

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-4409

Appeal MA21-00084

Toronto Police Services Board

July 10, 2023

**Summary:** 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 records related to a specified incident. The police issued a decision granting partial access to the responsive records withholding information under the discretionary 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 Toronto Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to an investigation into mortgage fraud.

[2] The police granted the appellant partial access to the responsive records and withheld portions of the records under the discretionary personal privacy exemption in section 38(b). The police also withheld portions of the records because they were not responsive to the appellant's request.

[3] The appellant appealed the police's decision to the Information and Privacy

Commissioner of Ontario (the IPC) and a mediator was assigned to explore resolution.

[4] During mediation, the appellant confirmed that she seeks access to the information the police withheld under the section 38(b) personal privacy exemption, but not the information withheld as not responsive. Some of the records at issue consist of video statements made by the appellant and others during the investigation. The police disclosed to the appellant her video statement, but the other three video statements were withheld.

[5] The IPC notified two affected parties during mediation; one gave their consent to the disclosure of information relating to them and the other did not. The appellant confirmed her interest in pursuing access to the remainder of the information withheld from disclosure under section 38(b) of the *Act*.

[6] 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*. The adjudicator originally assigned to this appeal began the inquiry by inviting the police and a number of affected parties to respond to a Notice of Inquiry, which summarized the facts and issues under appeal.

[7] One of the affected parties was deceased at the time of the IPC inquiry; however, their daughter signed a consent form on behalf of their estate.<sup>1</sup> An individual's personal representative is not given broad rights to stand in the place of the deceased for the purposes of providing consent under the *Act*.<sup>2</sup> Rather, their right to consent only arises if it relates to the administration of the estate. The information at issue pertaining to the deceased (and others) is unrelated to estate administration. Therefore, the consent form is not relevant to my consideration of the personal information of the deceased individual, which remains personal information for 30 years after their death.<sup>3</sup>

[8] None of the other affected parties responded to the notice of inquiry. The appeal was then assigned to me to continue the inquiry process, and I received representations from the police and the appellant about the issues in this appeal.

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

## **RECORDS:**

[10] The records at issue consists of three video statements, and paper records,

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<sup>1</sup> Section 54(a) any right or power conferred on an individual by this *Act* may be exercised, if the individual is deceased, by the individual's personal representative if exercise of the right or power relates to the administration of the individual's estate.

<sup>2</sup> See Orders PO-2063-R and MO-4278.

<sup>3</sup> Section 2(2) of the *Act* states, "Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity."

consisting of a general occurrence report, interview notes, officer's notes and investigation logs. The appellant seeks access to all three video statements and the withheld portions of pages 1-10, 12, 15-28 of the paper records.

## **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 information at issue and did the police properly exercise their discretion to apply it?

## **DISCUSSION:**

### **Issue A. Do the records 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.<sup>4</sup> Also, if the record contains the personal information of other individuals, one of the personal privacy exemptions might apply.<sup>5</sup>

[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,

(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,

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<sup>4</sup> 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.

<sup>5</sup> Sections 14(1) and 38(b), as discussed below.

(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.

[13] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.<sup>6</sup>

[14] Generally, information about an individual in their professional, official or business capacity is not considered to be "about" the individual.<sup>7</sup> See also sections 2(2.1) and (2.2), which state:

(2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[15] 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.<sup>8</sup>

### ***Representations of the parties***

[16] The police explain that the records were created in relation to an investigation into mortgage fraud. The police submit that during the course of this investigation, the police spoke to and recorded information from the parties involved, such as their first and last name, date of birth, address, and telephone number. The police argue that the

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<sup>6</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

<sup>7</sup> Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

<sup>8</sup> Orders P-1409, R-980015, PO-2225 and MO-2344.

records contain their personal information and these affected parties can easily be identified should their information be released.

[17] The appellant submits that the records contain some personal information, such as the first and last names of some of the affected parties that she is seeking information about. She submits, however, that the information of some of these affected parties is about them in a professional capacity, and therefore, is not personal information. The appellant submits that some of these affected parties are all involved in the mortgage fraud against her family.

### ***Analysis and findings***

[18] Based on my review of the records and the representations of the parties, I find that the records contain the personal information of the appellant and the affected parties. Specifically, I find that the records contain personal information about them, such as their name, address, sex, age, telephone numbers, employment information, driver's licence, their views or opinions, views or opinions about them, and their name along with other information, which fits within paragraphs (a)-(e), (g), and (h) of the definition of "personal information" in section 2(1) of the *Act*.

[19] The appellant argues that some of the affected parties' information is about them in a professional capacity, and therefore, does not qualify as personal information. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.<sup>9</sup> However, even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.<sup>10</sup>

[20] In the circumstances of this appeal, some of the information of some of the affected parties is about them in a professional capacity. However, based on my review of the records, I find that disclosure of the withheld information would reveal something of a personal nature about them, because their information appears in police records related to mortgage fraud and one of the affected parties was charged and convicted. Accordingly, I find the records contain the personal information of the affected parties.

[21] From my review of the records, the police have disclosed all of the appellant's personal information to her that could reasonably be severed. In the paper records, the police have only withheld the personal information of the affected parties. I considered whether the appellant's personal information could be severed from the video statements. However, based on my review of the videos, I find that the appellant's personal information is inextricably intertwined with that of the affected parties' and cannot be reasonably severed.

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<sup>9</sup> Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

<sup>10</sup> Orders P-1409, R-980015, PO-2225 and MO-2344.

[22] Having found that the records contain the personal information of both the appellant and the affected parties, I will now determine whether the withheld personal information 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 and did the police properly exercise their discretion to withhold it?**

[23] 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.

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

[28] 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.

[29] 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.

[30] 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.<sup>11</sup>

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<sup>11</sup> Order MO-2954.

### ***Representations, analysis and findings***

[31] The police submit that section 38(b) applies to the withheld personal information because disclosure of the affected parties' personal information would be an unjustified invasion of their personal privacy.

[32] The appellant argues that disclosure of the withheld personal information would not be an unjustified invasion of the affected parties' personal privacy. The appellant submitted documents related to the mortgage fraud, such as court documents, and emails. I have reviewed them and will only refer to them to the extent that they are relevant to my determination of whether the section 38(b) exemption applies to the withheld personal information.

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

[33] 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. The police state that one of the affected parties was charged as a result of this investigation.

[34] The appellant concedes that the personal information at issue was collected as part of an investigation into a possible violation of law.

[35] 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;

[36] 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 police records about an investigation into mortgage fraud and one of the affected parties was charged. 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.<sup>12</sup> 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 parties' personal privacy.

[37] 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.

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<sup>12</sup> Orders P-242 and MO-2235.

[38] The appellant argues that the factor at section 14(2)(d) (fair determination of rights) applies to the withheld personal information. This factor weighs in favour of disclosure, if it is found to apply.

[39] 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.

[40] Sections 14(2)(d) and 14(2)(h) state:

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,

(d) the personal information is relevant to a fair determination of rights affecting the person who made the request; and

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

*Section 14(2)(d) – fair determination of rights*

[41] The appellant argues that the section 14(2)(d) factor applies to the withheld personal information because the information is relevant to the fair determination of rights affecting her and her family. The appellant states that some of the affected parties are licensed professionals who have a duty to the public and they serve the company that they represent. The appellant states that she and her family are victims of mortgage fraud and a fraudulent lawsuit perpetrated by several individuals including some of the affected parties. The appellant states that there is an ongoing lawsuit that has been filed against her and her family after one of the affected parties was charged and convicted.

[42] The appellant states that she wrote a complaint to a specified credit union and in response, the internal investigator concluded that the police never came to their institution and spoke to anyone. The appellant states that disclosure of the police records in full would prove that the police did go to the credit union and speak to their employees. The appellant further states that some of the affected parties, including the person convicted of mortgage fraud, have filed a Notice of Sale on her home under fraudulent circumstances, and the credit union did not investigate, charge, or report that person. The appellant states that the credit union and their employees continue to violate her and her family's right to know what is going on with their mortgage, and the credit union has decided not to renew their mortgage without a reasonable explanation.

[43] The police submit that the section 14(2)(d) factor does not apply because the appellant does not require the personal information of the affected parties to pursue a civil action. The police further submit that the appellant's rights do not outweigh the



privacy rights of the affected parties.

[44] In order for the section 14(2)(d) factor to apply, the appellant must establish all four parts of the following test:

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; and
2. the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
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.<sup>13</sup>

[45] From the appellant's representations, it appears that she seeks the withheld personal information of the affected parties to defend her and her family in a civil lawsuit brought against them by some of the affected parties. She indicates that the withheld personal information is required because some of the affected parties have been "avoiding coming to Court to address" the case they have filed against her and her family.

[46] Although the appellant states that disclosure of the affected parties' personal information would help her defend her and her family in a civil lawsuit, I am unsure how disclosure of the affected parties' personal information would assist her in doing so. While the appellant has argued that if the police records were disclosed in full, she could prove to the credit union investigator that the police did come and speak to their employees, I am not persuaded that the credit union's internal investigation is significant to or required for the determination of the appellant's rights in a civil action. Therefore, I find that the appellant has not established parts 3 and 4 of the test under section 14(2)(d).

[47] In order for section 14(2)(d) to apply, all four parts of the test must be established. Since the appellant has not persuaded me that all four parts of the section 14(2)(d) test have been met, I find that section 14(2)(d) does not apply to weigh in favour of the disclosure of the affected parties' personal information. I therefore find that the appellant has not established that the withheld personal information is required for the fair determination of her rights. I note that the appellant is not prevented from pursuing other legal remedies by not having the affected parties' personal

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<sup>13</sup> 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.).

information.<sup>14</sup>

[48] While I do not find that section 14(2)(d) applies to the withheld personal information, I recognize that the appellant's arguments can be characterized as raising "inherent fairness issues" as an unlisted factor that should apply to weigh in favour of disclosure, and I will address this below.

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

[49] 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 parties provided the withheld information to the police during an investigation and there is an expectation by the affected parties that this information would remain confidential. The police further submit 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 personal information.

[50] 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.<sup>15</sup>

[51] I find that this factor applies in the circumstances and weighs against disclosure. The withheld personal information at issue is contained in police records, including video statements, relating to mortgage fraud involving the appellant and the affected parties. In my view, in the context of this appeal, a reasonable person would expect that the information the affected parties 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.

*Unlisted factors*

[52] As referenced above, the appellant's arguments indicate that there may be an inherent fairness principle at stake that ought to weigh in favour of disclosure. It is the appellant's position that she requires the withheld personal information to understand the mortgage fraud and defend her and her family against a civil action brought against them by some of the affected parties. After reviewing the withheld personal information

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<sup>14</sup> Section 51(1) of the *Act* provides that "This *Act* does not impose any limitation on the information otherwise available by law to a party to litigation."

<sup>15</sup> Order PO-1670.

and considering the circumstances of this appeal, I accept the appellant's submission in this regard and conclude that it raises inherent fairness issues. Therefore, I find that inherent fairness is an unlisted factor that applies to weigh in favour of disclosure.

### *Summary*

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

[54] Before leaving this issue, I will consider whether my finding leads to an absurd result.

### *Absurd result*

[55] The absurd result principle may apply where the appellant originally supplied the information at issue or is otherwise aware of it. Where circumstances are present, the information may not be exempt under section 38(b) because withholding the information might be absurd and inconsistent with the purpose of the exemption.<sup>16</sup>

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

- the requester sought access to their own witness statement,<sup>17</sup>
- the requester was present when the information was provided to the institution,<sup>18</sup> and
- the information was or is clearly within the requester's knowledge.<sup>19</sup>

[57] The appellant argues that the absurd result principle applies to the withheld personal information because it is clearly within her knowledge.

[58] The police submit it is not absurd to withhold the personal information as it is not clear in the records whether the appellant was present when the information was provided by the affected parties. The police further submit that because the appellant is specifically seeking the personal information of the affected parties, the logical conclusion is that the withheld personal information may not be within her knowledge.

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<sup>16</sup> Orders M-444 and MO-1323.

<sup>17</sup> Orders M-444 and M-451.

<sup>18</sup> Orders M-444 and P-1414.

<sup>19</sup> Orders MO-1196, PO-1679 and MO-1755.

[59] Based on my review of the withheld personal information, I find that the absurd result principle does not apply. While the appellant claims all of the withheld personal information is within her knowledge, her representations do not establish this to be the case. However, it appears that some of the withheld personal information is within the appellant's knowledge, such as the name of the affected party that was charged and convicted, and I considered whether some of the withheld personal information should be disclosed under the absurd result principle. However, previous IPC orders have held that, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is otherwise known to the requester.<sup>20</sup>

[60] Given that the withheld personal information appears in police records, one of the affected parties was charged and convicted, and my finding that disclosure of the withheld personal information would be an unjustified invasion of personal privacy of the affected parties under section 38(b), I find that disclosure under the absurd result principle would be inconsistent with the purpose of the section 38(b) exemption. Therefore, I find that it would not be absurd to withhold the personal information of the affected parties in the circumstances of this appeal.

*Section 38(b) conclusion*

[61] Since withholding the personal information at issue in this appeal would not be absurd, I find that the withheld personal information is exempt from disclosure under the discretionary exemption at section 38(b) of the *Act*.

*Exercise of discretion*

[62] 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.

[63] The police state that they properly exercised their discretion under section 38(b) to withhold the personal information of the affected parties from the appellant. The police state that they did not exercise their discretion in bad faith, and that all relevant considerations were taken into account and no irrelevant considerations were taken into account in exercising their discretion. The police further state that they balanced the access rights of the appellant with the privacy rights of the affected parties.

[64] The appellant's representations do not specifically address the police's exercise of discretion. However, she states that the section 38(b) exemption is discretionary and the police could have chosen to disclose the withheld personal information even if the exemption applies.

[65] After considering the representations of the parties and the circumstances of this

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<sup>20</sup> Orders M-757, MO-1323 and MO-1378.

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 parties 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 only withheld the personal information of the affected parties, and the appellant's personal information where it was inextricably intertwined with that of the affected parties' and could not be reasonably severed.

[66] 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

\_\_\_\_\_ July 10, 2023