

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4434

Appeal MA21-00499

Toronto Police Services Board

August 31, 2023

Summary: The Toronto Police Services Board (the police) received a request under the *Act* for access to police records related to a specific 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. 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] This order determines the issue of access to information in a Toronto Police Services Board (the police) occurrence report about a dispute over a driveway. The driveway is owned by the appellant's aunt for whom the appellant has power of attorney.

[2] The police received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following:

This request is for the following for incident reported by occupants of [specified address] reported between April 1, 2021 and April 5, 2021: 1.

All incident report(s) 2. All witness statements 3. Memorandum book notes. Note: Occupants of [specified address] [specified individuals].

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

[4] 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.

[5] During mediation, the appellant advised that she was seeking access to the withheld portions of the records. The police then issued a revised decision, disclosing additional portions of the records. The police confirmed that they were maintaining their decision to withhold the rest of the information.

[6] The appellant was not satisfied with the additional disclosure and advised that she was seeking access to the withheld portions of pages 8 and 9 of the records.

[7] 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 commenced an inquiry by inviting representations from the police, initially. Representations were sought and received from the police and the appellant. The appeal was then transferred to me to continue the adjudication process.

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

RECORD:

[9] In the appellant's representations, she confirms that she is only seeking access to specific withheld portions on page 8¹ of a police occurrence report. Therefore, only these withheld portions of this record remain at issue in this appeal.

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?

¹ The appellant notes that these portions are on page 12 of the occurrence report, but in my version of the records, it is page 8. I have confirmed that these pages are the same.

DISCUSSION:

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

[10] 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.² Also, if the record contains the personal information of other individuals, one of the personal privacy exemptions might apply.³

[11] 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,

(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.

[12] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁴

² 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.

³ Sections 14(1) and 38(b), as discussed below.

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

Representations, analysis and findings

[13] The parties submit and, based on my review of the record I find that, the record contains the personal information of the appellant, the appellant's aunt, and another individual.

[14] Specifically, I find the record contains the following types of personal information of the appellant and the other individual: their names, their birthdates, their views or opinions, views or opinions about them, and their name along with other information, which fits within paragraphs (a), (d), (e), (g), and (h) of the definition of "personal information" in section 2(1) of the *Act*. The record also contains the name and address of the appellant's aunt.

[15] The appellant submits the withheld portion of the record at issue contains her and her aunt's personal information, while the police submit that she is mistaken and it does not contain information relating to them. From my review of the record, I find that the only personal information that remains at issue in this appeal is the personal information of the other individual. While the record at issue contains the personal information of the appellant and the other individual, the withheld portion of the record at issue does not relate to the appellant or her aunt.

[16] Having found that the *record* contains the personal information of both the appellant and the other individual, I will now determine whether the withheld personal information of the other individual 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?

[17] 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.

[18] 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.

[19] 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.

[20] 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).

[21] Sections 14(1) to (4) provide guidance in deciding whether disclosure would be

an unjustified invasion of the other individual's personal privacy.

[22] 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.

[23] 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.

[24] 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.⁵

Representations, analysis and findings

[25] The police submit that disclosure of the other individual's personal information would be an unjustified invasion of their personal privacy.

[26] The appellant submits that disclosure of the withheld information would not amount to an unjustified invasion of the other individual's personal privacy.

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

[27] 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 based on a complaint by the appellant, although the police explain that no one was charged with a crime.

[28] The appellant argues that the section 14(3)(b) presumption does not apply to the withheld personal information because she states that the record was created for "information purposes" and no violation of law is identified by the police.

[29] In response, the police state that while a violation of law may not have been specifically identified, an investigation still took place as concerns were raised by the appellant about a possible violation of law.

[30] Section 14(3)(b) states:

⁵ Order MO-2954.

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;

[31] 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 occurrence report. 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,⁶ and I am satisfied that there was one as documented by the police occurrence report. 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 other individual's personal privacy.

[32] 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, as well as the interests of the parties. Both parties made representations that touched on all the factors in sections 14(2)(a)-(f) of the *Act*. However, both parties either simply repeated the factor, or provided minimal substantive arguments to explain how they applied to the personal information at issue in this appeal. As such, I will only summarize the factors that the parties provided substantive arguments for. I also do not reference some of the section 14(2) factors argued by the police because they are not relevant to the specific portion of the record that the appellant is seeking access to, as the police's representations addressed all the withheld information in the records.

[33] 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. 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.

[34] 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

⁶ Orders P-242 and MO-2235.

(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

[35] 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 aunt, for whom she has power of attorney. The appellant submits that a neighbour has issued a claim against her aunt seeking a declaration that there is a prescriptive easement and right of way in respect of their driveway. She submits that the withheld information is about the driveway and it “may be relevant to the proceeding” because it could provide further insight into the circumstances surrounding the driveway and its litigation.

[36] The police submit that the section 14(2)(d) factor does not apply because if the appellant seeks access to the records for litigation, there are discovery mechanisms to provide access that would be sufficient to ensure that the hearing would be fair. The police submit that if the withheld information is the linchpin to the legitimacy of the civil proceedings against the appellant’s aunt, a court can order production of the record to make a fair determination on its merits to the claim and relevancy to the proceeding. The police further submit that if the issue in the civil proceeding is right of way and prescriptive easement, it is unlikely that a singular line in a police report would be the sole determining factor, particularly, as it does not pertain to the issue in the claim.

[37] The appellant argues that it is not appropriate to advise her to bring a court motion in order to seek access to the withheld information because only disclosure of a small, redacted portion is being sought, which relates to the appellant. The appellant states that a motion is more appropriate for cases where an individual is being criminally prosecuted.

[38] 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.⁷

[39] Although the appellant states that she seeks the withheld personal information of the other individual to defend her aunt in a civil proceeding, I am unsure how disclosure of the other individual's personal information would assist her in doing so. According to the appellant, there is a claim seeking a declaration that there is a prescriptive easement and right of way in respect of their driveway. The appellant argued that disclosure of the withheld personal information could provide insight into the circumstances surrounding the driveway and its litigation. I am not persuaded that it would, because the withheld personal information does not pertain to their driveway, nor does it pertain to the appellant or her aunt. Therefore, I am not satisfied that the withheld personal information of the other individual is significant to or required for the determination of her or her aunt's rights in the civil proceeding relating to the driveway. Accordingly, I find that the appellant has not established parts 3 and 4 of the test under section 14(2)(d).

[40] 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 other individual's personal information. I therefore find that the appellant has not established that the withheld personal information is required for the fair determination of her or her aunt's rights. I note that the appellant is not prevented from pursuing other legal remedies by not having the other individual's personal information.⁸

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

[41] 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 although there were no explicit assurances of confidentiality, in gathering information during a police investigation, there is always an implicit understanding that personal information provided to police is protected from unauthorized disclosure.

[42] 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

⁷ 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.).

⁸ 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."

of any confidentiality expectation.⁹

[43] I find that this factor applies in the circumstances and weighs against disclosure. The withheld personal information at issue is contained in a police occurrence report involving the appellant, her aunt, and the other individual. In my view, in the context of this appeal, a reasonable person would expect that the information the other individual 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.

[44] I also considered whether any unlisted factors favouring disclosure, such as inherent fairness issues, apply, and I also find that none apply in the circumstances of this appeal.

Summary

[45] 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 these factors with the interests of the parties, it is my view that disclosure of the withheld personal information would constitute an unjustified invasion of the personal privacy of the other individual. Therefore, I find that the withheld personal information is exempt from disclosure under the discretionary exemption at section 38(b) of the *Act*.

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

Absurd result

[47] The absurd result principle may apply where the appellant originally supplied the information at issue or is otherwise aware of it. In such circumstances, 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.¹⁰

[48] For example, the “absurd result” principle has been applied when:

⁹ Order PO-1670.

¹⁰ Orders M-444 and MO-1323.

- the requester sought access to their own witness statement,¹¹
- the requester was present when the information was provided to the institution,¹² and
- the information was or is clearly within the requester's knowledge.¹³

[49] The appellant argues that the absurd result principle applies to the withheld personal information because withholding it would lead to an absurd result. The appellant argues that she is aware of the information contained in the record and as it pertains to her, and the driveway she and her aunt own, withholding the information might be inconsistent with the purpose of the section 38(b) exemption.

[50] The police submit it is not absurd to withhold the personal information because while the appellant may be aware of the police's attendance with regard to the ongoing issues between her and the other individual, she was not privy to any subsequent conversation between the other individual and the officers.

[51] Based on my review of the withheld personal information, I find that the absurd result principle does not apply. While the appellant claims she is aware of all the withheld personal information in the record, her representations do not establish this to be the case as she argues that the withheld personal information is about her, her aunt, and their driveway, which I have found that it is not. Therefore, I find that it would not be absurd to withhold the personal information of the other individual in the circumstances of this appeal, because the withheld personal information is not within the appellant's knowledge.

Exercise of discretion

[52] 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.

[53] The police state that they properly exercised their discretion under section 38(b) to withhold the personal information of the other individual from the appellant. The police state that they took into consideration the nature of the circumstances of the incident, and exercised caution to maintain the privacy and confidentiality of all the parties involved. The police submit that they disclosed all of the appellant's personal information to her and only withheld information that consists of the personal information of another individual. The police further submit that they did not exercise their discretion in bad faith or for an improper purpose, nor did they take into account any irrelevant factors.

¹¹ Orders M-444 and M-451.

¹² Orders M-444 and P-1414.

¹³ Orders MO-1196, PO-1679 and MO-1755.

[54] The appellant submits that the police's discretion should not be upheld because she claims that she should have a right of access to information that pertains to her, her aunt, and her aunt's property. She also submits that she has a compelling and sympathetic need to receive the information which relates to her, her aunt, and her aunt's estate. The appellant argues that the police have fettered their discretion by not taking into account her sympathetic need to receive the personal information at issue.

[55] 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 other individual 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 disclosed as much of the record as they could, without disclosing the personal information of the other individual.

[56] 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 access decision and dismiss the appeal.

Original Signed By: _____

Anna Truong
Adjudicator

August 31, 2023