Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4431

Appeal MA21-00659

Waterloo Regional Police Services Board

August 29, 2023

Summary: The police received a request for a copy of a video or transcript of an interview the police conducted with the requester's son. The requester also sought access to the occurrence report, officer notes and all other documentation relating to the investigation involving the requester's son. Ultimately, the police disclosed some personal information of the requester to him and denied access to the remainder of the information claiming it was exempt under section 38(b). 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*, RSO, 1990, c. M.56, sections 14(1) and 38(b).

Orders and Investigation Reports Considered: Orders MO-2237 and PO-3951.

OVERVIEW:

[1] The Waterloo Regional Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection Act* (*MFIPPA* or the *Act*) for access to records relating to a particular investigation involving the requester's child. Specifically, the request was for the following:

1. Copy of video or transcript of interview between my son [named individual #1 and date of birth] and [named constable] of the Waterloo Regional Police Service

and [named individual #2] of the Family and Children's Services of the Waterloo Region on or around [specified date].

2. Copy of the occurrence report, officer's notes and all other documentation pertaining to the above investigation.

[2] The police located responsive records and issued a decision initially denying access referring to section 14(1) (personal privacy).[1]

[3] The appellant appealed the police's decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC). The parties participated in mediation to explore resolution.

[4] During mediation, the appellant informed the mediator that he seeks access to information withheld from the records that is about his son, or what his son said to the police, and that he has a court order that he believes gives him access to information about his son.

[5] After the mediator conveyed this information to the police, the police issued a supplementary decision granting partial access to the records. The police withheld some information in the records on the basis that it is exempt under section 38(a) (right to refuse requester's own information), read with the law enforcement exemptions in sections 8(1)(d) (confidential source of information) and 8(1)(e) (endanger life or safety), and some information under the personal privacy exemption in section 38(b).[2]

[6] The appellant indicated that he does not seek access to descriptive information of affected parties or to information withheld as non-responsive to the request. As a result, section 38(a) with reference to the law enforcement exemptions in sections 8(1)(d) and (e) were removed and are not at issue in this appeal.

[7] The appellant maintained that he seeks access to all of the information about his son that the police withheld from the records.

[8] With no further mediation possible, the appeal was moved to the adjudication stage of the appeal process, where an adjudicator may conduct a written inquiry. The original adjudicator assigned to this appeal decided to commence an inquiry and invited representations from the police. Representations were received and at this point, I was assigned carriage of the appeal. I shared the police's non-confidential representations with the appellant, in accordance with the IPC's *Code of Procedure*. The appellant provided his own representations for consideration.

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[1] The police also cited section 54(c) of the *Act* which allows an individual with custody of an individual less than sixteen years of age to exercise the rights of that child under the *Act*. As the appellant does not have custody of his son, section 54(c) does not apply in this appeal.

[2] With reference to the presumption against disclosure in section 14(3)(b). The police also cited the factor in 14(2)(h) (highly sensitive).

[9] In this order, I uphold the police's decision that the withheld information in dispute is exempt from disclosure under section 38(b) and dismiss the appeal.

RECORDS:

[10] There are 10 pages of records consisting of an occurrence report, officer's handwritten notes, the transcript of an interview, as well as a video recording of the interview.[3]

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 determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) that reads, in part:

> "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,
>
> (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,

[3] As noted below, the appellant is already in receipt of the interview transcript from another institution and therefore the information he received is removed from the scope of this appeal.

> (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;

[12] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.

[13] The police submit that the records contain the personal information of individuals which they compiled during an investigation. They submit that the information would identify individuals by name, dates of birth, address and their relationship to the appellant. The police submit that the records contain personal views and opinions of the named individuals.

[14] The police also submit that the information in the records also relates to individuals that work for Family and Children's Services who provided the police with their personal information such as their home address and date of birth.

[15] The appellant does not address whether the records contain personal information.

Finding

[16] I have reviewed the records and I find that they contain information that qualifies as the personal information of identifiable individuals, including the appellant and his child.

[17] The police severed and released portions of the occurrence report revealing the steps taken by the police in response to allegations and the outcome of the investigation. The police also disclosed to the appellant any of his personal information that was not intermingled with that of another identifiable individual. Most of the withheld information consists of the substance of the allegations, which contain the personal information of both an identifiable individual and the appellant's child. Portions of the occurrence report and hand-written notes, contain home addresses and telephone numbers and personal opinions. The allegations contained in the videotaped statements to the police constitute the personal information of an identifiable individual and the appellant's child, under the introductory wording of the definition of that term in section 2(1).

[18] After reviewing the withheld information, I find that it is not reasonably possible to sever and disclose further information to the appellant, without also disclosing the personal information of others.

[19] In his representations the appellant provides some records that he received from another institution that includes his personal information and the personal information of his son. One of those records is identical to the transcript in dispute in this appeal, and was partially severed by the institution that provided it to the appellant. As a result, only the personal information of an affected party, that was not provided to the appellant by the other institution, remains in dispute in this appeal with regard to the transcript.

[20] I will now consider whether the withheld personal information is exempt from disclosure pursuant to section 38(b) of the *Act*.

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

[21] Since I found that the record contains the personal information of both the appellant and affected parties, section 36(1) applies to this appeal. 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 exemptions from this right.

[22] 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 appellant.[4]

[23] Sections 14(1) to (4) provide guidance in determining whether disclosure of the information would be an unjustified invasion of personal privacy under section 38(b).

[24] In making this determination, the IPC will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.[5] If the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). If the information fits within any of paragraphs (a) to (h) of section 14(3), disclosure of the information is presumed to be an unjustified invasion of personal privacy.

[25] Section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.[6] Some of the factors listed in section 14(2), if present, weigh in factor of disclosure, while others weigh in favour of non-disclosure. The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances

[4] See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 38(b).
[5] Order MO-2954.
[6] Order P-239.

that are relevant, even if they are not listed under section 14(2).[7]

Representations

The police's representations

[26] The police submit that section 38(b) was applied in this case, taking into account the appellant's right of access to information against the affected parties' right to protection of their privacy. They submit that the records contain personal information about both the appellant and other individuals. They submit that their exercise of discretion was reasonable based on the belief that disclosure would be an unjustifiable invasion of another individual's personal privacy which outweighed the appellant's right to information.

[27] The police submit that in considering the balance between the appellant's right of access and the affected parties' right of privacy, they took into account the appellant's relationship to the "subject" and the nature of the allegations that formed the basis of the investigation. They also note that the mediator attempted to gain consent from the affected parties, however consent was not given.

[28] The police submit that 14(1)(d) is not applicable in this appeal. They refer to a court order, a copy of which was provided by the appellant in his appeal form, that states that the applicant (named individual) will share with the appellant, information pertaining to the child's education, health and extracurricular activities. The police submit that they do not fall into the category of third party service provider, and, as such, the court order does not apply to police records. Further, the police note from the court order that the affected party has sole custody of the child and are not aware of any order that altered this arrangement.

[29] The police submit that section 14(3)(b) is relevant in this appeal as the personal information was compiled for another police service investigation as generated through the jurisdiction's Children's Aid Society. The police submit that the withheld information was compiled as part of a specific and identifiable investigation into a possible violation of the law. They refer to Order P-242 where the adjudicator clarified that this presumption "only requires that there be an investigation into a possible violation of law." The police also submit that the information is kept on record, should further concerns or investigations arise.

[30] The police refer to the factor at section 14(2)(h) (supplied in confidence) as applicable in this appeal. They submit that it is essential to their operations that trust is maintained by protecting the personal information obtained in the course of investigations. They submit that when victims, witnesses, and individuals under investigation provide information to police, there is an expectation that police will maintain confidentiality, otherwise, members of the public would be wary of providing

[7] Order P-99.

information to police.

[31] The police submit that in this appeal, whether it was explicit or not, the attending officer would have made assurances of confidentiality to the affected party, when the report was being made, that the information was being collected and would be used only for the purpose for which it was collected. The police submit that this was further supported by the affected parties' refusal to provide consent during mediation.

[32] The police submit that the absurd result principle does not apply in this appeal as the withheld information was neither provided by the appellant, nor was he present when it was provided. The police submit that although the appellant may be aware, on a very general level, of the information, the specific phrasing used, the nature and extent of the allegations, as well as the specific personal details of the affected parties contained in the records, are not known to the appellant, and as such, it would not be absurd to withhold the information.

The appellant's representations

[33] The appellant submits that the absurd result principle is relevant in this appeal as he is already aware of the information.

[34] He refers to records received from another institution and submits that he is aware of the identity of the parties including the police officers, case worker and the child's mother. The appellant also submits that he was informed that the concerns that prompted the investigation have not been verified and the investigation has been closed.

[35] The appellant submits that the interview/investigation has caused emotional harm to the child and the information will assist other professionals to help the child cope with this unjust allegation and investigation.

[36] The appellant submits that section 14(1)(d) of the *Act* is relevant and refers to the court order he provided. He submits that paragraph 16 of the court order requires that he be provided access to information/documents pertaining to the child's education, health and extracurricular activities. He also notes that the court order states that both parties shall be entitled to make enquiries and be given information by the child's teachers, school officials, doctors, dentists, health care providers, summer camp counsellors and/or others involved with the child. The court order sets out that the parties shall execute and consent to any necessary documentation to facilitate same.

[37] The appellant confirms that there have been no other orders from the court altering his access rights or rights to information contained in the severed records.

[38] The appellant suggests that by not disclosing the withheld information is a violation of the *Criminal Code of Canada*, section 127(1), disobeying order of court. He submits that the federal law has paramountcy over provincial laws.

[39] The appellant submits that the police are discriminating against him because he is a man. He submits that at no time during the investigation did the police contact him regarding the allegations or investigation.

Analysis and finding

[40] For the reasons that follow, I find that the withheld information is exempt under section 38(b).

[41] As noted, during mediation, an affected party was contacted and did not consent to disclosure of personal information, therefore, section 14(1)(a) does not apply.

[42] The appellant submits that section 14(1)(d) is relevant in this appeal because the court order authorizes the disclosure of information relating to his son. Section 14(1)(d) states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
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> > (d) under an Act of Ontario or Canada that expressly authorizes the disclosure;

[43] The appellant submits that the abovementioned court order is relevant to this exception.

[44] In order for section 14(1)(d) to apply, there must be either

- a specific authorization in another Act of Ontario or Canada that allows for the disclosure of the type of personal information at issue, or
- a general reference in the other act to the possibility of disclosure together with a specific reference in a regulation to the type of personal information at issue.[8]

[45] The appellant has not cited any Act of Ontario or Canada that allows for disclosure of the withheld personal information. Further, when examining the court order provided by the appellant, the part that deals with access to information/documents (paragraph 16), states that both parties shall be entitled to make enquiries and be given information by the child's teachers, school officials, doctors, dentists, health care providers, summer camp counsellors and/or others involved with the child. It also sets out that the parties shall provide each other with the contact information for any professionals involved with the child and consent to any necessary documentation to facilitate same. The court order addresses information involving third party service providers involved with the child and not information resulting from a police investigation. In my view, if the court order was meant to

[8] Orders M-292, MO-2030, PO-2641 and MO-2344.

include information from the police or resulting from a police investigation involving the child, it would explicitly state so.

[46] As such, I am unable to find that the court order applies to the withheld personal information in the police records and I find that section 14(1)(d) does not apply in this appeal.

[47] The police claim that section 14(3)(b) applies to the withheld personal information. If this presumption applies to the information, then disclosure is presumed to be an unjustified invasion of personal privacy. This section states:

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

[48] This presumption requires only that there be an investigation into a *possible* violation of law.[9] So, even if criminal proceedings were never started against the individual, section 14(3)(b) may still apply.[10]

[49] It is clear when reviewing the withheld information that it was compiled as part of a specific and identifiable investigation into a possible violation of the law. I am satisfied that the personal information at issue for which the 38(b) exemption is claimed was complied and is identifiable as part of the police investigation into a possible violation of law, and falls within the presumption in section 14(3)(b).

[50] In addition, I am satisfied that the factor at section 14(2)(h) is relevant in this appeal. This factor weighs against disclosure, if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. This requires an objective assessment of whether the expectation of confidentiality is "reasonable."[11]

[51] After reviewing the withheld information and the police's representations, I am satisfied that assurances of confidentiality were made to the affected parties when the report was made. Further, as noted by the police, an affected party did not consent to the disclosure of their personal information which contributes to my finding that the information was provided in confidence. I give this factor significant weight.

[52] The appellant has referred to his gender and the emotional welfare of his child

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[9] Orders P-242 and MO-2235.
[10] The presumption can also apply to records created as part of a law enforcement investigation where charges were laid but subsequently withdrawn (Orders MO-2213, PO-1849 and PO-2608).
[11] Order PO-1670.

as possible factors that support disclosure of the withheld information. However, the appellant has not explained how the records would assist in addressing the child's emotional welfare, considering the representations in this appeal, I give his submissions concerning his child's welfare no weight. I also give his suggestion that gender is a factor no weight as he has provided no basis for this suggestion.

[53] The appellant submits that the absurd result principle is relevant in this appeal because he is already aware of the information. As noted, the appellant provided records that he received from another institution which includes a transcript of the interview of an affected party with their personal information redacted and the transcript of his child's interview with an affected party's personal information redacted. The appellant also provided an event log that was disclosed to him, which revealed the nature of the allegations made against him. As noted, given that the appellant is already in possession of the transcript, that record is now mostly moot and the revealed information has been removed from the scope of this appeal. However, remaining at issue is the video of the interview, hand-written notes, the redacted portions of the occurrence report and the redacted portions of the transcripts that were not disclosed by the other institution.

[54] The "absurd result" principle has been applied by the IPC when:

- the requester sought access to their own witness statement,[12]
- the requester was present when the information was provided to the institution,[13] and
- the information was or is clearly within the requester's knowledge.[14]

[55] However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply.[15]

[56] In this instance, considering the representations, I find that the absurd result principle does not apply to the withheld information. With regard to the video interview, there are important distinctions between a written transcript and a video recording which has been addressed in previous orders. In Order MO-2237, the adjudicator discussed providing a video recording of an affected party that contained the personal information of the appellant's deceased daughter. The adjudicator in that appeal ordered that only the audio portion of that video be disclosed on compassionate grounds under section 14(4)(c). The adjudicator recognized that a video recording included "the recorded images of the affected party such as her physical characteristics, voice, speech and mannerisms." In Order PO-3951, the adjudicator made a distinction

[12] Orders M-444 and M-451.
[13] Orders M-444 and P-1414.
[14] Orders MO-1196, PO-1679 and MO-1755.
[15] Orders M-757, MO-1323 and MO-1378.

between an audio recording and the video counterpart noting that an individual's "'emotional state' can be said to be reflected to some degree in their intonation and in their voices." Considering these orders, in my view, the fact that the appellant has a redacted transcript of the interview does not suggest that the information in the video interview is clearly within his knowledge.

[57] The remaining information consists of identifying personal information or the opinions and views of affected parties in the withheld portion of the occurrence report, the hand-written notes and the undisclosed portions of the transcript. The appellant submits that he is already aware of the allegations and the parties involved, from records received in another FOI request. However, after reviewing the withheld information and comparing it to the information that was disclosed to the appellant, I find that the absurd result principle does not apply to the withheld information because most of this information would not be within his knowledge.

[58] In conclusion, I find that the factor at section 14(2)(h) applies in this appeal to support non-disclosure of the withheld information and that no factors support disclosure of the information. In addition, since the withheld personal information was compiled and is identifiable as part of an investigation into a possible violation of law, the presumption in section 14(3)(b) applies. As I have found that a presumption and a factor favouring non-disclosure of the withheld personal information apply in the circumstances, I find that disclosure of the withheld personal information would be an unjustified invasion of personal privacy and is exempt under section 38(b).

[59] I am also satisfied that the police exercised their discretion in choosing to withhold the parts of the record that contained the affected parties' personal information under section 38(b). The representations of the police demonstrate that they took relevant factors into account when exercising their discretion and did not consider irrelevant factors. The police indicate that in making their decision on access, they took into account considerations including the appellant's right of access to his own information, that the information was collected in the course of an investigation into a possible law enforcement matter, the belief of the affected parties that they were giving their personal information with an expectation of confidentiality and that the affected parties did not consent to the release of their personal information. I find these were relevant considerations and I uphold the police's exercise of discretion to claim section 38(b) to withhold the information in the records at issue.

ORDER:

The appeal is dismissed.

Original signed by: August 29, 2023
Alec Fadel
Adjudicator