

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4209

Appeal MA21-00609

Barrie Police Services Board

June 9, 2022

Summary: The appellants sought access to three specified 911 call recordings. In two decisions, the police relied on section 38(b) (personal privacy) of the *Municipal Freedom of Information and Protection of Privacy Act* to deny access to the 911 call recordings. In this order the adjudicator upholds the decisions of the police and dismisses the appeal.

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

Orders Considered: Orders MO-1378 and MO-2321.

OVERVIEW:

[1] The Barrie Police Services Board (the police) received a request under the *Act* for access to the following information:

1. All 911 calls to [specified address] between Feb 2020 to Jan 2021.
2. All names and badge numbers of officers dispatched to each of those calls.
3. All officer notes, pictures, body cams.
4. All arrest records.

[2] The police identified responsive records and in their first decision granted partial access to them, relying on section 38(b) (personal privacy) of the *Act* to deny access to

the portion they withheld.

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

[4] During mediation the requester confirmed that he is also acting for another individual regarding the request for access to 911 calls. He also informed the mediator that he was of the view that there are other 911 calls that were not identified by the police. The police then conducted an additional search for 911 calls and ultimately issued a supplementary decision letter relying on section 38(b) of the *Act* to deny access to the three 911 call recordings at issue in this appeal, in full.

[5] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process where an adjudicator may conduct an inquiry under the *Act*.

[6] I decided to conduct an inquiry. As a preliminary step, I sought and received a consent allowing the original requester to act as an Authorized Agent in the appeal for the other individual seeking access to the three 911 call recordings. For the purpose of the analysis in the Order that follows, I am considering both the original requester and the other identifiable individual as appellants, and that both of them have consented to disclose to each other any of their personal information that may appear in the records at issue.

[7] Representations were exchanged in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[8] In this order I uphold the decisions of the police and dismiss the appeal.

RECORDS:

[9] At issue in this appeal are three 911 call recordings dated May 9, 2020, May 19, 2020, and August 14, 2020.

ISSUES:

- A. Do the 911 call recordings contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?
- B. Does the discretionary personal privacy exemption at section 38(b) apply to the 911 call recordings?
- C. Does the absurd result principle apply in the circumstances of this case?

DISCUSSION:

Issue A: Do the 911 call recordings contain “personal information” as defined in section 2(1) and, if so, whose personal information is it?

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

What is “personal information”?

[11] Section 2(1) of the *Act* defines “personal information” as “recorded information about an identifiable individual.”

Recorded information

[12] “Recorded information” is information recorded in any format, such as paper records, electronic records, digital photographs, videos, or maps.¹

About

[13] Information is “about” the individual when it refers to them 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.² See also sections 2(2.1) and (2.2), which 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.

[14] 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.³

Identifiable individual

[15] 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

¹ See the definition of “record” in section 2(1).

² Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

³ Orders P-1409, R-980015, PO-2225 and MO-2344.

other information.⁴

What are some examples of "personal information"?

[16] Section 2(1) of the *Act* gives a list of examples of personal information:

"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.

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

Statutory exclusions from the definition of "personal information"

[18] Sections 2(2), (2.1) and (2.2) of the *Act* exclude some information from the

⁴ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

⁵ Order 11.

definition of personal information. Sections 2(2.1) and (2.2) are described above.

Whose personal information is in the record?

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

[20] The police take the position that the 911 call recordings contain personal information. The appellants assert that there is no personal information in the 911 call recordings, but if there was it would be the information of the appellants. I have listened to the 911 call recordings at issue, and in my view, they contain information that qualifies as the personal information of the caller, which is intertwined with information that qualifies as the personal information of the appellants and other identifiable individuals, all of which falls within the scope of the definition of personal information at section 2(1) of the *Act*.

[21] As I have found that the 911 calls contain the appellants' personal information, I will now consider whether the personal privacy exemption at section 38(b) may apply to the withheld personal information.

Issue B: Does the discretionary personal privacy exemption at section 38(b) apply to the 911 call recordings?

General principles

[22] Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 provides some exemptions from this right.

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

[24] The section 38(b) exemption is discretionary. This means that the institution can decide to disclose another individual's personal information to a requester even if doing so would result in an unjustified invasion of the other individual's personal privacy.⁸

[25] If disclosing another individual's personal information would not be an unjustified

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

⁷ See sections 14(1) and 38(b).

⁸ See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's exercise of discretion under section 38(b).

invasion of personal privacy, then the information is not exempt under section 38(b).

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

Sections 14(2), (3) and (4)

[27] Sections 14(2), (3) and (4) also help in deciding whether disclosure would or would not be an unjustified invasion of personal privacy under section 38(b). Section 14(4) lists situations where disclosure would not be an unjustified invasion of personal privacy, in which case it is not necessary to decide if any of the factors or presumptions in sections 14(2) or (3) apply.

[28] Otherwise, in deciding whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), the decision-maker⁹ must consider and weigh the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.¹⁰

Section 14(3) - is disclosure presumed to be an unjustified invasion of personal privacy?

[29] Sections 14(3)(a) to (h) list several situations in which disclosing personal information is presumed to be an unjustified invasion of personal privacy under section 38(b).

Section 14(2): Do any factors in section 14(2) help in deciding if disclosure would be an unjustified invasion of personal privacy?

[30] Section 14(2) lists several factors that may be relevant to determining whether disclosure of personal information would be an unjustified invasion of personal privacy.¹¹ Some of the factors weigh in favour of disclosure, while others weigh against disclosure.

[31] The list of factors under section 14(2) is not a complete list. The institution must also consider any other circumstances that are relevant, even if these circumstances are not listed under section 14(2).¹²

[32] Each of the first four factors, found in sections 14(2)(a) to (d), if established, would tend to support disclosure of the personal information in question, while the remaining five factors found in sections 14(2)(e) to (i), if established, would tend to support non- disclosure of that information.

⁹ The institution or, on appeal, the IPC.

¹⁰ Order MO-2954.

¹¹ Order P-239.

¹² Order P-99.

[33] The police's representations refer to the possible application of the presumption at section 14(3)(b) of the *Act*. The police submit that although no criminal proceedings were commenced against anyone and no charges were laid as a result of these calls for service, the personal information was compiled during an investigation into a possible violation of law.

[34] The appellants' representations do not specifically refer to any of the section 14(2) factors favouring disclosure and focus instead on the absurd result principle, which is addressed below. The appellants explain that any investigation has been completed and the prosecution dropped all charges.

14(3)(b): investigation into a possible violation of law

[35] Section 14(3)(b) provides that:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

[36] This presumption requires only that there be an investigation into a *possible* violation of law.¹³ I point out that even if criminal proceedings were never started against an individual, section 14(3)(b) may still apply.¹⁴

[37] I have reviewed the 911 call recordings at issue and it is clear from the circumstances that the personal information in it was compiled and is identifiable as part of the police's investigation into a possible violation of law, namely the *Criminal Code*¹⁵ of Canada.

[38] I am satisfied that the personal information in the 911 call recordings were compiled and are identifiable as part of an investigation into a possible violation of law and I find that the presumption at section 14(3)(b) applies.

[39] Given the application of the presumption in section 14(3)(b), and the fact that no factors favouring disclosure were raised by the appellant,¹⁶ and in balancing all the interests, I am satisfied that the disclosure of the personal information in the 911 call recordings at issue would constitute an unjustified invasion of another individual's personal privacy. Accordingly, I find that this personal information is exempt from disclosure under section 38(b) of the *Act*.

¹³ Orders P-242 and MO-2235.

¹⁴ 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 and PO-1849).

¹⁵ RSC 1985, c C-46.

¹⁶ Nor in my view would any apply.

Issue C: Does the absurd result principle apply in the circumstances of this case?

[40] An institution might not be able to rely on the section 38(b) exemption in cases where the requester originally supplied the information in the record, or is otherwise aware of the information contained in the record. In this situation, withholding the information might be absurd and inconsistent with the purpose of the exemption.¹⁷

[41] For example, the “absurd result” principle has been applied when:

- the requester sought access to their own witness statement,¹⁸
- the requester was present when the information was provided to the institution,¹⁹ and
- the information was or is clearly within the requester’s knowledge.²⁰

[42] However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply.²¹

[43] The police submit that the absurd result principle does not apply to the 911 call recordings. The police state that although they provided the appellants with the General Occurrence Reports and police officer’s notes for the May 9, 2020 and August 14, 2020 occurrences, there is no indication that the appellants are aware of the withheld personal information in the 911 call recordings.

[44] The appellants submit that it would be absurd to withhold the 911 call recordings because an appellant was present at the time the calls were made, he has videos of the dates in question, he is mentioned in the calls, he spoke to the investigating police officers and he is mentioned in their notes.

[45] I have carefully considered the contents of the 911 call recordings, and have done so bearing in mind the background to the creation of the records. Based on the circumstances surrounding how the calls were made, without revealing their content, unless the line on which the calls were made were recorded by the appellants and their video recording took place throughout the entirety of the place where the calls were made, I am not satisfied that the appellants are aware of the complete content of the calls, even if they have been provided with other information by the police.

[46] In any event, I rely on the analysis of Adjudicator Daphne Loukidelis in Order MO- 2321 where she found:

¹⁷ Orders M-444 and MO-1323.

¹⁸ Order M-444.

¹⁹ Orders M-444 and P-1414.

²⁰ Orders MO-1196, PO-1679 and MO-1755.

²¹ Orders MO-1323, PO-2622 and PO-2642.

In Order PO-2285, former Senior Adjudicator David Goodis reviewed the issue of disclosure and consistency with the purpose of the section 14(3)(b) exemption. He stated:

Although the appellant may well be aware of much, if not all, of the information remaining at issue, this is a case where disclosure is not consistent with the purpose of the exemption, which is to protect the privacy of individuals other than the requester. In my view, this situation is similar to that in my Order MO-1378, in which the requester sought access to photographs showing the injuries of a person he was alleged to have assaulted.

The former Senior Adjudicator then proceeded to review the following excerpt from Order MO-1378:

The appellant claims that the photographs should not be found to be exempt because they have been disclosed in public court proceedings, and because he is in possession of either similar or identical photographs.

In my view, whether or not the appellant is in possession of these or similar photographs, and whether or not they have been disclosed in court proceedings open to the public, the section 14(3)(b) presumption may still apply. In similar circumstances, this office stated in Order M-757:

Even though the agent or the appellant had previously received copies of [several listed records] through other processes, I find that the information withheld at this time is still subject to the presumption in section 14(3)(b) of the *Act*.

In my view, **this approach recognizes one of the two fundamental purposes of the *Act*, the protection of privacy of individuals** [see section 1(b)], **as well as the particular sensitivity inherent in records compiled in a law enforcement context.** The appellant has not persuaded me that I should depart from this approach in the circumstances of this case [emphasis added].

[47] I find that there is a particular and inherent sensitivity to the information in the 911 call recordings, and that disclosure would not be consistent with the fundamental purpose of the *Act* described by former Senior Adjudicator Goodis in Order MO-1378. Accordingly, in consideration of protecting the privacy of the caller, as well as the particular sensitivity inherent in records compiled in a law enforcement context, I find that the absurd result principle does not apply to the withheld personal information in the 911 call recordings at issue in this appeal.

[48] Finally, I have considered the circumstances surrounding this appeal and I am satisfied that the police have not erred in the exercise of their discretion with respect to section 38(b) of the *Act* regarding the withholding of the 911 call recordings.

ORDER:

I uphold the decisions of the police and dismiss the appeal.

Original Signed by: _____
Steven Faughnan
Adjudicator

_____ June 9, 2022