Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER MO-4350-I

Appeal MA21-00147

Windsor Police Services Board

March 23, 2023

Summary: The Windsor Police Services Board (the police) received an access request for records relating to a specified occurrence number. The police issued a decision granting partial access to the records withholding information under the discretionary personal privacy exemption in section 38(b). During mediation, the issue of reasonable search was raised by the appellant and it was added to the scope of the appeal. In this order, the adjudicator partially upholds the police's decision and orders them to disclose the non-exempt information to the appellant. She also finds that the police's search was not reasonable and orders them to conduct further searches for the statement in question and to provide evidence of the searches they conducted for responsive records.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (the definition of "personal information") and 38(b).

OVERVIEW:

[1] In 2018, the appellant responded to an advertisement for an apartment rental, owned by an affected party. The affected party refused to rent to the appellant the apartment in question. The appellant continued to contact the affected party. Consequently, the affected party involved the police in the matter.

[2] Subsequently, the appellant made an access request to the Windsor Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act)* for records relating to a specified occurrence number including

"… all documents, all reports, all records, all statements, all affidavits, all transcripts, all video and all audio."

[3] In response to the request, the police issued an access decision, granting partial access to the responsive records. The police withheld the information under the discretionary exemption at section 38(b) (personal privacy) of the *Act*.

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

[5] During mediation, the appellant raised the issue of reasonable search, on the basis that a particular statement should be found in the responsive records.

[6] The police conducted a further search and located additional responsive records. The police then issued a supplementary access decision to the appellant, denying access to the additional records under section 38(b).[1] In addition, the police stated that no records exist concerning the particular statement being sought by the appellant. The police also advised that they removed some information from the police notes, as it is not responsive to the request.

[7] As no further mediation was possible, the appeal was transferred to the adjudication stage, where an adjudicator may conduct a written inquiry under the *Act*.

[8] The adjudicator initially assigned to this appeal invited the police and the appellant to provide representations on the issues in this appeal. She received representations from both parties. This appeal was subsequently transferred to me to continue the adjudication. I reviewed the parties' representations and decided that I did not require further submissions before making my decision.

[9] For the reasons that follow, I partially uphold the police's decision and order them to disclose the non-exempt information to the appellant. I also find the police's search was not reasonable and orders them to conduct further searches for the statement in question and to provide evidence of the searches they conducted for responsive records.

RECORDS:

[10] The records remaining at issue are: two police occurrence reports (withheld in part), emails (fully withheld), and police officer's written notes (withheld in part).

[11] In her representations, the appellant states that she is not interested in the

[1] The police also relied on section 38(a) (refuse access to requester's own personal information) read with a number of discretionary law enforcement exemptions at sections 8(1)(a) (law enforcement matter), 8(1)(f) (fair trial) and 8(1)(l) (facilitate commission of an unlawful act).

police codes, zones and unit identifiers. Accordingly, I have removed this information from the scope of the appeal. As this information was withheld under section 38(a) read with section 8(1), I have also removed this issue from the scope of the appeal.

ISSUES:

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

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

C. Does the discretionary personal privacy exemption at section 38(b) apply to the information at issue?

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

E. Did the police conduct a reasonable search for records?

DISCUSSION:

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

[12] The police took the position that some withheld portions in the police officers' handwritten notes were not responsive to the request. I will consider whether this information is within the scope of the appellant's request.

[13] 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).

[14] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[2] To be considered responsive to the request, records must "reasonably relate" to the request.[3]

[15] The police submit that some portions of the police officers' handwritten notes are not responsive to the request. They explain that these portions involve other incidents and calls for police officers' attendance on the date in question and do not relate to the appellant's request.

[16] The appellant acknowledges that her request does not concern other incidents and calls. She submits that the police have indicated in their previous response that there is information relating to the occurrence that has not been released and she is concerned that the information marked as not responsive relates to the occurrence involving her.

[17] On my review, I find the portions of the police officers' handwritten notes marked not responsive do not "reasonably relate" to the appellant's request. These portions relate to other incidents and calls which occurred on the same date in question. Accordingly, I uphold the police's decision to withhold access to these portions of the records.

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

[18] In order to decide whether section 38(b) applies, I must first decide whether the records contain "personal information," and if so, to whom this personal information relates.

[19] Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual." Recorded information is information recorded in any format, including paper and electronic records.[4]

[20] Information is "about" the individual when it refers to them in their personal capacity, meaning that it reveals something of a personal nature about them. Generally, information about an individual in their professional, official, or business capacity is not considered to be "about" the individual if it does not reveal something of a personal

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[2] Orders P-134 and P-880.
[3] Orders P-880 and PO-2661.
[4] The definition of "records" in section 2(1) includes paper records, electronic records, digital photographs, videos and maps. The record before me is a paper record located by searching a police database.

nature about them.[5]

[21] 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.[6]

[22] Section 2(1) of the *Act* gives a list of examples of personal information. All of the examples that are relevant to this appeal are set out below:

> "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,
> >
> > (d) the address, telephone number, fingerprints or blood type of the individual,
> >
> > (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.

[23] 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."[7]

[24] It is important to know whose personal information is in the records. If the records contain the requester's own personal information, their access rights are greater than if it does not.[8] Also, if the records contain the personal information of other individuals, one of the personal privacy exemptions might apply.[9]

[25] The police submit that the records contain "personal information" as defined in section 2(1) of the *Act*. It submits that the name and other identifying information belonging to another individual (the affected party) are in the records.

[26] The appellant submits that the affected party's views relating to her is her personal information, and, as such, should be disclosed to her.

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[5] Orders P-1409, R-980015, PO-2225 and MO-2344.
[6] Order PO-1880, upheld on judicial review in *Ontario* (*Attorney General*) *v. Pascoe*, [2002] O.J. No. 4300 (C.A.).
[7] Order 11.
[8] Under sections 47(1) and 49 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.
[9] See sections 21(1) and 49(b).

[27] I note that the appellant has been granted access to most of the information in the records and the remaining withheld information contains information that would qualify as the personal information of the appellant and the affected party within the meaning of that term as defined in section 2(1) of the *Act*.

[28] In one of the occurrence reports, I find that the withheld information qualifies as the appellant's personal information. As the personal privacy exemptions cannot apply to exempt the appellant's own personal information from disclosure to herself, I will order the police to disclose the personal information pertaining to the appellant in accordance with the highlighted record enclosed with this order.

[29] As I have found that the remaining withheld information in the records contain the personal information of the appellant along with an affected party, I will consider the appellant's access to this information under Part II of the *Act*.

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

[30] Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other 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.

[31] Sections 14(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy. If the information fits within any of the exceptions in sections 14(1)(a) to (e), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b).

[32] Sections 14(2) and (3) also help in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 38(b). Also, section 14(4) lists situations that would not be an unjustified invasion of personal privacy. If any of paragraphs (a) to (d) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b).

[33] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), this office will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.[10]

[34] If any of sections 14(3)(a) to (h) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 38(b). Section 14(2) lists

[10] Order MO-2954.

various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.[11] 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).[12]

Analysis and findings

[35] I note that the withheld information does not fit within the exceptions set out in section 14(1)(a) to (e) nor section 14(4) of the *Act*. As such, I will turn to discuss whether any of the factors or presumptions under sections 14(2) and (3) apply.

[36] Although the appellant provided representations, her representations did not address this issue except to state that she is only interested in information as it pertains to herself and the investigation of corruption in the police.

[37] The presumption in section 14(3)(b) 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.

[38] 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.[13] The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.[14]

[39] Based on my review of the records, I find that the presumption at section 14(3)(b) applies to the withheld personal information in this circumstance. The withheld information relates to an investigation about criminal harassment. The withheld information was compiled and is identifiable as part of the police investigation into a possible violation of the *Criminal Code of Canada* which did result in charges being laid but later withdrawn. Section 14(3)(b) therefore weighs in favour of non-disclosure of the withheld personal information.

[40] Having reviewed the withheld personal information and considering the factors (listed and unlisted) and presumption in sections 14(2) and (3), I find that disclosure of the withheld information would be an unjustified invasion of the affected party's

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[11] Order P-239.
[12] Order P-99.
[13] Orders P-242 and MO-2235.
[14] Orders MO-2213, PO-1849 and PO-2608.

personal privacy. The personal information was compiled and is identifiable as part of the police investigation. Accordingly, I find that the remaining personal information is exempt under section 38(b) subject to my finding on the police's exercise of discretion below.

Absurd result principle

[41] An institution might not be able to rely on the section 38(b) exemption in cases where the requester originally supplied the information in the record, or is otherwise aware of the information contained in the record. In this situation, withholding the information might be absurd and inconsistent with the purpose of the exemption.[15]

[42] For example, the "absurd result" principle has been applied when:

- the requester sought access to their own witness statement,[16]
- the requester was present when the information was provided to the institution,[17] and
- the information was or is clearly within the requester's knowledge.[18]

[43] However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply.[19]

[44] In regards to the emails that were withheld by the police, I find that the absurd principle would apply to the withheld personal information in the emails. In this case, the appellant sent the majority of these emails and received responses back from them. She is aware of the content of these emails. As such, I find that it would be absurd to withhold the emails from her. Accordingly, I find that the emails are not exempt from disclosure under the discretionary privacy exemption at section 38(b) of the *Act* and order them disclosed to the appellant.

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

[45] 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, I may determine whether the institution failed to do so.

[46] In addition, the IPC may find that the institution erred in exercising its discretion

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[15] Orders M-444 and MO-1323.
[16] Orders M-444 and M-451.
[17] Orders M-444 and P-1414.
[18] Orders MO-1196, PO-1679 and MO-1755.
[19] Orders M-757, MO-1323 and MO-1378.

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.

[47] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.[20] The IPC cannot, however, substitute its own discretion for that of the institution.[21]

[48] The police submit that they properly exercised their discretion to withhold the personal information under section 38(b). The police submit that they considered all the parties involved and attempted to provide the appellant with all relevant information. They state that access was denied simply in consideration of the affected party. The police also submit that they considered whether the request was compelling. Finally, they submit that they also considered that the relationship between the appellant and the affected party is contentious. The appellant did not specifically address the police's exercise of discretion.

[49] After considering the representations of the parties and the circumstances of this appeal, I find that the police did not err in their exercise of discretion with respect to its decision to deny access to the withheld information under section 38(b) of the *Act*. I note that the police took into account the following relevant considerations: the relationship between the appellant and the affected party; and the wording of the exemption and the interests it seeks to protect. I am satisfied that the police took into account relevant considerations, and did not act in bad faith or for an improper purpose.

[50] Accordingly, I find that the police exercised its discretion in an appropriate manner in this appeal, and I uphold it.

E: Did the police conduct a reasonable search for records?

[51] The appellant claims a particular statement should be found in the responsive records which was not identified by the police. Where a requester claims 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.[22]

[52] If I am satisfied the search carried out was reasonable in the circumstances, I

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[20] Order MO-1573.
[21] Section 43(2).
[22] Orders P-85, P-221 and PO-1954-I.

will uphold the institution's decision. If I am not satisfied, I may order further searches.

[53] 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 it has made a reasonable effort to identify and locate responsive records.[23] 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 are reasonably related (responsive) to the request.[24]

[54] 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 such records exist.[25]

[55] The police submit that the responsive records are contained in one investigative file. They submit that they reviewed the general occurrence report, including any emails provided to them. The police also submit that they searched the call for service transcript and reviewed the police officer's handwritten notes but they cannot find the statement the appellant is seeking in any of the responsive records.

[56] The appellant submits that the police did not conduct a reasonable search for records which would contain the statement. She submits that simply claiming the exact phrase does not exist in the records is not a convincing demonstration that the statement does not exist as the phrase may have been entered incorrectly as a search term. The appellant submits that she has a clear memory of a statement being read to her and the police having essentially admitted at this point that they have withheld it. She also submits that the police are contradicting themselves in claiming the statement does not exist but offering arguments as to why they should not release it.

[57] In response, the police submit that the search for the statement was completed manually by which all records were visually reviewed (read) to determine if the information the appellant sought was contained within the police records. They submit that it was not, nor was any variation of the statement located in any of the responsive records.

[58] The police also submit that there is no contradiction as the request was for a specific statement which a search was completed with negative results. The police submit that access was denied to a section of the following statement "a formal account of events given by a witness or other party to the police an official account of facts, view".

[59] Having carefully reviewed the representations before me, I am not satisfied that the search conducted by the police for the statement in question to be reasonable.

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[23] Orders P-624 and PO-2559.
[24] Orders M-909, PO-2469 and PO-2592.
[25] Order MO-2246.

[60] In Order M-909, Adjudicator Laurel Cropley made the following finding with respect to the obligation of an institution to conduct a reasonable search for records. She states:

> In my view, an institution has met its obligations under the *Act* by providing experienced employees who expend a reasonable effort to conduct the search, in areas where the responsive records are likely to be located. In the final analysis, the identification of responsive records must rely on the experience and judgment of the individual conducting the search.

[61] I adopt the approach taken in the above-noted order for this appeal.

[62] In my view, the police's representations lacked details about when the search was conducted, what places were searched, and what types of files were searched. It is also unclear who conducted the search and whether this employee had experience in conducting searches, besides their position with the police and how long they were/are in that position.

[63] As stated above, the *Act* does not require the police to prove with certainty that the statement does not exist, but it does require the police to provide *sufficient* evidence to demonstrate that they have made a reasonable effort to identify and locate the statement in question in all of the responsive records within its custody or control. In the circumstances of this appeal, I do not find that the police have provided sufficient evidence that it has made such reasonable efforts. Accordingly, I do not uphold the police's search as reasonable and will order them to conduct further searches for the statement in question and to provide further evidence of the efforts they made in conducting their search.

ORDER:

1. I uphold the police's application of the personal privacy exemption at section 38(b).

2. I order the police to disclose the appellant's withheld personal information on page 7 of the occurrence report in accordance with the highlighted record accompanying this order and the emails to the appellant by **April 27, 2023**.

3. I order the police to conduct further searches for the statement in question. I order the police to provide me with an affidavit sworn by the individual or individuals who conduct the searches within 21 days of the date of this Interim Order. At a minimum, the affidavit should include information relating to the following:

a. information about the employee(s) swearing the affidavit describing his or her qualifications and responsibilities;

b. the date(s) the person conducted the search and the names and positions of any individuals who were consulted;

c. information about the record holdings searched, the nature and location of the search, and the steps taken in conducting the search;

d. the results of the search;

e. if as a result of the further searches it appears that no responsive records exist, a reasonable explanation for why such records would not exist.

4. The affidavit referred to in the above provision should be forwarded to my attention, c/o Information and Privacy Commissioner of Ontario, 2 Bloor Street East, Suite 1400, Toronto, Ontario, M4W 1A8. The affidavit provided to me will be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for the submitting and sharing of representations is set out in *IPC Practice Direction 7*.

5. If the police find additional records in its further searches, I order the police to issue an access decision for these records in accordance with the *Act*. For the purposes of section 19, 22 and 23 of the *Act*, the date of this order shall be deemed to be the date of the request.

6. In order to verify compliance with this order, I reserve the right to require the police to provide me with a copy of the records disclosed upon request.

Original Signed By: March 23, 2023

Lan An
Adjudicator