

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4223

Appeals MA21-00405 and MA21-00172

Toronto Police Services Board

July 12, 2022

Summary: The appellant made two access requests under the *Municipal Freedom of Information and Protection of Privacy Act* to the Toronto Police Services Board (the police) seeking records about complaints made to the police that involved him. The police granted partial access to the responsive records, withholding some information on the basis of the discretionary personal privacy exemption in section 38(b), or that portions of the records were not responsive to the requests. The appellant appealed the withholding of information and also claimed that the police had not conducted a reasonable search for responsive records.

In this order, the adjudicator upholds the police's decision to deny access to portions of the records pursuant to section 38(b) or because they are not responsive to the requests. She also finds that the police have conducted a reasonable search for records.

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"), 17, and 38(b).

OVERVIEW:

[1] The appellant sought access to police records about complaints to the police in relation to matters involving him.

[2] Specifically, the appellant made two access requests to the Toronto Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*).

[3] The first request was dated September 17, 2020 and sought:

...all Records and Notes. Including July 9, [2020] ([police] report), [and related] January 24, [2020 (police report)].

[4] The police issued an access decision dated November 9, 2020, in response to the first request, which stated:

...please be advised that General Occurrence Reports were not created for every incident. In order to satisfy your access to information request, you are being provided with copies of the related Intergraph Computer Aided Dispatches (ICADs or 911 Reports) and the attending officers' memorandum notes.

Partial access is granted to the records concerning your request, as held by this Police Service. Access is denied to certain information pursuant to [section 38(b) or because it is not responsive to this request]...

[5] In this access decision, dated November 9, 2020, the police provided the appellant with partial access to 25 pages of records, consisting of police officer notes, two ICAD reports, and one general occurrence report related to the two events specified in the first request. The police also provided the appellant with full access to a responsive 911 audio call recording.

[6] The second request was dated November 25, 2020 and was a follow up to the first request. This request sought:

All available records related to [the appellant's] complaints including, but not limited to: copies of [his] videotaped statement. Copies of audio-taped statements, Siri Audio and / or transcripts from Jan. 24, 2020 00:40 am to 02:00. Interview transcripts, police reports, officer notes, case synopsis, photographs, hospital records, surveillance footage email correspondence with witnesses, suspect interview and other official police forms relating to the investigation. I'm also seeking third party information for private citizens. I'd like all this information electronically preferably in a CD.

Please do a search from July 2014 - November 2020.

- [list of items from various private third party individuals and organizations]
- [and] Report [#] Videotaped statement (July 9, 2020) [one of the events listed in the first request], [and] Report [#], 911 audio (December 8, 2014).

[7] In their access decision of March 17, 2021, the police granted the appellant

partial access to the records responsive to the second request, consisting of police officer notes, two ICAD reports, two redacted videos and one audio recording, as well as the records responsive to the first request. Access to portions of the records was denied pursuant to the discretionary personal privacy exemption in section 38(b) of the Act. The police also stated that some information was redacted from the reports and notes disclosed because it was not responsive to the requests.

[8] The appellant appealed the police's decisions to the Information and Privacy Commissioner of Ontario (IPC). Appeal MA21-00172 was opened for the first request and Appeal MA21-00405 was opened for the second request. A mediator was appointed to attempt resolution of these appeals.

[9] During mediation, the appellant stated that he believed more records should exist. The mediator relayed the appellant's search concerns to the police. The police conducted further searches.

[10] Regarding the first request, the police conducted another search for responsive records and stated that no additional records exist. Following further discussions with the mediator, the police confirmed that the records responsive to the first request are duplicates of the records that are also responsive to the second request. The mediator relayed this to the appellant, who stated that he wished for both appeals to proceed to adjudication because he seeks full access to the responsive records and because he still believes that more records exist.

[11] Regarding the second request, the police also conducted another search for records and issued a revised access decision dated November 29, 2021, in which they identified a 911 audio recording relating to a November 30, 2020 incident. The police denied access to this November 30, 2020 911 audio file in full, pursuant to section 38(b) of the *Act*.

[12] During mediation, the appellant asserted that the police had altered or shortened some portions of the audio and video recordings that were disclosed to him. The police advised that they did not shorten or alter the audio or video recordings and they stated that no additional responsive records exist.

[13] Two of the videos disclosed to the appellant contained blurred images of other individuals. The appellant advised the mediator that he was not pursuing access to these blurred background images. Accordingly, further access to these videos is not at issue in these appeals.

[14] Because the outstanding issues could not be resolved, the appeal files were referred to adjudication, where an adjudicator may conduct an inquiry. I decided to conduct a joint inquiry into both appeals.

[15] I sought and received the police's representations, which I provided to the appellant, along with a Notice of Inquiry. The appellant provided representations in

response.

[16] In this order, I uphold the police's decision to deny access to the remaining withheld information at issue pursuant to the discretionary exemption for personal privacy at section 38(b) or because the information is not responsive to the requests. I also find that the police have conducted a reasonable search for responsive records. I dismiss the appeals.

RECORDS:

[17] For Appeal MA21-00172 (the first request), the information at issue consists of withheld portions of ICAD¹ Event Details reports, police officer memorandum book notes, and police occurrence reports for the two events listed in the first request. Both of these events (dated January 24, 2020 and July 9, 2020) resulted from complaints the appellant made to the police about other individuals.

[18] For Appeal MA21-00405 (the second request), the information at issue consists of the same information that is at issue in relation to the first request, as well as the withheld portions of two ICAD Event Details reports and police officer memorandum book notes. These records are related to two events dated December 8, 2014 and November 30, 2020, in which complaints were made to the police about the appellant.

[19] As well, for this appeal, there is a November 30, 2020 911 audio recording of a call made by an individual other than the appellant to the police that has been withheld in full.

ISSUES:

- A. What is the scope of the request for records? Which records are responsive to the request?
- B. Did the police conduct a reasonable search for records?
- C. Does the records contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?
- D. Does the discretionary personal privacy exemption at section 38(b) apply to the information at issue?
- E. Did the police exercise their discretion under section 38(b)? If so, should the IPC uphold the exercise of discretion?

¹ Intergraph Computer-Aided Dispatch.

DISCUSSION:

Issue A: What is the scope of the request for records? Which records are responsive to the request?

[20] The police claim that some of the withheld information in the records does not reasonably relate to either request and that this information is, therefore, withheld on the basis that it is outside the scope of the request or, in other words, non-responsive.

[21] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

(1) A person seeking access to a record shall,

(a) make a request in writing to the institution that the person believes has custody or control of the record;

(b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

...

(2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[22] To be considered responsive to the request, records must “reasonably relate” to the request.² Institutions should interpret requests liberally, in order to best serve the purpose and spirit of the *Act*. Generally, if there is ambiguity in the request, this should be resolved in the requester’s favour.³

Representations

[23] The police have marked portions of the records they have located in response to the appellant’s requests as non-responsive. Specifically, for both requests, the police have marked very limited portions of police officer notes and of two I/CAD reports as non-responsive.

[24] The police state that the records responsive to the first request relate to the January 24 and July 9, 2020 events.

[25] The police state that the second request is a follow up to the first request. They

² Orders P-880 and PO-2661.

³ Orders P-134 and P-880.

state that in the second request, the appellant sought access to the same records as he sought in the first request, but now also requested access to video records, audio-taped statements, photographs, surveillance footage, e-mail correspondence with witnesses, suspect interview and other police forms relating to the investigation, as well as third party information. This search was to be for records dated between July 2014 and November 2020.

[26] The appellant did not address the issue of the responsiveness of the records in his representations.

Findings

[27] The appellant has sought access to records related to complaints made to the police by, or about, him.

[28] Based on my review of the records and the police's representations, I find that the information marked as non-responsive by the police is not responsive to the requests. This information marked as non-responsive concerns other individuals other than the appellant or matters other than those referred to in either request.

[29] Therefore, I uphold the police's decision that certain portions of the records are non-responsive to the appellant's two requests.

Issue B: Did the police conduct a reasonable search for records?

[30] The appellant claims that the police's searches should have yielded additional records.

[31] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.⁴ If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[32] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.⁵ To be responsive, a record must be "reasonably related" to the request.⁶

[33] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which

⁴ Orders P-85, P-221 and PO-1954-I.

⁵ Orders P-624 and PO-2559.

⁶ Order PO-2554.

are reasonably related to the request.⁷

[34] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.⁸

[35] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.⁹

[36] A requester's lack of diligence in pursuing a request by not responding to requests from the institution for clarification may result in a finding that all steps taken by the institution to respond to the request were reasonable.¹⁰

Representations

[37] The police state that they have conducted the searches for records with the understanding that the scope of both requests was all agreed-upon records (as set out above under Issue A) in the custody or control of the police related to the appellant. They state that this includes the related ICAD Event Details reports, police officer memorandum book notes, occurrence reports and video and audio recordings.

[38] The police were asked in the Notice of Inquiry to provide a written summary of all steps taken in response to the requests.

[39] The police state that all relevant databases were searched and internal stakeholders consulted in gathering the responsive records, and that no responsive records have been destroyed.

[40] The police state that at the request stage, they contacted the appellant for additional clarification of the requests. They state that multiple steps were undertaken to search for responsive records.

[41] The appellant did not provide direct representations on the search issue. However, he appears to identify some records or portions of records that he believes ought to have been located by the police. The appellant's representations were provided by his counsel and read in their entirety as follows:

1. [The appellant] is seeking copies of all available audio calls in between the disclosure analyst [name and badge #] and himself as she has verified that reports have been prepared for release.

⁷ Orders M-909, PO-2469 and PO-2592.

⁸ Order MO-2185.

⁹ Order MO-2246.

¹⁰ Order MO-2213.

2. [The appellant] also asks the Toronto police to search again about the release of the remainder of the video statement for [the event in the first request] (beyond 17 minutes) & the remainder [of the] 911 audio [recording of the appellant for the related event in the first request].
3. [The appellant] would also like the police email and network accounts for responsive records containing the keywords [listing the private third party individuals and organizations in the second request].
4. [The appellant] would also like for the IPC File no. MA21-00172 [the first request]:- "Acknowledgment of access to Police files (May 2020) and intelligence files, court documents (May 2020 and all), Disciplinary history of - [two named police officers and their badge numbers] and 911 Operator for the [related event in the first request], Feb 3rd, 2020 (Service Ontario Assault), June 13 2019 car attack attempt, [named] parking lot Preparation and attempted Murder, [name]."

[42] The appellant raised many of these same concerns during mediation. During mediation, the police provided the appellant with further information about their searches. The police advised the appellant as follows:¹¹

Appellant's video statement beyond 17 minutes

Detective [name and badge #] and the Video Services Unit were contacted. The In Car Camera statement is 17 minutes long – there is no longer version.

Remainder of 911 audio recording of the appellant

A request was sent to Audio & Data Services to double check their library and they confirmed the length of the audio recording is 7 minutes and 27 seconds. Please note, the dispatcher does tell the appellant good bye in the recording, indicating the conclusion of the call.

Search of keywords

Searches were conducted using appropriate search criteria concerning the appellant's involvement concerning his request. Incidents describing events resembling those provided by the appellant were also reviewed concerning the following locations: [locations named in the second request]. A review of the reports returned did not note the appellant's involvement. I also requested officer memorandum notes for 2 events similar to what the appellant described even though the appellant was not named in them. Additional searches were conducted after the appellant

¹¹ The appellant provided the IPC with this additional information that he received from the police during the mediation stage of the appeal.

appealed and no additional records were located matching the information provided. During previous discussions with the appellant concerning the other search words noted in his request... The appellant confirmed he only wants to know if anything exists in connection between himself and the entities he listed.

Findings

[43] To begin, I am satisfied that the police understood the scope of the request, attempted to clarify it when necessary and carried out reasonable steps to identify records. The police have carried out several searches subsequent to their original search to respond to concerns raised by the appellant.

[44] As stated above, as the appellant claims that additional records exist beyond those identified by the police, he must provide a reasonable basis for me to conclude that additional responsive records exist.

[45] I will discuss each of the four items listed by the appellant's counsel.

1. all available audio calls between the appellant and the disclosure analyst

[46] As I understand this item, the appellant believes there are audio recordings of conversations between himself and a disclosure analyst. In support, the appellant indicates that there are reports of the disclosure analyst. However, he has not identified these reports in his representations and it is not clear to me how these reports, if they exist, are evidence of further audio recordings. Nor have I been able to identify any such calls from my review of the records and the parties' representations. Therefore, I find that the appellant has not provided a reasonable basis for me to conclude that such records exist. I will not order the police to conduct another search for these audio call recordings.

2. the remainder of the video statement for [the event in the first request] (beyond 17 minutes) & the remainder [of the] 911 audio [for the January 24, 2020 event in the first request]

[47] This item deals with the appellant's belief that the police have withheld portions of recording (one video, one audio) that the police say have been disclosed to him in full.

[48] Regarding the 17-minute video statement, as set out above, during mediation of the appeal, the police made inquiries of the detective who interviewed the appellant in the video statement and the police's Video Services Unit (the VSU). Both the detective and the VSU confirmed that the video statement at issue is 17 minutes long and that there is no longer version.

[49] I have reviewed this 17-minute video and I accept the police's assurance that

this is the entirety of the video. At the end of the video, the detective that interviewed the appellant asked the appellant if there is anything else the police need to know about. The appellant responded that there was not. The detective then said that this was the end of the interview and the video then ends. I am satisfied that there is no reasonable basis to believe that there is missing video.

[50] Regarding the 911 audio recording, as set out above, during mediation of the appeal, the police made inquiries of their Audio & Data Services unit (the ADS) to double check its library about the 911 audio call for the related event (on January 24, 2020). The ADS confirmed the length of the audio recording is 7 minutes and 27 seconds. I have listened to this audio recording. At the end, the appellant is invited to call back 911 if he needs to and the 911 operator does say "bye, bye" at the end. I find that the police have provided the entirety of this audio recording and there is no reasonable basis to believe that an additional portion exists.

[51] As a result, I will not order the police to conduct any further searches for additional portions of either the video or the 911 audio recording.

3. the police email and network accounts records containing the keywords of the third party individuals and organizations referred to in the second request

[52] The police advised the appellant during mediation that they conducted searches using the keywords for the locations, events, and private third party individuals and organizations referred to in the second request.

[53] The appellant's second request was for records about complaints he made to the police. Although the appellant mentions in the second request a number of third party private individuals and organizations, he has not provided evidence that he made complaints to the police about these individuals or organizations, nor is it evident from my review of the records before me that he did so.

[54] The police have indicated that their searches were conducted using the events, locations, and private third party individuals and organizations named in the second request and found no records that included information related to the appellant's involvement in these events.

[55] Therefore, I find that the appellant has not provided a reasonable basis for me to conclude that responsive records exist about his complaints related to the named private individuals and organizations. In any event, I am satisfied that the searches that were undertaken include all of the keywords referred to in the appellant's request related to any complaints he may have made to the police. Accordingly, I will not order the police to conduct a search for the records sought in item 3 of the appellant's representations.

4. to the first request, acknowledgment of access to Police files (May 2020) and intelligence files, court documents (May 2020 and all), disciplinary history of two

named police officers and their badge numbers and 911 Operator for the [related] event, Feb 3rd, 2020 (Service Ontario Assault), June 13 2019 car attack attempt, [named] parking lot Preparation and attempted Murder, [name]

[56] Giving this item a broad reading, it appears that the appellant is suggesting that additional areas ought to have been searched in relation to the first request. As indicated, the first request is a very narrow request focusing on two specified incidents. Considering the clear wording and narrow scope of the first request, I am of the view that the appellant is now seeking access to new information. In particular, the appellant is seeking information about access to unrelated files, disciplinary history information and events. To gain access to this information, the appellant needs to submit a new access request to the police as the information that the appellant is now seeking in item 4 of his representations is not responsive to the first request. Therefore, I will not order the police to conduct a search for these records.

Conclusion

[57] In conclusion, I find that the police have demonstrated that they have made a reasonable effort to identify and locate responsive records and the appellant has not provided a reasonable basis for me to conclude that additional responsive records exist.

[58] Therefore, after reviewing the wording of the appellant's requests, the parties' representations and the records located by the police, I find that the police have conducted a reasonable search for records and I uphold their search.

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

[59] The police withheld records and portions of records relying on the discretionary personal privacy exemption at section 38(b) of the *Act*. In order to decide if this exemption applies, I must first decide whether the record contains "personal information," and if so, to whom the personal information relates.

[60] Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual." "Recorded information" is information recorded in any format, such as paper records, electronic records, digital photographs, videos, or maps.¹²

[61] 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.¹³

¹² See the definition of "record" in section 2(1).

¹³ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

[62] 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.¹⁴

[63] 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.¹⁵

[64] 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.

¹⁴ Orders P-1409, R-980015, PO-2225 and MO-2344.

¹⁵ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[65] 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."¹⁶

Representations

[66] The police state that the withheld information in the records contains the personal information of other involved individual(s), which if disclosed, would identify the individuals. Information includes the address (unit number), telephone number, and name(s), as they appear with this other personal information and family relationship information.

[67] The appellant did not provide representations on this issue.

Findings

[68] The records at issue are ICAD Event Details reports, police officer memorandum book notes, occurrence reports, and video and 911 audio recordings.

[69] First, I find that all of the records at issue contain the personal information of the appellant, as they contain information provided by him in his complaints to the police or in the November 30, 2020 911 audio recording. This is personal information in accordance with paragraphs (d), (g) and (h) of the definition of personal information in section 2(1).

[70] Based on my review of the withheld information in the records, I find that the records, and in particular the withheld information, also contain the personal information of individuals other than the appellant. This information is information about these individuals in their personal capacity.

[71] The 911 audio recording at issue is a recording of the appellant and another individual. This record also contains views or opinions of this individual in accordance with paragraph (g) of the definition of personal information in section 2(1).

[72] Although one individual is identified in a business capacity in the remaining records, disclosure of his name would reveal other personal information about him, namely whether the police considered his behaviour to be criminal in nature. In my view, this is information "about" the individual in a personal rather than purely professional capacity, and constitutes his personal information in accordance with paragraph (h) of the definition of personal information in section 2(1).

[73] The personal information at issue in the records of other individuals in the records includes these individuals' home addresses and telephone numbers, and their names that appear with other personal information about them in accordance with paragraphs (d) and (h) of the definition of personal information in section 2(1).

¹⁶ Order 11.

[74] The remaining withheld information, including the November 30, 2020 911 audio recording, consists of the appellant's personal information that is intertwined with the personal information of other individuals. In my view, it is not reasonably possible to sever the appellant's personal information and disclose it to him, without revealing the personal information of others.

[75] Therefore, as the records contain the personal information of both the appellant and other individuals, I will consider whether the discretionary personal privacy exemption in section 38(b) applies to the personal information of the other individuals at issue in the records.

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

[76] 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.

[77] 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.

[78] 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.

[79] 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).

[80] Sections 14(1) to (4) provide guidance in deciding whether disclosure would be an unjustified invasion of the other individual's personal privacy.

[81] If paragraphs (a) to (e) of section 14(1) or paragraphs (a) to (c) of section 14(4) apply, disclosure would not be an unjustified invasion of personal privacy and the information is not exempt from disclosure under section 38(b). In these appeals, none of these paragraphs apply.

[82] Sections 14(2) and (3) help in deciding whether disclosure would or would not be an unjustified invasion of personal privacy under section 38(b). In deciding whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), I must consider and weigh the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.¹⁷

¹⁷ Order MO-2954.

Section 14(3)

[83] The police rely on the presumption in section 14(3)(b), which reads:

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;

[84] The police state that the personal information was compiled as part of an investigation into possible violations of law. The police rely on Order MO-3423, where the adjudicator found that it was apparent from the records in that appeal that the police had attended a location to investigate incidents involving a possible violation of law. In finding that the presumption in section 14(3)(b) applied, the adjudicator in that order recognized that the police did not lay charges.

[85] The appellant did not address this issue in his representations.

Findings re: section 14(3)(b)

[86] The presumption in section 14(3)(b) requires only that there be an investigation into a possible violation of law.¹⁸ So, even if criminal proceedings were never started against the individual, section 14(3)(b) may still apply.¹⁹

[87] Based on my review of the records at issue, which are ICAD Event Details reports, police officer memorandum book notes, police occurrence reports, and a 911 audio recording, I find that they were all compiled as part of investigations into possible violations of law and contain personal information of individuals other than the appellant. In each record, the police were asked to investigate whether a violation of law had taken place. The information at issue documents the police's investigation of these possible violations of law reported and includes the personal information of individuals other than the appellant.

[88] Therefore, I find that the presumption against disclosure of the personal information in the records in section 14(3)(b) applies to the personal information at issue in the records.

Section 14(2)

[89] Section 14(2) lists several factors that may be relevant to determining whether disclosure of personal information would be an unjustified invasion of personal

¹⁸ Orders P-242 and MO-2235.

¹⁹ 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).

privacy.²⁰ Some of the factors weigh in favour of disclosure, while others weigh against disclosure.

[90] 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).²¹

[91] 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.

[92] Other considerations (besides the ones listed in sections 14(2)(a) to (i)) must be considered under section 14(2) if they are relevant. These may include:

- inherent fairness issues,²²
- ensuring public confidence in an institution.²³

[93] The police rely on the factor in section 14(2)(h), which reads:

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

the personal information has been supplied by the individual to whom the information relates in confidence.

[94] The police state that there is unequivocally an issue of confidentiality relating to the information at issue. They state that generally any information relayed to police by individuals during an investigation is not conveyed with the understanding that the other involved parties could foreseeably be given unfettered access to such records in the future. They state:

Although we cannot verify that explicit assurances were given in this respect, it is highly reasonable to expect that there is a pre-existing understanding of confidentiality when information is supplied to officers in the course of an investigation.

[95] The police also rely on an unlisted factor of ensuring public confidence in the police. They submit that:

²⁰ Order P-239.

²¹ Order P-99.

²² Orders M-82, PO-1731, PO-1750, PO-1767 and P-1014.

²³ Orders MO-2293, P-237, M-129, M-173 and P-1348.

When providing information to aid in an investigation, the public entrusts the police to protect their privacy. There is a vital and implicit assumption of confidentiality. The appellant wishes to be given access to personal information of others without their consent. To disclose this information to the appellant under such circumstances would not only be an unjustified invasion of personal privacy but would violate the public's trust in this institution to safeguard their rights. Consequently, disclosure would also be deleterious to the ability of the police to fulfill their role in ensuring public safety and administering the law.

Findings re: section 14(2)

[96] Section 14(2)(h) weighs against disclosure if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. This requires an objective assessment of whether the expectation of confidentiality is "reasonable."²⁴

[97] The records that are responsive to the second request that do not overlap with the first request pertain to contacts with the police that were initiated by individuals other than the appellant. Based on my review of these records, I agree with the police that the personal information that was supplied to the police by individuals other than the appellant was supplied by these individuals in confidence. It is apparent from the content of the records that contain this information that the individuals supplying this information to the police did so with a reasonable expectation of confidentiality.

[98] Therefore, I find that the factor in section 14(2)(h) applies and weighs against disclosure of the personal information of other individuals in the records.

[99] However, I do not agree with the police that the unlisted factor of ensuring public confidence in the police applies and weighs in favour of privacy protection. The police rely on this factor because the other individuals in the records have not consented to the disclosure of their information.

[100] The police have not provided record specific representations, nor have they sought the consent of the other individuals in the records. Nor, in applying this unlisted factor, have the police recognized that section 38(b) of *MFIPPA* allows for the disclosure of other individuals' personal information after the consideration of and weighing of the factors and presumptions in sections 14(2) and (3) and balancing the interests of the parties. Considering the contents of the records at issue and the police's representations, I find that in the circumstance of this appeal, the unlisted factor of ensuring public confidence in the police does not apply to weigh against disclosure of the personal information at issue.

²⁴ Order PO-1670.

Conclusion re section 38(b)

[101] In the discussion above, I find that it is relevant to consider and weigh the factor in section 14(2)(h) and presumption in section 14(3)(b), both of which weigh against disclosure of the information at issue to the appellant.

[102] I have also considered whether there are any listed or unlisted factors that favour disclosure. Based on my review of the records at issue and the parties' representations, I find that there are not any such factors that favour disclosure.

[103] Balancing the interests of the parties, I find that disclosure of the personal information at issue in the records would be an unjustified invasion of personal privacy under section 38(b).²⁵

[104] Therefore, I find that the personal information at issue in the records is exempt under section 38(b), subject to my review of the police's exercise of discretion.

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

[105] The section 38(b) exemption is discretionary (the institution "may" refuse to disclose), meaning that the institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[106] 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.

[107] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.²⁶ The IPC cannot, however, substitute its own discretion for that of the institution.²⁷

[108] Some examples of relevant considerations are listed below. However, not all of these will necessarily be relevant, and additional considerations may be relevant:²⁸

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

²⁵ Order MO-2954.

²⁶ Order MO-1573.

²⁷ Section 43(2).

²⁸ 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,
 - whether the requester is an individual or an organization,
 - 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,
 - the age of the information, and
 - the historic practice of the institution with respect to similar information.

Representations

[109] The police state that they weighed the considerations listed above and took into account that the mandate and the spirit of the *Act* is the balance of privacy protection with the public's right to know. They state that they balanced the access interests of the appellant with the privacy rights of other individuals.

[110] The police submit that they exercised their discretion to withhold the personal information in these parts of the records under section 38(b) in good faith and did not withhold this information for an improper purpose.²⁹

[111] The appellant did not address this issue in his representations.

²⁹ The police rely on Order MO-3861.

Findings

[112] The information at issue in the records contains the personal information of other individuals who were involved in interactions with the appellant where the police were called upon to conduct law enforcement investigations.

[113] I find in denying access to the information at issue in the records, the police exercised their discretion under section 38(b) in a proper manner, taking into account relevant considerations and not taking into account irrelevant considerations.

[114] In particular, the police took into account the appellant's right of access to the information at issue in the records and balanced that with the privacy rights of the other individuals in the records.

[115] Therefore, I am upholding the police's exercise of discretion and find that the personal information at issue in the records is exempt by reason of section 38(b).

ORDER:

1. I uphold the police's search for records.
2. I uphold the police's decision to withhold the information at issue in the records on the basis of the section 38(b) exemption for personal privacy or because it is not responsive to the appellant's request.

Original Signed by: _____
Diane Smith
Adjudicator

_____ July 12, 2022