

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4376

Appeal MA21-00573

Windsor Police Services Board

May 18, 2023

Summary: The Windsor Police Services Board (the police) received a request under the *Act* for access to records related to a specified incident. The police issued a decision granting partial access to the responsive records withholding information under the personal privacy exemption at section 38(b) of the *Act*. The appellant appealed the police's decision to the IPC, and 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, sections 2(1) (definition of "personal information"), 14(3)(b), and 38(b).

OVERVIEW:

[1] The Windsor Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for:

"...copies of all documents and reports for the case [specified number] including 911 call."

[2] The police issued a decision granting partial access to the responsive records. Access to the withheld information was denied under sections 38(a) (discretion to refuse access to requester's own personal information) read with section 8(1)(l) (law enforcement) of the *Act*.

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

[4] During the mediation, the appellant advised that he believes further records responsive to his request should exist. The appellant confirmed that he is not pursuing access to the information withheld under sections 38(a) and 8(1)(l) of the *Act*.

[5] The appellant also expressed concerns about the decision letter, the police's conduct, and their investigation. The appellant was provided the contact information to initiate a complaint through the police's Professional Standards branch.

[6] The police agreed to conduct another search for responsive records. After conducting another search, the police located additional responsive records and issued a supplementary decision granting partial access to the records. Information was withheld under section 38(b) (personal privacy) of the *Act*. The police also claimed that portions of the record were withheld as non-responsive to the request.

[7] Following the receipt of the supplementary decision, the appellant stated that he is not pursuing access to the information the police withheld as non-responsive. The appellant advised that he is only seeking the statement withheld under section 38(b), which was made by the third party, now an affected party in this appeal.

[8] As a mediated resolution was not possible, the appeal was transferred to the adjudication stage, where an adjudicator may conduct an inquiry under the *Act*. I commenced an inquiry in which I sought and received representations from the parties about the issues in this appeal.

[9] In this order, I uphold the police's access decision and dismiss the appeal.

RECORD:

[10] The information at issue in this appeal consists of the withheld portions of page 111 of a police officer's handwritten notes.

ISSUES:

- A. Does the record 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 information at issue?

DISCUSSION:

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

[11] In order to decide which sections of the *Act* may apply to a specific case, the IPC must first decide whether the record contains “personal information,” and if so, to whom the personal information relates. 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.¹ Also, if the record contains the personal information of other individuals, one of the personal privacy exemptions might apply.²

[12] Personal information is defined in section 2(1). The relevant portions are as follows:

“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,

(e) the personal opinions or views of the individual except if they relate to another 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.

[13] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.³

Representations of the parties

[14] The police submit that the record contains the personal information of the affected party and that this information includes their name, date of birth, and their views and opinions. They state that this information was collected during an investigation into an alleged assault. They state that they have disclosed all of the appellant’s personal information at issue in the record and they have only withheld the

¹ 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.

² Sections 14(1) and 38(b), as discussed below.

³ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

affected party's personal information.

[15] The appellant concedes that the record may contain the affected party's name and date of birth, but he submits that he does not seek this information and it can be severed. The appellant submits that the affected party's "interpretation of the event" does not qualify as personal information as that term is defined under section 2(1) of the *Act*. The appellant also concedes that the affected party's skin colour may be contained in the record. However, the appellant submits that he has photos of the affected party and he has seen the affected party in person, so he already knows their skin colour.

Analysis and findings

[16] Based on my review of the record and the representations of the parties, I find that the record contains the personal information of the appellant and the affected party.

[17] Specifically, the record contains the following types of personal information of the appellant and the affected party: their names, their birthdates, their views or opinions, and their name along with other information, which fits within paragraphs (a), (e), and (h) of the definition of "personal information" in section 2(1) of the *Act*.

[18] From my review of the record, the police have disclosed all of the appellant's personal information to him that can be disclosed without disclosing the personal information of the affected party. The only personal information that remains at issue in this appeal is the personal information of the affected party. Since the appellant does not seek access to the affected party's name and date of birth, the only personal information remaining at issue in this appeal is from the affected party's statement.

[19] Having found that the record contains the personal information of both the appellant and the affected party, I will now determine whether the withheld personal information of the affected party is exempt from disclosure under section 38(b) of the *Act*.

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

[20] 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.

[21] 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.

[22] 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.

[23] 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).

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

[25] 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). In this appeal, none of the section 14(1) exceptions apply to the circumstances before me and I will not discuss them further in this order.

[26] 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. The parties do not rely on section 14(4), and I find that it does not apply in the present appeal.

[27] 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), I must consider and weigh the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.⁴

Representations, analysis and findings

[28] The police submit that disclosure of the affected party's personal information would be an unjustified invasion of their personal privacy.

[29] The appellant's representations outline his concerns about the police's investigation and the complaint he filed against them for how they conducted the investigation. I have reviewed his representations in full, but I will only refer to the portions most relevant to the issues in this appeal. The appellant submits that section 38(b) does not apply to the information at issue and it should be disclosed to him.

Section 14(3)(b) presumption: investigation into a possible violation of law

[30] The police argue that the section 14(3)(b) presumption applies to the withheld personal information because it was compiled and is identifiable as part of an investigation into a possible violation of law, specifically an allegation of assault. The police state, however, they determined there was insufficient evidence for an arrest.

⁴ Order MO-2954.

[31] The appellant argues that the section 14(3)(b) presumption does not apply to the withheld personal information because he alleges that the police neglected their duty to investigate, and therefore, no investigation was conducted.

[32] Section 14(3)(b) 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;

[33] Based on my review of the withheld personal information, I am satisfied that it was compiled and is identifiable as part of an investigation into a possible violation of law. The personal information at issue appears in a police officer's handwritten notes about an investigation into an alleged assault. As noted above, after the investigation was completed, the police determined there was insufficient evidence for an arrest. However, even if no criminal proceedings were commenced against an individual, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.⁵ Therefore, I find that section 14(3)(b) applies to the personal information at issue in this appeal, and that its disclosure is presumed to be an unjustified invasion of the affected party's personal privacy.

[34] Under section 38(b), the presumptions in section 14(3) must be weighed and balanced with any factors in section 14(2) that are relevant. The police argue that the factor at section 14(2)(h) (supplied in confidence) applies to the withheld personal information. This factor weighs against disclosure, if it is found to apply.

[35] Section 14(2)(h) states:

14(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

Section 14(2)(h) (supplied in confidence)

[36] The police argue that the section 14(2)(h) (supplied in confidence) factor applies to weigh against disclosure of the withheld personal information, because it was supplied in confidence. The police submit that the affected party provided the information in response to questions asked by the police during an investigation and it

⁵ Orders P-242 and MO-2235.

is not unreasonable for the affected party to believe that this information would remain confidential.

[37] As past orders have established, section 14(2)(h) 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.⁶

[38] I find that this factor applies in the circumstances and weighs against disclosure. The withheld personal information at issue is contained in the handwritten notes of a police officer relating to an alleged incident of assault involving the appellant and the affected party. In my view, in the context of this appeal, a reasonable person would expect that the information the affected party supplied to the police would be kept confidential. Based on my review of the withheld personal information and the representations of the police, I am satisfied that the personal information was provided in circumstances where there was a reasonable expectation of confidentiality. Therefore, I find that the factor in section 14(2)(h) applies to the withheld personal information in this appeal and weighs against its disclosure.

[39] The appellant did not argue that any of the section 14(2) factors apply to the withheld personal information, and I find that none apply in the circumstances of this appeal. I also considered whether any unlisted factors favouring disclosure, such as inherent fairness issues, apply, and I also find that none apply.

[40] Overall, I have found that no section 14(2) factors, listed or unlisted, weigh in favour of disclosure of the withheld personal information, and that the factor at section 14(2)(h) (supplied in confidence) weighs against its disclosure. I have also found that the section 14(3)(b) presumption applies to the withheld personal information. Balancing the interests of the parties, the facts of this appeal weigh against disclosure of the withheld personal information of the affected party. Therefore, I find that the withheld personal information is exempt from disclosure under the discretionary exemption at section 38(b) of the *Act*.

[41] The section 38(b) exemption is discretionary, meaning that the police can decide to disclose information even if the information qualifies for exemption. The police must exercise their discretion. On appeal, I may determine whether the police failed to do so.

[42] The police state that they properly exercised their discretion under section 38(b) to withhold the personal information of the affected party from the appellant. The police state that they took into consideration that the affected party and the appellant were strangers, and that the appellant is only seeking access to the affected party's information. The police submit that they disclosed all of the appellant's personal

⁶ Order PO-1670.

information to him and only withheld the affected party's information.

[43] The appellant's representations do not specifically address the police's exercise of discretion. However, the appellant states that the police's refusal to disclose the information at issue to him is a "misapplication" of the *Act*.

[44] 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 their decision to deny access to the withheld personal information of the affected party under section 38(b) of the *Act*. I am satisfied that the police considered relevant factors, and did not consider irrelevant factors in the exercise of discretion. In particular, it is evident that the police considered the fact that the record contains the appellant's own personal information. I am satisfied that the police provided his personal information to him, and only withheld the personal information of the affected party.

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

ORDER:

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

Original Signed by: _____
Anna Truong
Adjudicator

_____ May 18, 2023