

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-4238

Appeal MA20-00069

Niagara Regional Police Services Board

August 17, 2022

**Summary:** The appellant sought access under the *Municipal Freedom of Information and Protection of Privacy Act* to a specified police report. The police granted partial access to the records, withholding some of the information on the basis that its disclosure would be an unjustified invasion of the personal privacy of other individuals under the discretionary exemption in section 38(b) of the *Act*.

In this order, the adjudicator partly upholds the police's decision to withhold portions of the record under section 38(b). The adjudicator orders the police to disclose certain information that relates to the appellant only.

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

### OVERVIEW:

[1] The appellant made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Niagara Regional Police Services Board (the police) for a specified police report.

[2] The police issued an access decision granting partial access to responsive records. The police took the position that disclosure of the withheld information would constitute an unjustified invasion of personal privacy under section 38(b). The police also claimed that some portions of the records are non-responsive to the request.

[3] The appellant appealed the police's decision to the Information and Privacy Commissioner of Ontario (the IPC) and a mediator was assigned to explore settlement with the parties.

[4] Mediation did not resolve the appeal and the file was moved to the adjudication stage of the appeal process in which an adjudicator may conduct an inquiry. I decided to commence my inquiry by inviting the written representations from the police. However, the police declined to make any submissions other than what it had already provided in its access decision letter. The appellant also indicated that he did not wish to submit written representations though he confirmed that he continued to seek access to the withheld information.

[5] I have reviewed the records and am satisfied that the portions of the records the police identified as "unresponsive" or "not relevant" do not respond to the appellant's request. These portions of the records contain information in the footer located at the end of each page that do not relate to the subject-matter of request.<sup>1</sup> Accordingly, I have removed those portions of the withheld records from the scope of this appeal.

[6] The remaining issue to be determined is whether the police's decision to withhold the remaining information at issue under the personal privacy exemption under section 38(b) should be upheld.

[7] In this order, I uphold the police's application of section 38(b) to most of the withheld records. I find that small portions of the records contain information about the appellant that does not constitute the personal information of another individual. As the police did not claim another exemption under the *Act* applies to this information and I am satisfied that no mandatory exemption could apply, I order the police to disclose these portions of the records to the appellant. I uphold the police's decision to withhold the remaining information under section 38(b).

## **RECORDS:**

[8] The records are computer-generated occurrence reports totalling 19 pages prepared by the police.

## **ISSUES:**

- A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

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<sup>1</sup> To be considered responsive to the request, records must "reasonably relate" to the request (see Orders P-880 and PO-2661)

- B. Would disclosure of the personal information at issue constitute an unjustified invasion of personal privacy under section 38(b)? Did the police exercise its discretion under section 38(b)?

## **DISCUSSION:**

### **A. Do the records contain “personal information” as defined in section 2(1) and, if so, to whom does it relate?**

[9] Having reviewed the records, I am satisfied that the portions of the records withheld by the police under section 38(b) contain the personal information of the appellant and other individuals, as defined in paragraphs (a), (d), (e), (g) or (h) of the section 2(1) definition of that term.<sup>2</sup> I note that the records before me relate to a complaint filed with the police.

[10] The police have already disclosed information that would qualify as personal information of two identifiable individuals. This includes their name, address and ethnicity. Both of the individuals are known to the appellant and one of them is identified as his daughter in the records. The police disclosed the individual’s names, address and ethnicity to the appellant. The police also disclosed the appellant’s daughter’s birthdate to him.

[11] Small portions of the records contain notations regarding the investigating officer’s notations confirming the appellant’s whereabouts. As this information does not contain the personal information of any individual but for the appellant, I am satisfied that the personal privacy exemption under section 38(b) can not apply to withhold this information from him. As the police did not claim any other discretionary exemptions for this information and I find that no mandatory exemption applies, I will order the police to disclose these portions of the records located at pages 6 and 7 to the appellant.

[12] I will now consider whether the remaining withheld personal information relating to other individuals should be disclosed to the appellant in the circumstance of this appeal.

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<sup>2</sup> The term “personal information” is defined, in part, in section 2(1) as 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,
- (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;

**B. Would disclosure of the personal information at issue constitute an unjustified invasion of personal privacy under section 38(b)? Did the police exercise its discretion under section 38(b)?**

[13] Since I found that the records contain the personal information of the appellant and other individuals, section 36(1) of the *Act* applies to the appellant's access request. Section 36(1) 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.

[14] Under section 38(b), where a record contains personal information of the appellant and another individual, and disclosure of the information would be an "unjustified invasion" of the other's individual's personal privacy, the institution may refuse to disclose that information to the requester. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.

[15] Sections 14(1) to (4) provide guidance in determining whether disclosure of the information would be an unjustified invasion of personal privacy under section 38(b).

[16] If the information fits within any of the paragraphs (a) to (f) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). The parties have not claimed that any of the exceptions in paragraphs (a) to (e) apply, and I am satisfied that none apply in the circumstances of this appeal.

[17] Sections 14(2) and (3) also help in determining whether disclosure would or would not be an unjustified invasion of personal privacy. Also, section 14(4) lists situations that would not be an unjustified invasion of personal privacy, but I find that none of the section 14(4) exceptions are relevant in this appeal.

[18] In determining whether the disclosure of the 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 sections 14(2) and (3) and balance the interests of the parties.<sup>3</sup>

***Does the presumption at section 14(3)(b) apply?***

[19] If any of the paragraphs (a) to (h) of section 14(3) apply, disclosure of the personal information is presumed to be an unjustified invasion of personal privacy.

[20] The police take the position that the presumption at section 14(3)(b) applies because the records were created during the course of its investigation into a possible violation of law. Section 14(3)(b) states:

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<sup>3</sup> Order PO-2954.

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;

[21] Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.<sup>4</sup> The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.<sup>5</sup>

[22] Having regard to the records, I am satisfied that the withheld personal information was compiled and is identifiable as part of the police's investigation into a possible violation of law, namely a *Criminal Code* offence.

[23] Having regard to the above, I find that the presumption at section 14(3)(b) applies to the withheld personal information.

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

[24] 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.<sup>6</sup>

[25] 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).<sup>7</sup>

[26] As stated earlier in this order, the police declined making representations during the inquiry stage of this appeal and referred me to its decision letter. The police's decision letter did not cite any of the factors weighing in favour of privacy protection or disclosure. However, the police's decision did inform the appellant that if he required an unsevered copy of the record for a court proceeding, he can make an application to the courts directly.

[27] The appellant did not make representations and thus there is insufficient evidence before me to consider whether any of the factors weighing in favour of disclosure apply in the circumstances of this appeal.

[28] However, I considered whether the absurd result principle could apply. Where the requester originally supplied the information, or the requester is otherwise aware of

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<sup>4</sup> Orders P-242 and MO-2235.

<sup>5</sup> Orders MO-2213, PO-1849 and PO-2608.

<sup>6</sup> Order P-239.

<sup>7</sup> Order P-99.

it, the information may not be exempt under sections 14(1) or 38(b), because to withhold the information would be absurd and inconsistent with the purpose of the exemption.<sup>8</sup>

[29] The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement<sup>9</sup>
- the requester was present when the information was provided to the institution<sup>10</sup>
- the information is clearly within the requester's knowledge<sup>11</sup>

[30] However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.<sup>12</sup>

[31] I previously found that the personal information remaining at issue consists of personal information the police gathered when they spoke to other individuals about a complaint filed against the appellant. Having reviewed the records, I am satisfied that there is no evidence in the records themselves that would support a position that the appellant is aware of the exact nature of the personal information other individuals provided to the police. For instance, there is no evidence before me suggesting that the appellant was physically present when other individuals provided information to the police. Accordingly, I find that the absurd result principle does not apply to the circumstances of this appeal.

### ***Findings and analysis***

[32] I find that the presumption at section 14(3)(b) applies and that no factors weighing in favour of disclosure apply. I also find that the absurd result principle would not apply to any of the withheld personal information that I find to be exempt under section 38(b).

[33] As stated above, the appellant has already received disclosure of the information that relates to him in addition to the information of two identifiable individuals known to him. Furthermore, I have found that section 38(b) applies to the remaining personal information at issue. Given the narrow application of section 38(b) evidenced by the police's severance of the records, I find that the police properly exercised its discretion. In arriving at my decision, I am satisfied that the police balanced the principle that individuals should have a right of access to their own personal information with the principle that the privacy of individuals should be protected.

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<sup>8</sup> Orders M-444 and MO-1323.

<sup>9</sup> Orders M-444 and M-451.

<sup>10</sup> Orders M-444 and P-1414.

<sup>11</sup> Orders MO-1196, PO-1679 and MO-1755.

<sup>12</sup> Orders M-757, MO-1323 and MO-1378.

[34] In absence of evidence that the police took into account irrelevant factors, I am satisfied that the police exercised its discretion in good faith. Accordingly I am satisfied that the police properly exercised its discretion to withhold the personal information I found exempt under section 38(b).

**ORDER:**

1. I order the police to disclose to the appellant the portions of the records related to information gathered by the police confirming his whereabouts on pages 6 and 7 of the records. The police is ordered to disclose these portions of the records to the appellant by **September 19, 2022**.
2. I uphold the police's decision to withhold the remaining portions of the records at issue under section 38(b).
3. In order to verify compliance with provision 1 of this order, I reserve the right to require the police to provide me with a copy of the records that are disclosed to the appellant.

Original Signed by: \_\_\_\_\_  
Jennifer James  
Adjudicator

\_\_\_\_\_ August 17, 2022