

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4464

Appeal MA23-00257

Waterloo Regional Police Services Board

November 23, 2023

Summary: The appellant sought access to a police report regarding a complaint he had filed with the police. The police granted access to the report, but withheld portions of it pursuant to section 38(b) (personal privacy) of the *Act*. In this order, the adjudicator allows the appeal in part. He finds that portions related to statements made by affected parties to the police are exempt from disclosure, but orders portions related to statements made by the appellant disclosed.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (personal information), 14(1), and 38(b).

Orders Considered: Orders PO-1819 and MO-3036.

OVERVIEW:

[1] The Waterloo Regional Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

...Police Report [specified number] done and submitted by Constable [officer name] [specified badge number]. Cause for the report was Vandalism caused by tenants [named person] and [named person] living at [specified address].

[2] The police issued a decision granting access to a two-page occurrence report, with portions of the report withheld pursuant to section 38(b) (personal privacy) of the *Act*. The requester (now the appellant) appealed the decision to the Information and Privacy Commissioner of Ontario (IPC).

[3] During mediation, the appellant stated that they continued to pursue access to the withheld information and the police stated that they would not revise their decision. Further mediation was not possible and the appeal was moved to the adjudication stage, where an adjudicator may conduct an inquiry. I sought and received representations from the parties, which included the appellant (a property manager) and two tenants in the property he manages (the affected parties). Reply representations were sought and received from the police and the affected parties. Representations were shared in accordance with the IPC's *Code of Procedure*.

[4] For the reasons that follow, I allow the appeal, in part. I find that portions of the occurrence report related to statements given to the police by the affected parties are exempt from disclosure, but the information provided by the appellant is not and I order it disclosed.

RECORDS:

[5] The sole record at issue is the withheld portion of a two-page police occurrence report (the report).

ISSUES:

- A. Does the report contain personal information?
- B. Does the discretionary personal privacy exemption at section 38(b) apply to the personal information at issue?
- C. Did the police exercise their discretion under section 38(b)?

DISCUSSION:

Issue A: Does the report contain personal information?

[6] Before I consider the exemption claimed by the police, I must first determine whether the report contains "personal information." If it does, I must determine whether the personal information belongs to the appellant, other identifiable individuals (such as the affected parties), or both. "Personal information" is defined in section 2(1) of the *Act* as "recorded information about an identifiable individual."

[7] Information is “about” the individual when it refers to them in their personal capacity, which means that it reveals something of a personal nature about the individual. Information is about an “identifiable individual” if it is reasonable to expect that an individual can be identified from the information either by itself or if combined with other information.¹ Section 2(1) of the *Act* gives a list of examples of personal information.

[8] The police submit that the report identifies the appellant and the affected parties by name, date of birth, phone number, driver’s license number, address, and contains a brief statement provided by the parties, describing their involvement, views, and opinion in relation to the incident underlying the request. The appellant does not dispute that the report contains personal information.

[9] I have reviewed the report and I find that it contains the personal information of the appellant and the affected parties, with information such as their names, addresses, phone numbers, and statements to the police present throughout the report. Having found that the report contains the personal information of the appellant and other individuals, I will consider the application of the personal privacy exemption at section 38(b).

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

[10] 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.

[11] Under section 38(b), where a record contains personal information of both the appellant 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. This involves a weighing of the appellant’s right of access to their own personal information against the other individual’s right to protection of their privacy.

[12] 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.

[13] 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). Additionally, the requester’s own personal information, standing alone, cannot be exempt under section 38(b) as its disclosure could not, by definition, be an unjustified

¹ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

invasion of another individual's personal privacy.²

[14] Sections 14(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy under section 38(b). If any of the five exceptions in sections 14(1)(a) to (e) apply, the section 38(b) exemption does not apply to the report. None of the parties refer to these exceptions and based on my review of the report, I find that none of the exceptions apply.

[15] Section 14(2) provides a list of factors for the police to consider in making this determination, while section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy.

[16] Section 14(4) sets out certain types of information whose disclosure is not an unjustified invasion of personal privacy. The police submit that none of the paragraphs in section 14(4) apply to the information at issue. I agree and find that none of the situations described in section 14(4) are applicable in this appeal.

[17] In determining whether the disclosure of the report would be an unjustified invasion of personal privacy under section 38(b), therefore, I will consider and weigh the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.³

Representations

Police representations

[18] The police submit that disclosing the withheld information in the report would constitute an unjustified invasion of personal privacy. They refer to Order MO-4274, where similar information provided to police in the context of a landlord-tenant relationship was found to be exempt from disclosure. They submit that the information was compiled as part of an investigation into a possible violation of law, related to a report of vandalism, engaging the presumption in section 14(3)(b) of the *Act*. They state that although no charges were filed, the presumption in section 14(3)(b) only requires that there be an investigation into a possible violation of law.

[19] They further submit that the information was supplied in confidence, engaging the factor in section 14(2)(h), stating that it is essential to police operations that information obtained in the course of investigations be protected, and that information provided to the police is done so under the expectation that the police will maintain confidentiality. They refer to section 95 of the *Police Services Act*,⁴ which sets out limited and specific considerations with respect to communicating information that has been provided to the police, and state that this gives rise to a reasonable expectation of

² Order PO-2560.

³ Order MO-2954.

⁴ R.S.O. 1990, c. P.15.

confidentiality. The police also state that the report indicates that the appellant wishes to have the tenants evicted, and submit that this means that the factor in section 14(2)(e) (unfair exposure to pecuniary or other harm) applies.

[20] With respect to whether withholding the information in the report would lead to an absurd result, the police state that the withheld information in the report was not provided by the appellant, and the appellant was not present when it was provided. They submit that the appellant is not aware of the information provided by the affected parties. They refer to Orders MO-4238 and MO-4272, where it was found that the absurd result principle did not apply where the appellant was not aware of the exact nature of the personal information at issue. They submit that, in this case, there is no evidence that the withheld personal information is clearly within the appellant's knowledge and withholding the information would not lead to an absurd result.

Affected parties' representations

[21] The affected parties did not provide substantive representations, but did state that they did not consent to disclosure of their personal information and they questioned why the appellant would require this information.

Appellant's representations

[22] In response to the representations of the police, the appellant submits that disclosure of the withheld information would not be an unjustified invasion of personal privacy. He states that the information was not supplied in confidence, submitting that statements given in response to an investigation are routinely used against individuals in criminal proceedings when charges are laid. He also submits that the police have started recording the full extent of police interactions on body cameras, which are routinely used in criminal proceedings. He states that the fact that the information provided by the affected parties would have been disclosed in criminal proceedings, had charges been laid, means that the information was not supplied in confidence.

[23] Referring to Order PO-1819, he states that the section 14(3)(b) presumption does not apply to records created after the completion of an investigation, and that in this case the report was created after the investigation was completed, as indicated by the report saying "Complete – Solved – Non-criminal" at the end of the report. He submits that even if the factor were to apply, it would not be determinative and the disclosure of the affected parties' responses would not be an unjust invasion of privacy in the circumstances.

[24] He refutes the police's submission that disclosure of the information would unfairly expose the affected parties to harm. He states that the police appear to be assuming that the proceedings the tenants may be subject to at the Landlord and Tenant Board, in accordance with Ontario law, would be an unfair exposure to harm, which he submits cannot be the case.

[25] He states that, on the contrary, the redacted portions of the record are relevant to the fair determination of rights of the landlord in relation to future Landlord and Tenant Board proceedings, engaging the factor in section 14(2)(d) (fair determination of rights). He submits that the response of the affected parties in response to a police investigation is relevant to the total circumstances of the underlying incident, including whether they were willing to take responsibility for the incident. He submits that the definition of "damage" in the landlord-tenant context is different than the criminal context, and can lead to eviction. He states that complete disclosure of the criminal investigation record is therefore relevant to the fair determination of rights.

Police reply representations

[26] The appellant's representations were provided to the police and the affected parties for a response. The affected parties reiterated that they did not consent to disclosure, but did not provide substantive representations.

[27] Citing Order MO-4165, the police submit that an individual's expectation of confidentiality is not diminished because their statements given to the police may be used in legal proceedings. They also submit that "it would be problematic to determine whether the information contained in the statements is significant to the determination of the right in question." They cite Order MO-4246, where the adjudicator found that, in that particular appeal, the section 14(2)(d) factor did not apply.

[28] The police submit that the spirit of the *Act* is not to determine criminal or civil liabilities and disclosure in the civil or administrative context is governed by separate rules and procedures. They refer to Order MO-3036, where the adjudicator found that the appellant had not specifically identified what right in question was being determined and why the information in the record at issue was relevant to the determination of that right.

[29] With respect to the appellant's submission that the investigation had been completed, the police submit that the "Complete – Solved – Non-criminal" is a form of standard statement that is included at the end of every occurrence report as an indication of the investigation status. They submit that the purpose of the occurrence report is to document the police services' investigation efforts and to indicate how it concluded. They state that it would be impossible for an officer to type out a report while actively investigating.

[30] In response to my request that they provide further submissions on whether disclosure of the withheld information would produce an absurd result, they declined to do so.

Analysis and finding

[31] As stated above, the issue in this appeal is whether disclosure of the report would be an unjustified invasion of the personal privacy of individuals other than the

appellant under section 38(b).

Presumptions and factors

Investigation into a possible violation of law

[32] Under section 14(3)(b), the disclosure of an individual's personal information to another individual is presumed to be 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 of law or to continue the investigation.

[33] Even if no criminal proceedings were commenced against any individual, as is the case in this appeal, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of the law.⁵

[34] The information in the report consists of the notes made by a police officer investigating a possible violation of law. I am satisfied that it was compiled by the police as part of an investigation into a possible violation of law.

[35] The appellant, referencing Order PO-1819, states that the presumption does not apply as the report was completed after the investigation had been completed. In Order PO-1819, the adjudicator found that records related to communications about the completed status of an investigation (a cover letter to a report following the investigation and a letter to a police chief) were not compiled as part of an investigation.

[36] I find that this appeal is distinguishable from Order PO-1819 in that the report is a summary of the police's investigation. The letter at issue in Order PO-1819 was created after the investigation was completed to communicate the outcome of an investigation. Furthermore, numerous IPC orders have found that the section 14(3)(b) presumption applies to reports prepared by the police.⁶ I agree with the analysis in these orders and I find that the section 14(3)(b) presumption applies to the affected parties' personal information and that it weighs against disclosure of it.

Information supplied in confidence

[37] The police point to section 14(2)(h) as a factor weighing against disclosure. This factor 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. Thus, section 14(2)(h) requires an objective

⁵ Orders P-242 and MO-2235.

⁶ See, for example, Orders MO-3662 and MO-4299.

assessment of the reasonableness of any confidentiality expectation.⁷

[38] Previous decisions have found that personal information provided to the police is generally done so in confidence.⁸ I agree with and adopt this reasoning in the present appeal.

[39] I am not persuaded by the appellant's submission that there is no expectation of privacy because information collected by police may be used in criminal proceedings in the absence of the provider's consent. The fact that information provided to police may be disclosed by police in certain circumstances in separate proceedings does not mean that the information itself is not generally provided with an expectation of confidentiality. Additionally, whether such information is disclosed in the context of a criminal proceeding depends on the context of the proceeding and the information at issue – it is not the case that all information collected by law enforcement is disclosed in criminal proceedings as a matter of course. As such, I find that the section 14(2)(h) factor applies and weighs against disclosure of the affected parties' personal information.

Unfair exposure to pecuniary harm and fair determination of rights

[40] The police submit that disclosure of the withheld information would expose the affected parties to unfair pecuniary harm because the appellant wants to have the affected parties evicted. While the merits of any eviction application are clearly outside the scope of this appeal, I do not agree that this situation would lead to unfair pecuniary harm. As the appellant stated, any such process would be occurring according to the procedures of the Landlord and Tenant Board and relevant legislation. I accept that an eviction proceeding or other matter before the Landlord and Tenant Board could lead to some form of pecuniary harm. However, I do not agree that this exposure, resulting from a legal proceeding, would be unfair within the meaning of section 14(2)(e). I find that the factor does not apply and I will not consider it further when determining whether disclosure of the affected parties' personal information constitutes an unjustified invasion of their personal privacy.

[41] The appellant states that disclosure of the personal information is necessary for a landlord-tenant matter and other civil litigation against the appellants, engaging the factor in section 14(2)(d). Based on the information before me, it is clear that the right in question is a legal right related to a proceeding that might be brought by the appellant, and that the personal information at issue, information about the affected parties' interaction with the police, is relevant to the determination of the right in question. It is also clear that the personal information would be required for the appellant to prepare for a potential proceeding, for example an eviction hearing at the Landlord and Tenant Board.

⁷ Order PO-1670.

⁸ See, for example, Order MO-3028.

[42] The police state that the appellant may have other options for obtaining the information, such as summons procedures at the Landlord and Tenant Board. While this may be the case, I do not agree that this precludes this from being a relevant factor in favour of the appellant's access rights.

[43] Previous IPC orders have found that the existence of alternate routes to access information are contemplated within the access regime of the *Act*.⁹ The police point to Order MO-3036, where the adjudicator found that the factor did not apply because the right in question had not been specified. However, a key distinction with this appeal is that the appellant, regardless of the potential merits of any claims, has clearly identified the right in question and the procedures that he wishes to pursue. Accordingly, I find that the fair determination of the appellant's rights is a relevant factor and weighs in favour of disclosure.

Balancing the factors and absurd result

[44] Balancing the section 14(3)(b) presumption and the factor in section 14(2)(h), both of which weigh against disclosure, with the section 14(2)(d) factor weighing in favour of disclosure, I find that the balance weighs in favour of protecting the affected parties' personal privacy, rather than the appellant's access rights. I therefore find that disclosure would constitute an unjustified invasion of the affected parties' personal privacy.

[45] I have reached this conclusion in consideration of the nature of the information at issue, the confidentiality expectations of the affected parties, and the potential value of the information in the fair determination of rights. While I appreciate the appellant's submissions regarding why he requires the information, I find that this is not sufficient to outweigh the presumption that the information is exempt from disclosure because it was compiled as part of an investigation into a possible violation of law, particularly given the expectation of confidentiality of the affected parties when communicating with the police.

[46] However, an institution might not be able to rely on the section 38(b) exemption in cases where the requester originally supplied the information in the record, or is otherwise aware of the information contained in the record. In this situation, withholding the information might be absurd and inconsistent with the purpose of the exemption.¹⁰

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

- the requester sought access to their own witness statement,¹¹

⁹ See, for example, Orders MO-2980 and MO-4213.

¹⁰ Orders M-444 and MO-1323.

¹¹ Orders M-444 and M-451.

- 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

[48] However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply.¹⁴

[49] Based on my review of the report there are numerous portions that, if found to be exempt from disclosure, would lead to an absurd result. As outlined above, an absurd result has previously been found in situations where the withheld information was clearly within the requester's knowledge. Here, information that the appellant provided, such as the names of the affected parties, is clearly known by the appellant and disclosing this information would not be inconsistent with the purposes of the personal privacy exemption.

[50] I accept the police's submission that the statements that the affected parties made to the police in the course of the investigation are not something that the appellant is aware of, and I find that withholding this information would not lead to an absurd result.

[51] However, throughout the report the names and addresses of the affected parties appear in the context of information provided by the appellant to the police, such as in the officer's description of the appellant's complaint. I order this information disclosed.

Issue C: Did the police exercise their discretion under section 38(b)?

[52] The section 38(b) exemption is discretionary and permits an institution to disclose information, despite the fact that it could withhold it. Having found that portions of the report are exempt under section 38(b), I must next determine if the police properly exercised their discretion in withholding the information. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[53] The IPC may find that an institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose;
- it takes into account irrelevant considerations; or
- it fails to take into account relevant considerations.

¹² Orders M-444 and P-1414.

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

¹⁴ Orders M-757, MO-1323 and MO-1378.

[54] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁵ The IPC may not, however, substitute its own discretion for that of the institution.¹⁶

Representations, analysis and finding

[55] The police submit that they relied on a number of relevant factors, such as that information should be available to the public, that exemptions from the right of access should be limited and specific, and that the privacy of individuals should be protected. The appellant and affected party did not provide specific representations on the exercise of discretion.

[56] I have reviewed the considerations relied upon by the police and I find that they properly exercised their discretion in response to the access request. Based on their overall representations, it is clear that they considered the purposes of the *Act* and sought to balance the appellant's interest in accessing the full records with the protection of the affected parties' privacy when making their access decision.

[57] I find that the police did not exercise their discretion to withhold the affected parties' personal information for any improper purpose or in bad faith, and that there is no evidence that they failed to take relevant factors into account or that they considered irrelevant factors. Accordingly, I uphold the police's exercise of discretion in denying access to the portions of the report that I have not ordered disclosed.

ORDER:

1. I uphold the police's decision to withhold portions of the report.
2. I order the police to disclose portions of the report related to information the appellant provided to the police as described above. I order the police to disclose this information by **January 4, 2024** but not before **December 29, 2023**. I have provided the police with a copy of the record, highlighting this information in yellow. To be clear, only the information that is highlighted in yellow should be disclosed to the appellant.
3. In order to verify compliance with Order provision 2, I reserve the right to require the police to provide me with a copy of the report disclosed to the appellant.

Original Signed By: _____
Chris Anzenberger
Adjudicator

November 23, 2023 _____

¹⁵ Order MO-1573.

¹⁶ Section 43(2) of the *Act*.

