

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4243

Appeal MA19-00825

Toronto Police Services Board

August 24, 2022

Summary: The police received a request under the *Act* for a specified police occurrence report. The police partially disclosed the report and related attachments, withholding portions on the basis of the section 38(b) personal privacy exemption in the *Act*.

In this order, the adjudicator upholds the police's decision to withhold all but a small portion of the withheld information under the discretionary personal privacy exemption in section 38(b).

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, section 38(b).

Orders Considered: Order MO-3028.

OVERVIEW:

[1] The Toronto Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a specified police occurrence report. The requester (now the appellant) made the request after they were contacted by the police as the result of a complaint made to the police.

[2] The police issued a decision providing partial access to an occurrence report, withholding information pursuant to section 38(b) of the *Act*, the discretionary personal privacy exemption, claiming that disclosure of the withheld information would constitute an unjustified invasion of the personal privacy of individuals other than the appellant.

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

[4] A mediator was assigned to explore resolution. During the mediation, the mediator had discussions with both the appellant and the police. As a result of these discussions, the police conducted an additional search for records and located 22 pages referred to in the occurrence report as "attached letters," material provided by individuals other than the appellant to the police.

[5] In a supplemental decision, the police agreed to fully disclose four pages of the "attached letters" to the appellant, withholding the rest on the same grounds as it withheld information in the occurrence report. No further mediation was possible and the file was transferred to adjudication.

[6] I conducted a written inquiry, in which I sought and received representations from the police, the appellant, and three individuals involved in the police complaint and whose interests may be affected by disclosure of the information at issue (the affected parties). Representations were shared with the parties in accordance with the IPC's *Code of Procedure* and *Practice Direction 7*. In consideration of the confidentiality criteria in *Practice Direction 7*, I did not share the representations made by the appellant with the police or the affected parties, and I did not share the representations made by the affected parties with the appellant (or the police).

[7] In this order, I uphold the police's decision to withhold all but a small portion of the withheld information on the basis of the section 38(b) personal privacy exemption. As a result, I order the police to disclose specified brief withheld portions of a summary of the appellant's statement to police.

RECORDS:

[8] The information at issue is contained within the following records:

- Information withheld on pages 2-6 and 9-11 of a General Occurrence Hardcopy (the "report"). The report consists of summaries of statements taken and conversations with various individuals as the result of a complaint made to the police.
- 18 pages of "attached letters" provided to the police by individuals other than the appellant (the "attachments").

ISSUES:

- A. Do the records 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 personal information at issue?
- C. Did the police exercise their discretion under section 38(b)?

DISCUSSION:

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

[9] The police rely on the personal privacy exemption in section 38(b) of the *Act* to withhold information in this appeal. It is therefore necessary to determine first whether the records contain "personal information" and, if so, whose.

[10] "Personal information" is defined in section 2(1) of the *Act* and means "recorded information about an identifiable individual." The definition at section 2(1) also contains a non-exhaustive list of examples of types of personal information, such as information relating to an individual's marital or family status (paragraph a), information relating to an individual's psychiatric, psychological or criminal history (paragraph b), an individual's address (paragraph d), the personal opinions or views of the individual except if they relate to another (paragraph e), correspondence sent to an institution of a private or confidential nature (paragraph f), the views or opinions of another individual about the individual (paragraph g), or an individual's name if it appears with other personal information relating to the individual (paragraph h).

[11] The list of examples of personal information is not exhaustive, meaning that information that is not specifically listed in the definition may still qualify as personal information.¹

[12] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.²

Representations

[13] The police explain that the records were created after the police received a complaint about the conduct of the appellant. They state that as a result of the complaint, a law enforcement investigation into a possible violation of law was undertaken, and the police recorded and gathered the personal information of the involved parties as part of the investigation. They state that the record contains the names, dates of birth, addresses, and telephone numbers of the involved parties.

¹ Order 11.

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

[14] The appellant submits that they are not seeking access to any “personal information” about individuals who complained to the police, but instead is requesting information about the substance of the complaint made, and their own personal information that they provided to the police.

[15] The representations of the affected parties do not specifically address whether the records at issue contain personal information.

Analysis and findings

[16] Having reviewed them and considered the representations of the parties, I find that the records contain the personal information of the appellant and other individuals. I also find that some of the information is not sought by the appellant and is therefore not within the scope of the appeal. I will explain these findings below.

Appellant’s personal information

[17] The records contain the personal information of the appellant, such as their name, address, phone number and other details about the appellant and their life, including the fact that they had discussions with police, information about their family and their views.

Other individuals’ personal information

[18] The records also contain the personal information of the affected parties, such as their names and contact information. In some cases, the personal information consists of recorded information about the circumstances of their home and work lives, their family, their views or opinions in general as well certain circumstances involving the appellant. In some cases, the personal information consists of information that they provided to the police in a private or confidential way (personal information definition, paragraph (f)).

[19] Page 9 of the report also contains the personal information of another individual (not one of the affected parties) that is unrelated to the police complaint, but still within the scope of the appellant’s access request (the unrelated personal information).

Scope of personal information at issue

[20] The focus of the appellant’s request is information about the substance of the complaint itself, as well as information that the appellant told the police. The appellant does not seek, in their words, any other individual’s “personal information.” As I have explained above, the things that the affected parties said to the police (i.e. the substance of the complaint) qualifies as personal information of the affected parties under the *Act*. However, as I understand the arguments made, the appellant does not seek access to any *names or contact information* of any individuals identified in the records.

[21] Based on my review of the records, the withheld information on the following pages consists only of names, contact information or other similar information of the affected parties: 2, 5, 10 and 11. Based on my understanding that the appellant does not seek this type of information, I will therefore not address these pages further and I uphold the police's decision to withhold the information in them.

[22] Some of the withheld information on page 9 also consists of names and contact information of affected parties; I will not address this latter information further and I uphold the police's decision to withhold it. However, page 9 also contains the unrelated personal information, which, as explained above is unrelated to the complaint or the affected parties, but is within the scope of the appellant's access request and which I will discuss below.

Summary

[23] Having established that the records (the report and the attachments) contain the personal information of both the appellant and other individuals, I will next consider whether the remaining withheld personal information of the other individuals is exempt under section 38(b).

Issue B: Does the discretionary personal privacy exemption at section 38(b) apply to the personal 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 some exemptions from this right. 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.

[25] 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.

[26] 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).

[27] 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.³ I considered whether any of the withheld personal information at issue consists of the appellant's personal information alone so that it could be severed and disclosed to them. In my view, it cannot.

[28] Sections 14(1) to (4) provide guidance in deciding whether disclosure would be

³ Order PO-2560.

an unjustified invasion of the other individual's personal privacy.

[29] If any of the section 14(1)(a) to (e) exceptions apply, disclosure would not be an unjustified invasion of personal privacy and the information is not exempt from disclosure under section 38(b). No party has argued that these exceptions are relevant to the circumstances of this appeal and, based on my review, I find that they are not.

[30] 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. No party has argued that any of the situations in section 14(4) are relevant to the circumstances of this appeal and, based on my review, I find that they are not.

[31] 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-maker⁴ must consider and weigh the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.⁵

[32] Sections 14(3)(a) to (h) list several situations which, if established, would weigh against disclosure as a presumed unjustified invasion of personal privacy under section 38(b). The police rely on section 14(3)(b), which states:

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

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

[33] Establishing that section 14(3)(b) applies requires only that there be an investigation into a *possible* violation of law.⁶ That is, even if criminal proceedings were never started against the individual, section 14(3)(b) may still apply.⁷

[34] 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.⁸ Some of the factors weigh in favour of disclosure, while others weigh against disclosure.

[35] The police submit that the factor at section 14(2)(h) applies and weighs in favour

⁴ The institution or, on appeal, the IPC.

⁵ Order MO-2954.

⁶ Orders P-242 and MO-2235.

⁷ 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).

⁸ Order P-239.

of privacy protection. It states:

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

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

[36] This section 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."⁹

[37] The police also refer to the factor at section 14(2)(d) (fair determination of rights), a factor that if established would favour disclosure; however, the appellant has not claimed the application of section 14(2)(d) and I do not find it to be a relevant consideration in the circumstances of this appeal. I will therefore not consider it further.

[38] 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)¹⁰ such as inherent fairness issues.¹¹

[39] The appellant does not specify which presumptions or factors are relevant to determining whether disclosure would constitute an unjustified invasion of personal privacy. However, as I will explain below, I understand the appellant to be asserting that an unlisted factor is relevant to deciding whether disclosure would constitute an unjustified invasion of personal privacy.

[40] Lastly, the affected parties have not specified which of the presumptions or factors are relevant to determining whether disclosure would constitute an unjustified invasion of personal privacy. However, they echo the arguments made by the police that they believed that they were providing the information to the police in confidence.

[41] The unrelated personal information on page 9 is found within a note made by the police about a conversation between the appellant and the police that does not relate to the police complaint in question. The appellant has expressed frustration about why information that they provided to the police has not been disclosed to them. I have also therefore considered whether the absurd result principle applies. 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

⁹ Order PO-1670.

¹⁰ Order P-99.

¹¹ Orders M-82, PO-1731, PO-1750, PO-1767 and P-1014.

be absurd and inconsistent with the purpose of the exemption.¹²

Police representations

[42] The police submit that section 38(b) applies to all of the withheld information at issue. They submit that disclosure of the withheld information would be an unjustified invasion of personal privacy of the affected parties, and that the information collected from the affected parties (in particular) was supplied to the police believing there to be a certain degree of confidentiality. They state that police investigations imply an element of trust that the law enforcement agency will act responsibly in the manner in which it deals with recorded information.

[43] The police submit that the presumption at section 14(3)(b) applies to the records at issue, stating that the personal information was compiled and is identifiable as part of an investigation into a possible violation of law. They cite Order MO-3423, where the adjudicator found that section 14(3)(b) applied to information collected when police attended a location to investigate incidents involving trespassing.

[44] They state that section 14(2)(h) applies, claiming that the personal information at issue was supplied to them in confidence. They cite Order MO-3028, where the adjudicator found that information supplied to police was done so in confidence, and state that this expectation applies every time an individual gives their personal information to the police.

[45] They reiterate that any personal information provided by any individual to any law enforcement agency implies that the information is being provided in confidence, and that if such information were routinely disclosed, it could heavily impact the trust members of the public have in any police service. They state that this mistrust will deter the public from coming forward to provide information to police, such as the complete details of an incident, or their full name and address. They submit that this would hinder police investigations and prevent the police from properly exercising their mandate.

Appellant representations

[46] In consideration of the confidentiality criteria in *Practice Direction 7*, representations made by the appellant were not shared with the police or the affected parties, nor are they described in this order. I have reviewed the appellant's representations in detail and taken them into account in making my findings. Generally speaking, I understand that the appellant seeks more information about the complaint made to the police and the appellant asserts a right as a matter of fairness to this information as well as information that they (not the affected parties) provided to the police (i.e. the unrelated personal information on page 9).

¹² Orders M-444 and MO-1323.

Affected party representations

[47] Also in contemplation of the confidentiality criteria in *Practice Direction 7*, the affected parties' representations were not shared with the other parties in the appeal, nor are they summarized in detail in this order. I have reviewed these representations and taken them into account when making my findings. Generally speaking, I understand the affected parties to object to the further disclosure of any information that they provided to the police for the same reasons argued by the police.

Analysis and findings

The unrelated personal information

[48] I will first address the unrelated personal information that is found on page 9. In order to protect the confidentiality of the other individual in the record, I have intentionally not described or characterized this information in this order.

[49] To begin, I find that none of the listed or unlisted factors assist in determining whether disclosure of the information would result in an unjustified invasion of personal privacy of the other individual. I nevertheless find that disclosure of the information would be an unjustified invasion of another individual's personal privacy and exempt under section 38(b).

[50] However, it is also my view that because this unrelated personal information is contained within a summary of a statement made by the appellant to the police and it consists therefore of information that is well within the appellant's knowledge, I find that it would be absurd to withhold this information from the appellant. The "absurd result" principle has been applied when the requester sought access to their own witness statement¹³ or when the information was or is clearly within the requester's knowledge.¹⁴

[51] The absurd result principle may not apply when disclosure is inconsistent with the purpose of the exemption. In my view, the unrelated personal information at issue is so general in nature and clearly within the knowledge of the appellant that I easily conclude that disclosure is not inconsistent with the purpose of the exemption.

The remaining withheld personal information – personal information of the affected parties

The section 14(3)(b) presumption for law enforcement investigations applies and weighs against disclosure

[52] To begin, all of the remaining information at issue – the report and the

¹³ Orders M-444 and M-451.

¹⁴ Orders MO-1196, PO-1679 and MO-1755.

attachments – was provided to the police by the affected parties as part of an investigation into a possible violation of law. I therefore find that the section 14(3)(b) presumption applies and weighs in favour of privacy protection over all of the affected parties' personal information at issue.

The section 14(2)(h) factor for information supplied in confidence applies and weighs against disclosure

[53] The police point to section 14(2)(h) as a factor also favouring privacy protection. This factor applies 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. Section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.¹⁵

[54] The police cite Order MO-3028, where the adjudicator found that information given to the police was done so in confidence, and state that every time an individual gives their personal information to the police, there is an expectation that the information will be held in confidence. The affected parties indicate that they had an expectation of confidentiality over the information that they provided to the police.

[55] I do not agree that it is necessarily the case that all information obtained by an institution during the course of a law enforcement investigation is presumed to have been obtained in confidence.¹⁶ However, based on the representations provided and the nature of the information at issue, I am satisfied that the affected parties contacted the police with the expectation that the information they provided would remain confidential. That I have reached such a conclusion does not dictate the result, but rather merely establishes that this is a factor that ought to be considered. I find that section 14(2)(h) is a relevant consideration and weighs in favour of privacy protection.

The unlisted factor of inherent fairness considerations applies and weighs in favour of disclosure

[56] Generally speaking, the appellant seeks more information about the complaint and argues that they therefore have a right to further information as a matter of inherent fairness.

[57] I have intentionally not elaborated on the appellant's arguments in this regard due to confidentiality concerns. Taking into account the appellant's arguments, I agree that the appellant's interest in knowing information provided to the police about the appellant gives rise to an issue of inherent fairness and I therefore find that it is a relevant factor that weighs in favour of disclosure.

¹⁵ Order PO-1670.

¹⁶ See, for example, Order M-167.

Balancing the presumption, factors and interests of the parties

[58] I must now consider and weigh the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.¹⁷ Considering the competing interests of the appellant's right to disclosure of their own personal information against the privacy rights of the affected parties, and taking into account the factors and presumptions discussed above, I conclude the balance weighs more heavily in favour of privacy protection. I have reached this conclusion in consideration of the sensitive nature of the information at issue, the confidentiality expectations of the affected parties and in consideration of the amount of information that has already been disclosed to the appellant about the police complaint.

[59] In conclusion, I find that disclosure of the remaining withheld personal information would constitute an unjustified invasion of the personal privacy of the affected parties and the information at issue qualifies for exemption under section 38(b).

[60] I will next review the police's exercise of discretion as it relates to the remaining withheld information of the affected parties.

Issue C: Did the police exercise their discretion under section 38(b)?

[61] 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.

[62] 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
- it fails to take into account relevant considerations.

[63] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁸ The IPC may not, however, substitute its own discretion for that of the institution.¹⁹

[64] The police submit that they did exercise their discretion in denying access to the records at issue. They state that they did not exercise their discretion in bad faith or for an improper purpose, that they took into account all relevant considerations, and that

¹⁷ Order MO-2954.

¹⁸ Order MO-1573.

¹⁹ Section 43(2).

they did not take into account any irrelevant considerations.²⁰ They state that the mandate and spirit of the *Act* is the balance of privacy protection with the public's right to know, and that they must balance the access interests of requesters with the privacy rights of affected parties. They state that the appellant is trying to access the personal information of the affected parties, and that the appellant is not entitled to this information.

[65] The appellant and affected parties did not provide specific representations on the police's exercise of discretion.

[66] Having considered the circumstances surrounding this appeal, the information that was disclosed and the police's representations, I am satisfied that the police have properly exercised their discretion with respect to section 38(b) of the *Act*. I am satisfied that they did not exercise their discretion in bad faith or for an improper purpose. The police considered the purposes of the *Act* and have given due regard to the nature and sensitivity of the information in the specific circumstances of this appeal, and I have upheld its decision with respect to the information they have claimed is exempt. Accordingly, I find that the police took relevant factors into account and I uphold their exercise of discretion in this appeal.

ORDER:

1. I order the police to disclose to the appellant the unrelated personal information on page 9 of the report by **September 29, 2022** but not before **September 26, 2022**. I have indicated which portions of page 9 ought to be disclosed in the highlighted copy of the record provided to the police with this order.
2. I uphold the remainder of the police's decision.
3. Upon request, the ministry will provide the IPC with a copy of the records disclosed to the appellant pursuant to order provision 1.

Original signed by: _____

Valerie Jepson
Adjudicator

August 24, 2022 _____

²⁰ I note that the police referred to taking into account "all irrelevant considerations." Taken in context, this was obviously a typographical error.