

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4246

Appeal MA19-00865

Toronto Police Services Board

August 26, 2022

Summary: The police received a request under the *Municipal Freedom of Information and Protection of Privacy Act* for witness statements they gathered during a homicide investigation. The police denied access to the witness statements under the exemption at section 38(b) (personal privacy) of the *Act*, with reference to the presumption at section 14(3)(b) (investigation into a possible violation of law). The requester appealed the police's decision to deny access to the witness statements. In this order, the adjudicator upholds the police's decision and dismisses the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 2(1), 14(2)(d), 14(2)(h), 14(3)(b) and 38(b).

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 access to witness statements, police related 9-1-1 emergency calls, memorandum book notes and other items the police provided to the Crown's office in relation to an alleged homicide. The requester also sought access to all disclosure that was passed on to the Crown prior to the commencement of the trial.

[2] The requester later amended their request to include only certain witness statements. The police notified the affected parties who may have an interest in the disclosure of the witness statements and then issued a decision denying the requester

access to the records they identified as responsive to the request pursuant to section 38(b) (personal privacy) of the *Act*, with reference to section 14(1) and the presumption in section 14(3)(b) (investigation into a possible violation of law). The responsive records are comprised of the transcripts from 10 witness statements, totalling 733 pages.

[3] The requester, now the appellant, appealed the police's decision to the Information and Privacy Commissioner of Ontario (the IPC). During the course of mediation, the mediator communicated with the appellant and the police and discussed the matters at issue. The appellant confirmed that they are seeking access to the witness statements. The mediator attempted to notify the affected parties to obtain their consent to disclose the transcripts of their statements to the appellant. The mediator did not obtain the consent of any of the affected parties. No further mediation was possible and the file was transferred to the adjudication stage of the appeals process where an adjudicator may conduct a written inquiry under the *Act*. An adjudicator began this inquiry by seeking the representations of the police and the affected parties.

[4] The police and the appellant both provided representations and representations in reply, which were shared in accordance with this office's *Code of Procedure and Practice Direction Number 7*. None of the affected parties provided representations. The appeal was then transferred to me to continue the inquiry.¹

[5] In this order, I uphold the police's decision to deny access to the witness statements. I find that the witness statements contain the appellant's personal information, within the meaning of the definition of that term at section 2(1), as well as the personal information of other identifiable individuals, in particular the individuals providing the statements. I find that the discretionary exemption at section 38(b) applies to exempt the witness statements from disclosure and I uphold the police's exercise of discretion to deny access to the appellant.

RECORDS:

[6] The records at issue are comprised of 733 pages of transcripts from the police's interviews of 10 individuals during a homicide investigation.

ISSUES:

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

¹ After reviewing the file material, including the records, I determined that I did not need to seek representations from any of the parties before rendering a decision.

- B. Does the discretionary exemption for personal privacy at section 38(b) apply to the witness statements?
- C. Did the police exercise their discretion under section 38(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

The parties' representations

[7] As background, the police submit that the information collected from the witnesses in the statements that are at issue in this appeal was supplied to the police by the affected parties in the course of an investigation into a homicide. As a result, they say that the presumption against disclosure at section 14(3)(b) of the *Act* applies. The police say that due to the serious nature of the incident, it is reasonable to conclude that the witnesses supplied their personal information with the understanding that there would be a degree of confidentiality. They submit that their investigations imply an element of trust and the assumption the law enforcement agency will act responsibly in the manner in which it deals with recorded personal information.

[8] Specifically, the police say that when providing information to aid in an investigation, the public entrusts the police to protect their privacy. They submit that there is a vital and implicit assumption of confidentiality. The police assert that disclosing the witness statements to the appellant under these circumstances would not only be an unjustified invasion of personal privacy, but would violate the public's trust in the police. Consequently, the police argue, disclosure would also damage their ability to fulfill their role in ensuring public safety and administering the law.

[9] The police further submit that all attempts to solicit authorization from the witnesses in order to release their personal information were unsuccessful and that as a result, the release of the information at issue would constitute an unjustified invasion of personal privacy.

[10] In their representations, the appellant explains that they are requesting access to the statements because they do not believe their lawyer was given this information during the trial. They also say they suspect that there were witnesses who made a deal and that as a result, the trial focussed solely on the appellant and not the other parties the appellant says were involved.

[11] In reply, the police state that the appellant appears to believe a miscarriage of justice was perpetrated by the courts, whereby the accused became the focal point of the Crown's prosecution when others involved may in fact share responsibility, or be responsible for the incident. The police submit that the appellant's attempts to use the *Act* to gather evidence that will prove this contention is an improper use of access to information. The police assert that the appellant should redirect their efforts toward

contacting legal counsel to identify what materials were provided to the defense of the accused and to inquire about the appeal process.

[12] The police reassert their position that the appellant has no right to access the information at issue and that disclosure would be a violation of personal privacy and a contravention of the *Act*.

[13] The appellant submitted a brief sur-reply specifying that they have attempted to obtain the information at issue through other avenues but have not been successful. They state that they require the information to determine whether they were granted a fair sentence.

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

[14] In order to decide which sections of the *Act* may apply to a specific case, the IPC must first decide whether the records contain “personal information,” and if so, to whom the personal information relates. For the reasons I will explain below, I find that the witness statements contain personal information belonging to the appellant and other identifiable individuals, specifically, those individuals providing the statements.

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

[16] “Recorded information” is information recorded in any format, such as paper records, electronic records, digital photographs, videos, or maps.²

[17] 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.

[18] 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

[19] 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.⁴

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

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

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

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

“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,

...

(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.

[21] 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

[22] It is important to know whose personal information is in the record. If the record contains the requester’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 discussed below might apply.⁷

[23] I have reviewed the records and considered the parties’ submissions and I find that the information at issue consists of the personal information of the appellant and other identifiable individuals, as defined by the portions of the section 2(1) definition of

⁵ Order 11.

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).

personal information listed above, and the introductory language of the definition. Each witness statement is the personal information of the affected party who provided it, under paragraph (h), above, and the introductory wording of the definition of personal information. The witness statements also contain the appellant's personal information, as well as the personal information of other identifiable individuals whose names appear with other personal details about themselves in the statements.

[24] The personal information of the various individuals in the witness statements is intermingled with the appellant's personal information. In my view, the appellant's personal information cannot reasonably be severed from that of other parties in the records at issue.

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

[25] Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exceptions to this general right of access, including section 38(b). Section 38(b) introduces a balancing principle that must be applied by institutions if a record contains the personal information of both the requester and other individuals.

[26] In this case, the police must look at the information and weigh the appellant's right of access to their own personal information against the affected parties' right to the protection of their privacy. If the police determine that release of the information would constitute an unjustified invasion of the affected parties' personal privacy, then section 38(b) gives the police the discretion to deny access to the appellant's personal information. Section 38(b) states:

A head may refuse to disclose to the individual to whom the information relates personal information,

if the disclosure would constitute an unjustified invasion of another individual's personal privacy

[27] In determining whether the exemption in section 38(b) applies, sections 14(1), (2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the affected person's personal privacy. Section 14(2) provides some criteria for the police to consider in making this determination; section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. In addition, if the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is deemed not to be an unjustified invasion of personal privacy under section 38(b). In the circumstances of this appeal, I find that sections 14(1) and (4) are not relevant to my determination.

The presumption in section 14(3)(b)

[28] In this appeal, the police rely on the presumed unjustified invasion of personal privacy at section 14(3)(b) of the *Act*, which states:

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;

[29] 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.⁸ The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.⁹

[30] As noted above, the police submit that the witness statements were compiled and are identifiable as part of an investigation into a possible violation of law, as contemplated by the presumption at section 14(3)(b). Specifically, they submit that the witness statements were compiled as part of an investigation into a homicide.

[31] The appellant did not make any representations on whether the presumption at section 14(3)(b) applies to the information at issue.

[32] I have reviewed all of the witness statements and I find that all of the information in each of the statements was compiled by the police in the course of their investigation into a homicide. Accordingly, I accept that the statements were compiled and are identifiable as part of an investigation into a possible violation of law. I find that all of the information in the witness statements falls under the presumption at section 14(3)(b) of the *Act*.

The factor at section 14(2)(h)

[33] 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.¹⁰ Some of the factors weigh in favour of disclosure, while others weigh against disclosure.

[34] The police say that section 14(2)(h) applies to the information at issue. Section 14(2)(h) specifies that

⁸ Orders P-242 and MO-2235.

⁹ Orders MO-2213, PO-1849 and PO-2608.

¹⁰ Order P-239.

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; ...

[35] This section 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. This requires an objective assessment of whether the expectation of confidentiality is "reasonable."¹¹ If section 14(2)(h) applies, it would weigh against the disclosure of the information at issue.

[36] As noted above, the police say that in general, information relayed to police by individuals during an investigation is not done with the understanding a suspect will be granted access to the information in the future. The police say that although they cannot verify that explicit assurance was given in this respect, it is highly reasonable for the witnesses to have an implied understanding of confidentiality when information is supplied to officers in the course of an investigation.

[37] The appellant did not make any representations about whether the witnesses would have expected the information they provided to remain confidential.

[38] Based on my review of the witness statements, I am unable to conclude that the witnesses would have had a reasonable expectation of confidentiality when providing their statements. The witnesses were aware that the police were investigating a homicide and that charges had been laid. They were under no obligation to provide a statement to the police. The witnesses also knew that the matter would be proceeding to trial and that the information they were providing could be used by the prosecution. Furthermore, I see no evidence that any express assurances of confidentiality were given by the police.

[39] Nonetheless, I am mindful of the police's assertion that when individuals provide information to the police during an investigation, the public entrusts police to protect their privacy and that disclosing the information at issue to the appellant in these circumstances would violate the public's trust in the police to safeguard their rights.

[40] Based on all of the foregoing, I find that this factor does not apply and therefore neither weighs in favour, nor does it weigh against, the disclosure of the information at issue.

The factor at section 14(2)(d)

[41] Although the appellant does not specifically assert that section 14(2)(d) applies,

¹¹ Order PO-1670.

their representations suggest that this factor weighs in favour of the disclosure of the information. Section 14(2)(d) states the following:

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 is relevant to a fair determination of rights affecting the person who made the request;

[42] For section 14(2)(d) to apply, previous orders have stated that appellant must establish that:

1. the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds;
2. the right is related to a proceeding which is either existing or contemplated, not one which has already been completed;
3. the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
4. the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.¹²

[43] The appellant submits that they are pursuing the information at issue to determine whether the appellant "was granted a fair sentence." The appellant explains that they believe their lawyer may not have been given certain critical information during the trial and that witnesses may have "cut a deal" with the result that the trial focused on unfairly on the appellant.

[44] In reply, the police say that the appellant's attempts to gather evidence to prove there was a miscarriage of justice through the *Act* are misguided and they suggest that the appellant consult legal counsel and consider bringing the matter before an appeals court.

[45] In my view, there is insufficient evidence to support a conclusion that the factor at section 14(2)(d) is relevant. Although the appellant suggests that the information at issue would assist in the fair determination of their rights, they do not specifically identify how the right in question is being determined, whether that right relates to a proceeding that is either existing or contemplated and not already completed, whether

¹² Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).

the information contained in the witness statements is significant to the determination of the right in question, or whether the information is required in order to prepare for that proceeding or to ensure an impartial hearing.

[46] Accordingly, I have not been provided with sufficient evidence to establish that section 14(2)(d) is a relevant factor that should be given any weight in the circumstances of this appeal.

Summary

[47] I have found that the witness statements contain the personal information of the appellant and other affected parties and that as such, I must consider whether section 38(b) applies. I have also determined that the presumption weighing against disclosure at section 14(3)(b) applies to the information at issue, that the factor at 14(2)(h) is not relevant to the balancing of interests of the parties, and that the factor favouring disclosure at section 14(2)(d) does not apply.

[48] Based on these findings, I am satisfied that the disclosure of the information contained in the witness statements would constitute an unjustified invasion of the affected parties' personal privacy. I have considered whether any portions of the witness statements containing the appellant's personal information could be severed and provided to them. However, after reviewing the witness statements in detail and considering the circumstances under which the statements were compiled and the appellant's familiarity with the underlying matters, I am satisfied that information cannot be reasonably severed, without revealing information that is exempt under section 38(b) or resulting in disconnected snippets of information being revealed.¹³

[49] Accordingly, I find that the witness statements are exempt from disclosure under section 38(b) of the *Act*, subject to my review of the police's exercise of discretion.

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

[50] 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.

[51] 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;

¹³ See Order PO-1663, *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)*, (1997), 2004 CanLII 39011 (ON CA), 192 O.A.C. 71 (Div. Ct.).

- it takes into account irrelevant considerations; or
- it fails to take into account relevant considerations.

[52] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁴ The IPC cannot, however, substitute its own discretion for that of the institution.¹⁵

What considerations are relevant to the exercise of discretion?

[53] Some examples of relevant considerations are listed below. However, not all of these will necessarily be relevant, and additional considerations may be relevant:¹⁶

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

¹⁴ Order MO-1573.

¹⁵ Section 43(2).

¹⁶ Orders P-344 and MO-1573.

[54] The police deny that they exercised their discretion in bad faith or for an improper purpose. They assert that they considered all of the relevant factors and in rendering their decision, specifically considered the following points:

- the circumstances surrounding this request;
- the circumstances surrounding the related incident;
- the seriousness of the charges laid;
- what was witnessed by the individuals providing the statements;
- that the witnesses who provided statements did not consent to the disclosure of the information; and
- the public perception/future cooperation of witnesses, which the police say they rely upon to solve crime, protect the public and keep communities safe.

[55] The appellant does not specifically address the police's exercise of discretion. However, their assertion that they have a compelling reason for their request is relevant.

[56] Based on my consideration of the nature of the information at issue and the police's representations, I accept that the police exercised their discretion in a proper manner. I find the police also considered the appellant's reasons for seeking access to the witness statements but found that the affected parties' right to privacy outweighed the appellant's reasons for seeking access. I accept that the police considered relevant factors and did not consider irrelevant factors. Having found that the information contained in the witness statements falls within the personal privacy exemption at section 38(b) and having accepted the police exercised their discretion reasonably and in good faith, it is not within my jurisdiction to substitute their exercise of discretion for my own.¹⁷

[57] Accordingly, I uphold the police's exercise of discretion and find that the witness statements are properly exempt under the discretionary exemption at section 38(b) of the *Act*.

ORDER:

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

Original signed by: _____
Meganne Cameron

August 26, 2022 _____

¹⁷ Section 43(2).

Adjudicator