an occurrence report and officers' notes relating to a specified incident involving the appellant. The police granted partial access to the records. Information in the records was withheld under the discretionary personal privacy exemption in section 38(b) of the *Act*. The appellant appealed the police's decision to the IPC. In this order, the adjudicator finds that the withheld personal information of an affected party is exempt under section 38(b). She finds that the police exercised their discretion properly in withholding the exempt information and she upholds the police's decision.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of "personal information"), 14(3)(b) and 38(b).

OVERVIEW:

[1] This order determines the issues arising from the appellant's request for access to information in an occurrence report and officers' notes pertaining to a specific incident involving the appellant, their spouse and another individual. The appellant had made a complaint to the police alleging that the other individual trespassed onto their property and had caused damage. The police attended the appellant's property and investigated the incident.

[2] The appellant made the request for the occurrence report and officers' notes to the York Regional Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

[3] The police issued a decision granting the appellant partial access to the responsive records with some information severed pursuant to the discretionary personal privacy exemption in section 38(b) of the *Act*.

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

[5] During mediation, the police located additional responsive records and issued a supplementary decision granting access to those records, which were the notes of an officer relating to the incident specified in the request. The appellant was provided with a typed transcript of these notes and subsequently confirmed that they are not appealing the police's supplementary decision.

[6] The appellant advised that they do not seek access to the withheld portions of the occurrence report and the officers' notes that relate to their spouse, but they wished to pursue access to the information severed in respect of a named individual (the affected party) in the records disclosed pursuant to the police's initial decision. The mediator contacted the affected party to seek their consent to the release of the information at issue in the records. The affected party declined to provide their consent.

[7] As a mediated resolution was not achieved, the appeal was transferred to the adjudication stage, where an adjudicator may conduct an inquiry. The adjudicator originally assigned to the appeal sought and received representations from the police, the affected party and the appellant. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure* and Practice Direction 7.

[8] The appeal was then transferred to me to continue the adjudication of the appeal.¹ In this order, I find that the records contain the personal information of the appellant, their spouse and the affected party. I find that disclosure of the affected party's personal information would constitute an unjustified invasion of their personal privacy and the information is therefore exempt from disclosure under section 38(b). I also find that the police properly exercised their discretion in withholding the affected party's personal information under section 38(b). I uphold the police's decision.

¹ I have reviewed the complete file material, including the representations from the police, the affected party and appellant. I have concluded that I do not need any further information before rendering a decision.

RECORDS:

The information at issue is contained in the portions severed from the occurrence report (7 pages) and officers' notes (3 pages and 4 pages) relating to the specified incident.

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. Does the discretionary personal privacy exemption at section 38(b) apply to the information at issue?
- C. Did the police exercise their discretion under section 38(b)? If so, should the IPC uphold the exercise of discretion?

DISCUSSION:

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

[9] The police have withheld information from the occurrence report and officers' notes on the basis of the discretionary personal privacy exemption in section 38(b). This exemption can only apply to personal information and so I must first decide whether the records contain "personal information."

[10] "Personal information" is defined in section 2(1) of the *Act* as recorded information about an identifiable individual and includes:

(a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of 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,

...

(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.

[11] 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.²

[12] To qualify as personal information, the information must be about the individual in their personal capacity, which means that it reveals something of a personal nature about the individual. Generally, information about an individual in their professional, official or business capacity is not considered to be "about" the individual.³ Sections 2(2.1) and (2.2) state:

(2.1) 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.

(2.2) For greater certainty, subsection (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.

[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

Representations

[14] The police, the appellant and the affected party all refer to an ongoing civil court action involving the appellant and the affected party's business. This civil proceeding concerns the affected party's provision of services to the appellant. The police state that knowledge of these proceedings led the police to conclude that the appellant and the affected party are known to each other.

[15] The police submit that the occurrence report and the officers' notes contain the personal information of the appellant, their spouse and the affected party. The police state that the information at issue includes the personal information of the affected party consisting of their name, sex, date of birth, personal address, personal telephone number and police advice given to the affected party.

² Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

³ Orders P-257, P-427, P-1412, P-1612, R-980015, MO-1550-F and PO-2225.

⁴ See sections 2(3) and (4) of the Act and Orders P-1409, R-980015, PO-2225 and MO-2344.

[16] The police state that information relating to the affected party in their business capacity has already been disclosed to the appellant and the withheld information relates to the affected party in their personal capacity, only.

[17] The affected party does not directly address whether the information at issue is their personal information in their representations, but maintains that they do not consent to its disclosure to the appellant.

[18] The appellant states that they believe the withheld information makes reference to them, their property and their family members and this is the reason they are seeking access to it. I understand the appellant's submission to be that they believe the information at issue is their personal information.

Analysis and findings

[19] I have reviewed the records and find that they contain the personal information of three identifiable individuals, namely the appellant, the appellant's spouse and the affected party. With respect to the appellant and their spouse, I find that the records contain their name, date of birth, address, and telephone number and their opinions and views on the incident described in the records. I find that this information qualifies as the personal information of the appellant and their spouse within the meaning of paragraphs (a), (d), (e) and (h) of the definition in section 2(1).

[20] The appellant has also confirmed that their spouse's personal information is not at issue in this appeal.

[21] With respect to the affected party, I find that the records contain their name, date of birth, sex, address, telephone number, their opinions and views on the incident to which the records relate and police advice they received in this regard. I find that the information at issue qualifies as the affected party's personal information within the meaning of paragraphs (a), (d), (e) and (h) of the definition in section 2(1). The appellant seeks access to this information, except for the affected party's name.

[22] I also find that the records contain the name of the affected party's business but that this does not qualify as the affected party's personal information as it identifies the affected party in a business capacity and falls within the exception in section 2(2.1) of the *Act*. This information has been disclosed to the appellant and is not at issue in this appeal.

[23] I must now consider the application of the discretionary personal privacy exemption in section 38(b) to the affected party's personal information that was withheld from the occurrence report and the officers' notes.

Issue B: Does the discretionary personal privacy exemption at section 38(b) apply to the information at issue?

[24] 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 exemptions from this right.

[25] Under section 38(b), where a record contains personal information of both the appellant and another individual, and disclosure of the information would be an “unjustified invasion” of the other individual’s personal privacy, the institution may refuse to disclose that information to the appellant. This involves a weighing of the appellant’s right of access to their own personal information against the other individual’s right to protection of their privacy.

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

[27] 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).

[28] 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.⁵ From my review of the records, the police have already disclosed the appellant’s own personal information where it stands alone. The issue is whether the withheld personal information relating to the affected party is exempt under section 38(b).

[29] Sections 14(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy under section 38(b). Section 14(2) provides a list of factors for the police to consider in making this determination, while section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy.

[30] Section 14(4) sets out certain types of information whose disclosure is not an unjustified invasion of personal privacy. The police submit that none of paragraphs (a) to (c) of section 14(4) apply to the records in this appeal. I agree and I find that none of the situations described in section 14(4) are applicable in this appeal.

[31] In determining whether the disclosure of the affected party’s personal information in the records would be an unjustified invasion of personal privacy under section 38(b), therefore, I will consider and weigh the factors and presumptions in

⁵ Order PO-2560.

sections 14(2) and (3) and balance the interests of the parties.⁶

Representations

[32] The police submit that none of the exceptions described in paragraphs (a) to (e) in section 14(1) apply in this case. The police state, with reference to section 14(1)(a), that while they did not seek the consent of the affected party to release their personal information, during mediation consent was sought by the mediator and was not provided.

[33] The police submit that the affected party's personal information was obtained as part of an investigation into a possible violation of the law, within the meaning of section 14(3)(b). It is the police's position that the disclosure of the affected party's personal information is presumed to be an unjustified invasion of their personal privacy by virtue of the application of section 14(3)(b) and the information being collected as part of their investigation into a complaint of trespassing and property damage.

[34] The police submit that none of the factors listed in section 14(2) apply in this case. However, they submit that releasing the affected party's personal information to the appellant could subject the affected party to harassment as the appellant continues to assert that the affected party trespassed on their property causing damage.

[35] In their representations, the appellant does not specifically address the personal privacy exemption in section 38(b) or address whether disclosure of the information at issue would constitute an unjustified invasion of the affected party's personal privacy. Instead, the appellant's representations focus on their assertion that the affected party trespassed on their property and caused damage and details about the ongoing civil proceedings involving both parties.

[36] The appellant states that they believe the information provided to the police by the affected party is "untruthful" and that it "unfairly influenced the police officers' decision(s) on how to deal with" their complaints of trespass and property damage. The appellant submits that they are concerned that their privacy was breached during the interactions between the affected party and the police during the specified incident and that it may be necessary to correct the information in the police report and that, in order to do this, they need full access to the records.

[37] In their representations, the affected party also refers to the civil court action and, as already noted, declines consent to their information being disclosed to the appellant.

Analysis and findings

[38] As stated, the issue is whether disclosure of the affected party's personal

⁶ Order MO-2954.

information would be an unjustified invasion of their personal privacy under section 38(b).

[39] Under section 14(3)(b), the disclosure of an individual's personal information to another individual is presumed to be 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 of law or to continue the investigation.

[40] Even if no criminal proceedings were commenced against any individual, as is the case in this appeal, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of the law.⁷

[41] I have reviewed the records and find that the withheld personal information of the affected party was compiled and is identifiable as part of an investigation into a possible violation of law. Based on the appellant's complaint to the police alleging that the affected party trespassed onto their property and had caused damage, the police attended the appellant's property and initiated an investigation that could have resulted in criminal charges.

[42] While the appellant maintains that the affected party trespassed on their property and caused property damage, the records demonstrate that no charges were laid as a result of the investigation. The presumption in section 14(3)(b) only requires that there be an investigation into a possible violation of law. I therefore find that the presumption against disclosure in section 14(3)(b) applies to the affected party's personal information and that its disclosure to the appellant would be a presumed unjustified invasion of their privacy.

[43] I have considered whether any other factors favouring disclosure of the affected party's personal information, either listed or unlisted, may apply, and I find that none of them do.

[44] As I have found that the presumption against disclosure in section 14(3)(b) applies, and that no section 14(2) factors that would weigh in favour of disclosure apply, the balance weighs in favour of protecting the affected party's personal privacy rather than the appellant's access rights. I find that the affected party's personal information in the records is therefore exempt under section 38(b), subject to my review of the police's exercise of discretion, below.

[45] For the benefit of the appellant, I note that although the records as a whole relate to the incident in which the appellant was involved, the specific information at issue belongs to the affected party and there is no reference in the withheld information

⁷ Orders P-242 and MO-2235.

to the appellant or their family members.

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

[46] The section 38(b) exemption is discretionary and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[47] The IPC may find that an 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.

[48] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.⁸ The IPC may not, however, substitute its own discretion for that of the institution.⁹

Representations

[49] The police state that, when determining whether or not to release the affected party's personal information, they considered the purposes of the *Act* to provide individuals a right of access to their own information and the protection of personal privacy. The police submit that they disclosed to the appellant their own personal information together with the affected party's business information and the outcome of the police conversation with the affected party's employees. The police state that they also considered the fact that the appellant had advised them that they were involved in a civil action with the affected party and had used the affected party's services in the past so that the parties were known to each other.

[50] The police state that in exercising their discretion not to release the affected party's personal information, they considered that the protection of the affected party's privacy outweighed the appellant's interest in accessing the exempt information.

[51] The appellant and the affected party did not provide representations addressing the police's exercise of discretion under section 38(b).

⁸ Order MO-1573.

⁹ Section 43(2) of the *Act*.

Analysis and findings

[52] I have reviewed the considerations relied upon by the police and find that they properly exercised their discretion in withholding the affected party's personal information under section 38(b). I am satisfied that the police considered the purposes of the *Act* and balanced the appellant's interest in accessing the full records with the protection of the affected party's privacy in reaching their decision to disclose the affected party's business information and the appellant's own personal information, while withholding other information about the affected party that fell within the scope of the section 38(b) exemption.

[53] I find that the police did not exercise their discretion to withhold the affected party's personal information for any improper purpose or in bad faith. On the contrary, I am of the view that the police took into account relevant factors, which included the parties' interests, the extent to which the information that was disclosed to the appellant addressed the appellant's concerns, the outcome of the police investigation following the appellant's complaint and the acrimonious relationship between the parties, including their ongoing civil court action.

[54] There is no evidence that the police failed to take relevant factors into account or that they considered irrelevant factors. Accordingly, I uphold the police's exercise of discretion under section 38(b) in denying access to the affected party's personal information.

ORDER:

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

Original signed by: _____
Katherine Ball
Adjudicator

_____ May 27, 2022