

Information and Privacy Commissioner,  
Ontario, Canada



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

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## INTERIM ORDER MO-4473-I

Appeal MA22-00347

York Regional Police Services Board

December 21, 2023

**Summary:** Under the *Act*, the appellant sought access to a statement made by a third party to the York Regional Police Services Board (the police) concerning an incident that led to charges against the third party for assault of the appellant. The police denied the appellant access to any part of the statement on the basis its disclosure would be an unjustified invasion of the personal privacy of the third party.

In this interim order, the adjudicator finds that the requested statement contains the personal information of the third party and of the appellant, so that the relevant personal privacy exemption is section 38(b) of the *Act*. Section 38(b) is a discretionary exemption that permits, but does not require, an institution to refuse to disclose to a requester her own personal information. The police instead applied the personal privacy exemption as if it were a mandatory exemption, based on a fundamental misapprehension of the nature of the record and of the appellant's greater right of access under the *Act* to a record of her own personal information. In the circumstances, the adjudicator orders the police to issue a new access decision to the appellant, having regard to the principles set out in this interim order. She remains seized of the appeal to address issues arising from the police's new access decision.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M.56, sections 2 (definition of "personal information"), 4(2), 14, 21, and 38(b).

### OVERVIEW:

[1] The appellant was involved in a relationship with a third party, who is an affected person in this appeal. Following a complaint of assault, the affected person was

charged and convicted of a criminal offence.

[2] Under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), the appellant made a request to the York Regional Police Services Board (the police) for statements made by the affected person to the police in relation to the incident giving rise to the charges. Her request read, in part:

... I am interested in accessing [the affected person's] statements from [specified time frames]. I understand that this may not be feasible without his consent or a court order. In lieu of these statements, please provide any available information such as officer reports and any related supplementary reports.

[3] In response, the police issued a decision granting the appellant partial access to records responsive to her request. They withheld some information in the records, citing in their decision letter the discretionary personal privacy exemption at section 38(b) of the *Act*, and the presumption against disclosure in section 14(3)(b), which applies to certain information compiled as part of an investigation into a violation of law.

[4] The appellant was dissatisfied with the police's decision and filed an appeal with the Office of the Information and Privacy Commissioner of Ontario (IPC). She continues to seek access to the affected person's statement to the police, which the police withheld in full.

[5] As no mediated resolution was possible, the appeal was transferred to the adjudication stage of the appeal process, where the IPC may conduct a written inquiry under the *Act*. I conducted an inquiry, during which I shared the parties' representations with one another in accordance with the IPC's *Code of Procedure and Practice Direction 7*.

[6] In this interim order, I find that the record at issue is a record of personal information of both the affected person and the appellant. By treating the record as a record of personal information of the affected person only, the police failed to consider the appellant's greater right of access under the *Act* to a record of her own personal information. In the circumstances, I find the appropriate remedy is to return the matter to the police for a new access decision, in accordance with the principles set out in this decision.

**RECORD:**

[7] The record at issue is the affected person's statement to the police.

## **ISSUES:**

1. Does the record contain “personal information” as defined in section 2(1) and, if so, whose personal information is it?
2. What is the appropriate personal privacy exemption in the circumstances?

Did the police apply the appropriate personal privacy exemption?

## **DISCUSSION:**

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

[8] To decide which sections of the *Act* may apply in the circumstances, the IPC must first decide whether the record contains “personal information” within the meaning of the *Act*, and, if so, to whom that personal information relates.

[9] Section 2(1) of the *Act* defines “personal information” as “recorded information about an identifiable individual,” including, among other things, the individual’s name if it appears with other personal information relating to the individual or where disclosure of the name would reveal other personal information about the individual [paragraph (h) of the definition at section 2(1)].

[10] An individual’s personal information also includes his or her personal opinions or views (paragraph (e) of the definition), with one important caveat. Where the individual’s personal opinions or views relate to another person, then those opinions or views are the personal information of that other person (paragraphs (e) and (g) of the definition). The IPC has also found that the personal opinions or views of one individual about another individual can constitute the mixed personal information of both individuals.<sup>1</sup>

[11] Sections 2(2), (2.1), and (2.2) set out exceptions to the definition of personal information that are not relevant here.

[12] The record at issue in this appeal is a transcript of a statement given by the affected person to the police during the police’s investigation of a complaint that the affected person had assaulted the appellant. The record is replete with details about the affected person, who provided the statement, and about the appellant, who was the victim of the assault. While the appellant was not present at the giving of the statement, the affected person’s account contains multiple references to her, including in the affected person’s description of the events that led to the interview with the police.

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<sup>1</sup> Order PO-3458.

[13] It is clear that the record contains the personal information of the affected person, who is the interview subject and who provides details to the police about his living situation, his relationship with the appellant, and his views on the events that brought him to the attention of the police, among other things. The record also reveals the fact of the affected person's interaction with the police. All this information qualifies as the affected person's personal information within the meaning of section 2(1).

[14] The record also contains the personal information of the appellant. It contains the affected person's personal opinions or views about the appellant, which in this context constitutes the personal information of both the affected person and the appellant. The record also reveals other personal details about the appellant, including her relationship with the affected person and her involvement in the incident that was investigated by the police. All this information is the appellant's personal information within the meaning of section 2(1), irrespective of the fact this information was communicated to the police by the affected person. In this regard, I explicitly reject the police's position, taken in its representations, that the record is solely a record of personal information of the affected person and does not contain the personal information of the appellant. The statement is a record containing the personal information of them both.

[15] The appellant in her representations says that she does not seek access to those portions of the statement that relate solely to the affected person, such as his employment history and living arrangements. She does, however, seek access to the portions of the affected person's statement that relate to her, including the affected person's opinions and views about her. The appellant asks that the statement be severed so that only her personal information is disclosed to her, without any invasion of the affected person's privacy. However, I find that the personal information of the appellant in these portions of the statement is inextricably intertwined with that of the affected person, so that the record cannot reasonably be severed for the purposes of disclosure under the *Act*.<sup>2</sup>

[16] I thus conclude that the record is a record of personal information of both the appellant and the affected person. As will be seen next, this means the *Act* confers on the appellant a greater right of access to the record than she would have were the record solely a record of the affected person's personal information.

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<sup>2</sup> Section 4(2) of the *Act* requires that institutions disclose as much of a record as "can reasonably be severed without disclosing the information that falls under one of the exemptions." However, the IPC has found that the duty to sever does not apply where non-exempt information is so intertwined with exempt information that any disclosure would result in the release of only "disconnected snippets," or of information that is "worthless," "meaningless," or "misleading": see Order PO-1663, followed in numerous IPC orders.

**B. What is the appropriate personal privacy exemption in the circumstances?**

**Did the police apply the appropriate personal privacy exemption?**

[17] For the reasons that follow, I find the police failed to address the appellant's access request under the relevant sections of the *Act*. I will remedy this failure by ordering the police to issue a new access decision to the appellant.

[18] Section 4 of the *Act*, contained in Part I, gives an individual a right of access to a record in the custody or under the control of an institution like the police. The right of access in section 4 applies to general records that do not contain personal information. It also applies to records that contain the personal information of individuals other than the requester. Exemptions from the right of access are set out in sections 6 to 15 of the *Act*. One such exemption is found at section 14(1), which provides that an institution must not disclose to a requester a record containing the personal information of individuals other than the requester, except in specified circumstances.

[19] A different section of the *Act*, section 36(1) contained in Part II, gives an individual a right of access to her own personal information held by an institution. Section 38 sets out exemptions from the right of access in section 36(1). 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.

[20] Thus, while the section 14(1) exemption is a mandatory prohibition against any disclosure that would constitute an "unjustified invasion" of another individual's personal privacy, the section 38(b) exemption is discretionary. This means that under section 38(b), the institution may 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. An institution must exercise the discretion conferred on it by section 38(b), and it must do so in a proper manner. (I will discuss the proper exercise of discretion under section 38(b) further below.)

[21] Sections 14(1) to (4) of the *Act* provide guidance in deciding whether the personal information at issue is exempt under section 14(1) or 38(b), as the case may be.

[22] In this case, the police withheld the affected person's statement in its entirety. In doing so, the police cited in their decision letter the discretionary personal privacy exemption at section 38(b). Based on my finding, above, that the record at issue in this appeal is a record of personal information of both the appellant and the affected person, section 38(b) is the appropriate section under which the police may claim a personal privacy exemption for the record.

[23] However, in representations made during the inquiry, the police make clear that

they consider the statement to be a record of personal information of the affected person only, and that they did not consider the appellant's right of access to the record under the appropriate section of the *Act*. When invited to explain during the inquiry whether and how the section 38(b) exemption applies to the record, the police stated, among other things:

- All personal information of the appellant [in other records that are not at issue in this appeal] has already been released to her.
- The statement in its entirety constitutes the personal information of the individual who provided the statement.
- Although the appellant states that she has a right to her own personal information, the personal information in the record is not hers.
- Once it has been shown that a section 14(3) presumption applies to the personal information at issue, the presumption cannot be overcome by a combination of the factors set out in section 14(2) in the *Act*.

[24] These submissions reveal a fundamental misunderstanding of the nature of the record (which, as I found above, is a record of personal information of the appellant and of the affected person); and of the section 38(b) exemption. Unlike the mandatory personal privacy exemption at section 14(1), the discretionary exemption at section 38(b) recognizes that a requester has a greater right of access to a record that contains her personal information than to a record that does not.

[25] For instance, for a record claimed to be exempt under section 14(1) (i.e., where the record does not contain the requester's personal information), the factors outlined in section 14(2) cannot be used to overcome a presumed unjustified invasion of personal privacy under section 14(3).<sup>3</sup> However, where the applicable personal privacy exemption is section 38(b) (i.e., where the record contains the requester's personal information), the decisionmaker must consider and weigh the factors and presumptions in sections 14(2) and (3), and balance the interests of the parties, in deciding whether disclosure of the other individual's personal information would be an unjustified invasion of personal privacy.<sup>4</sup>

[26] In other words, in the circumstances of this appeal, the police are incorrect in stating that a section 14(3) presumption cannot be overcome by consideration of the factors in section 14(2) (and any other relevant interests).

[27] Overall, the police's representations demonstrate to me that despite citing the appropriate personal privacy exemption in their decision letter, they failed to apply it properly. The police's own evidence establishes that once they decided a presumption

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<sup>3</sup> *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.

<sup>4</sup> Order MO-2954.

in section 14(3) applies to the record, they did not turn their mind to the possibility of disclosure based on consideration of the factors in section 14(2) or the interests of the parties.

[28] In these circumstances, rather than assessing the correctness of the police's decision to withhold the record in full based solely on the presumption in section 14(3)(b), I find it necessary and appropriate to return the matter to the police for a proper exercise of their discretion under the relevant personal privacy exemption at section 38(b).

[29] A proper exercise of discretion is one that takes into account only relevant considerations and not irrelevant considerations, and that is not done in bad faith or for an improper purpose. In the circumstances of this appeal, some relevant considerations may include (but are not limited to) the following:<sup>5</sup>

- the purposes of the *Act*, including the principles that:
  - information should be available to the public,
  - an individual should have a right of access to her own personal information,
  - exemptions from the right of access should be limited and specific, and
  - the privacy of individuals should be protected;
- the wording of the exemption and the interests it seeks to protect;
- that the appellant is seeking her own personal information;
- whether the appellant has a sympathetic or compelling need to receive the information;
- the relationship between the appellant and the affected person;
- the nature of the information and the extent to which it is significant and/or sensitive to the police, the appellant or the affected person; and
- the historic practice of the police with respect to similar information.

[30] It may be that after proper consideration of the record and the guiding principles in the *Act*, the police will issue a new decision to withhold the statement, in full or in part, on personal privacy grounds. The appellant may appeal the police's new access decision, following which the IPC may uphold or not uphold the application of any claimed exemptions, and may order the disclosure of any non-exempt information. In

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<sup>5</sup> Orders P-344 and MO-1573.

addition, if the police fail to exercise their discretion under section 38(b), or they fail to exercise their discretion in a proper manner, the IPC may send the matter back to the police for an exercise of discretion based on proper considerations.<sup>6</sup> The IPC cannot, however, substitute its own discretion for that of an institution.<sup>7</sup>

[31] I note that if the police decide, after a proper exercise of their discretion under section 38(b), to disclose all or part of the statement to the appellant, they must, before any such disclosure, comply with their obligations under section 21 of the *Act* concerning the notification of persons whose interests may be affected by their decision.

[32] I remain seized of this appeal to address issues arising from the police's new access decision to the appellant.

### **ORDER:**

1. I order the police to issue a new access decision to the appellant, with a copy to me, having regard to the findings and principles set out in this interim order. For the purposes of the new access decision, the police are to treat the date of this interim order as the date of the request.
2. If the police decide to withhold all or part of the record, they must identify the relevant exemption claim(s) and the reasons for their decision.
3. If the police decide to grant the appellant access to all or part of the record, the police should have regard to section 21 of the *Act* concerning the notification of affected persons before granting any such access.
4. I remain seized of this appeal to address issues arising from the police's new access decision.

Original Signed By: \_\_\_\_\_

Jenny Ryu  
Adjudicator

December 21, 2023 \_\_\_\_\_

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<sup>6</sup> Order MO-1573.

<sup>7</sup> Section 43(2).