

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4482

Appeal MA21-00782

Barrie Police Services Board

January 17, 2024

Summary: The Barrie Police Services Board received a request under the *Act* for records relating to complaints involving the appellant. The police granted the appellant partial access to an occurrence report and officer's notes claiming that the withheld portions qualified for exemption under section 38(a)(discretion to refuse a requester's own information), read with section 8(1)(d)(confidential source). The police withheld an audio recording provided by an affected individual on the basis that disclosure would constitute an unjustified invasion of personal privacy under section 38(b)(personal privacy). The appellant appealed the police's decision to the IPC. The adjudicator finds that the records qualify for exemption under sections 38(a) and (b) 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) (personal information), 8(1)(d), 14(3)(b), 38(a) and 38(b).

OVERVIEW:

[1] This order resolves an appeal of a decision from the Barrie Police Services Board (the police) in response to a request made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) by the appellant for:

Unredacted and unedited (no bullet points or summaries) copies of ALL the anonymous complaints against me, including, but not limited to, [two occurrence numbers].

[2] The background of this appeal is that the police contacted the appellant in the course of an investigation. The appellant says that he was told that the police received information about himself through a tip made to Crime Stoppers. The appellant says that the anonymous complainant provided false information to the police and should be held responsible for their actions.

[3] In response to the appellant's request, the police issued a decision granting the appellant partial access to responsive records. The appellant appealed the police's decision to the Information and Privacy Commissioner of Ontario (IPC) and a mediator was assigned to explore settlement with the parties. During mediation, the police agreed to expand the scope of the appeal to address previous access requests made by the appellant but not appealed to the IPC. The police also issued supplemental decision letters to the appellant. Most of the appellant's questions and concerns relating to his previous and present access requests were resolved at this stage. However, at the end of mediation, the appellant continued to pursue access to the withheld portions of a general occurrence report, officer's notes, and an audio recording.

[4] The police took the position that the withheld audio recording qualified for exemption under the personal privacy exemption under section 38(b), (personal privacy). The police also said that the withheld portions of the occurrence report and officer's notes qualify for exemption under the law enforcement exemption under section 38(a), read with section 8(1)(d)(confidential source). The appellant also said that additional records should exist relating to a June 2020 incident.

[5] As the parties were unable to reach a full settlement, the file was moved to the adjudication stage of the appeals process in which an adjudicator may decide to conduct an inquiry. I commenced an inquiry by inviting the police's written representations. A complete copy of the police's representations were shared with the appellant and the appellant submitted written representations to the IPC in response.

[6] For the reasons stated below, I uphold the police's decision to withhold the records remaining at issue and dismiss the appeal.

RECORDS:

[7] The records remaining at issue comprise of:

- Page 1 of the General Occurrence Report (totaling 2 pages)¹, and pages 1 and 2 of the officer notes (totaling 9 pages)². The police claim that the withheld portions of these records qualify for exemption under section 38(a), read with section 8(1)(d)(confidential source), and

¹ Access Request No. 337-21.

² Access Request No. 214-19.

- Audio recording of an interview of a police officer relating to a complaint the appellant filed with the police against another individual.³ The police claim that this record qualifies for exemption under section 38(b)(personal privacy).

ISSUES:

- A. Did the police conduct a reasonable search for records relating to a June 2020 incident?
- B. Do the records contain personal information as defined in section 2(1) and, if so, whose personal information is it?
- C. Does the discretionary exemption at section 38(a), read with section 8(1)(d) apply to the occurrence reports and officer's notes?
- D. Does the discretionary personal privacy exemption at section 38(b), apply to the audio recording?

DISCUSSION:

A. Did the police conduct a reasonable search for records relating to a June 2020 incident?

[8] If a requester claims that additional records exist beyond those found by the institution, the issue is whether the institution has conducted a reasonable search for records as required by section 17 of the *Act*.⁴ If the IPC is satisfied that the search carried out was reasonable in the circumstances, it will uphold the institution's decision. Otherwise, it may order the institution to conduct another search for records.

[9] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, they still must provide a reasonable basis for concluding that such records exist.⁵

[10] The *Act* does not require the institution to prove with certainty that further records do not exist. However, the institution must provide enough evidence to show that it has made a reasonable effort to identify and locate responsive records;⁶ that is, records that are "reasonably related" to the request.⁷

[11] A reasonable search is one in which an experienced employee knowledgeable in

³ Access Request No. 307-21.

⁴ Orders P-85, P-221 and PO-1954-I.

⁵ Order MO-2246.

⁶ Orders P-624 and PO-2559.

⁷ Order PO-2554.

the subject matter of the request makes a reasonable effort to locate records that are reasonably related to the request.⁸ The IPC will order a further search if the institution does not provide enough evidence to show that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.⁹

[12] The police say in their representations that during mediation they contacted the investigating officer to inquire whether additional records relating to the June 2020 incident could be located. The officer was not able to locate additional records.

[13] The appellant in his representations says that he is looking for records or a notation regarding the information the police received from Crime Stoppers about himself. The appellant says that if the police received information from Crime Stoppers, they should have documented their decision to act on the information and commence an investigation against him. However, I note that the portions of records disclosed to the appellant clearly indicate that a Crime Stoppers tip had been received. The appellant says that during the investigation he was shown a plain, white piece of paper with typewritten information in it. The appellant suggests that the information the police received from Crime Stoppers was on this piece of paper. The appellant asks me in his representations if he can be provided a copy of this paper though it does not appear that he had previously requested a copy.

[14] I have considered the appellant's submissions and am not satisfied that his evidence demonstrates a reasonable basis for concluding that additional records relating to the June 2020 should exist. In addition, I am not satisfied that the piece of paper the appellant hopes to obtain is reasonably related to his request and find that the police's further search during mediation for records relating to the June 2020 incident was reasonable. As stated above, the *Act* does not require the police to prove with certainty that further records do not exist. Instead, the police must provide enough evidence to demonstrate that it made a reasonable effort to identify and locate responsive records and in the circumstances of this appeal, I am satisfied that the police has done so.

B. Do the records contain personal information as defined in section 2(1) and, if so, whose personal information is it?

[15] 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.¹⁰ However, if the record contains the personal information of other individuals, one of the personal privacy exemptions might apply.¹¹

⁸ Orders M-909, PO-2469 and PO-2592.

⁹ Order MO-2185.

¹⁰ 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.

¹¹ See sections 14(1) and 38(b).

[16] 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.

[17] There is no dispute between the parties that the records contain the personal information of the appellant. The occurrence reports and police officer’s notes were created by the police in response to a complaint they received about the appellant. The audio recording was created by the police in response to a complaint the appellant subsequently filed. The appellant filed the complaint on the basis of his belief that the individual(s) who filed a complaint about him knowingly provided false information to the police.

[18] The police say that the records also contain the personal information of other identifiable individuals. The appellant does not assert that the records only contain his information.

[19] Section 2(1) of the *Act* defines “personal information” as “recorded information about an identifiable individual.” “Recorded information” is information recorded in any format, such as paper records, electronic records, digital photographs, videos, or maps.¹² 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. Generally, information about an individual in their professional, official, or business capacity is not considered to be “about” the individual.¹³

[20] In some situations, even if information relates to an individual in a professional, official, or business capacity, it may still be “personal information” if it reveals something of a personal nature about the individual.¹⁴ 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.¹⁵

[21] Having regard to the parties’ representations, along with the records themselves, I find that the records contain the personal information of the appellant along with other identifiable individuals. In its representations, the police identify one of these individuals as a police officer. For the remainder of this order, I will refer to the police officer as the affected individual and the other individual(s) as the complainants. I listened to the audio recording of the affected individual’s interview and am satisfied that the information was provided to the police in their personal capacity and not associated with them in a professional, official, or business capacity.

[22] Accordingly, I find that the records remaining at issue contain the personal

¹² See the definition of “record” in section 2(1).

¹³ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

¹⁴ Orders P-1409, R-980015, PO-2225 and MO-2344.

¹⁵ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

information of the appellant along with the personal information of other individuals (the affected individual and complainants). Namely, the names, addresses, contact information and opinions or views of other individuals as defined in the definition of personal information in paragraphs (d), (e) and (h) in section 2(1).¹⁶

[23] Given my finding, I will go on to determine whether the withheld information qualifies for the exemptions claimed by the police.

C. Does the discretionary exemption at section 38(a), read with section 8(1)(d) apply to the occurrence reports and officer's notes?

[24] Section 38(a) of the *Act* reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

if section 6, 7, 8, 8.1, 8.2, 9, 9.1, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

[25] The discretionary nature of section 38(a) ("may" refuse to disclose) recognizes the special nature of requests for one's own personal information and the desire of the Legislature to give institutions the power to grant requesters access to their own personal information.¹⁷

[26] If the institution refuses to give an individual access to their own personal information under section 38(a), the institution must show that it considered whether a record should be released to the requester because the record contains their personal information.

[27] In this case, the police rely on section 38(a) read with section 8(1)(d), which states:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,

¹⁶ The term "personal information" is defined, in part, in section 2(1) as recorded information about an identifiable individual, including,

(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,

(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.

¹⁷ Order M-352.

disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;

[28] The section 8(1)(d) exemption is intended to protect the identity of people who provide information to an institution in the context of a law enforcement matter. There is no dispute between the parties that the records concern a law enforcement matter.¹⁸ However, for this exemption to apply, the police must show that it is reasonable to expect that the identity of the source or the information given by the source would remain confidential in the circumstances.¹⁹

[29] The police must show that the risk of harm is real and not just a possibility.²⁰ However, the police do not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the information.²¹

[30] The police say that disclosure of the withheld portions of the occurrence report and officer's notes would disclose the identity of a confidential source of information in respect of a law enforcement matter or disclose information furnished only by the confidential source. The appellant's representations focus on questions he has about the identity of the source and his suspicions of who provided false information about him to the police. He argues that "there is no reason for keeping this information confidential. These were false allegations and whomever made them committed public mischief."

[31] Having regard to the representations of the parties and the records themselves, I find that disclosure of the withheld portions of the occurrence reports and officer's notes could reasonably be expected to disclose the identity of a confidential source of information in respect of a law enforcement matter. I am also satisfied that given that the withheld information was provided to the police in the context of a law enforcement investigation, it is reasonable to expect that the identity of the source would remain confidential in the circumstances.

[32] Turning to the issue of whether the police properly exercised their discretion to rely on section 38(a) to withhold portions of the occurrence report and officer's notes. The police say that they released information not exempt under section 38(a) to the appellant. I have reviewed the records and given the manner the records were severed, I am satisfied that the police balanced the wording of the exemption and the interests

¹⁸ The term "law enforcement" is defined in section 2(1) "law enforcement", in part, as (a) policing and (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings.

¹⁹ Order MO-1416.

²⁰ *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

²¹ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616.

they seek to protect with the consideration that exemptions from the right of access should be limited and specific. Accordingly, I am satisfied that the police have demonstrated that they took into account relevant considerations in exercising their discretion to withhold the information at issue and did not exercise their discretion in bad faith or for an improper purpose.

[33] For the reasons stated above, I uphold the police's decision to deny access to the appellant to the withheld information in the occurrence reports and officer's notes. Given my decision, it is not necessary that I also consider whether disclosure of this information to the appellant would constitute an unjustified invasion of personal privacy under section 38(b).²²

D. Does the discretionary personal privacy exemption at section 38(b) apply to the audio recording?

[34] 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.²³

[35] 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 other individual's personal privacy.²⁴

[36] Sections 14(1) to (4) provide guidance in deciding whether the information is exempt under section 38(b). If the information fits within any of the 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). The parties have not claimed that any of the exceptions in paragraphs (a) to (e) apply, and I am satisfied that none apply in the circumstances of this appeal. Also, I am satisfied that none of the situations listed in section 14(4) are relevant in this appeal.

[37] For records claimed to be exempt under section 38(b) (that is, records that contain the requester's personal information), the decision-maker must consider and weigh the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties in deciding whether the disclosure of the other individual's personal information would be

²² The police did not claim that these records are also exempt under section 38(b) but the appellant appeared to make submissions in this regard.

²³ However, 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 invasion of another individual's personal privacy; Order PO-2560.

²⁴ See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's exercise of discretion under section 38(b).

an unjustified invasion of personal privacy.²⁵

Does the presumption at section 14(3)(b) claimed by the police apply?

[38] If any of sections 14(3)(a) to (h) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy. The police take the position that the presumption at section 14(3)(b) applies to the audio recording because it was created during the course of their investigation into a possible violation of law.

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

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

was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

[40] The section 14(3)(b) presumption requires only that there be an investigation into a possible violation of law.²⁶ So, even if criminal proceedings were never started against the individual, section 14(3)(b) may still apply.²⁷

[41] The audio recording was created in the course of the police's investigation into the appellant's complaint filed with the police. The appellant alleges that a certain individual provided the police with false information about him which resulted in him becoming the subject of a police investigation. This is not the same individual who spoke to the police in the audio recording.

[42] Earlier in this order, I found that the affected individual spoke to the police in their personal capacity. Based on the representations of the appellant, it is clear he is not aware what the affected individual told the police.

[43] The appellant says that disclosure of the audio recording to him would not constitute an unjustified invasion of personal privacy because the information this individual provided the police would substantiate his suspicions of the identity of the person, he believes provided the police false information about himself. The appellant wants that person held responsible and charged with public mischief.

[44] Having regard to the representations of the parties along with the audio recording itself, I am satisfied that the withheld personal information was compiled and is identifiable as part of the police's investigation into a possible violation of law, namely a

²⁵ Order MO-2954.

²⁶ Orders P-242 and MO-2235.

²⁷ 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).

Criminal Code offence. Accordingly, I find that the presumption at section 14(3)(b) applies to the circumstances of this appeal.

[45] I considered any factors in section 14(2) weighing in favour of disclosure apply to the circumstances of this appeal and find that none apply.²⁸ I also considered whether other factors or relevant considerations besides the ones listed in 14(2) could apply. Past IPC orders have found that other factors (besides the ones listed in sections 14(2)) must be considered under section 14(2) if they are relevant. These may include:

- inherent fairness issues,²⁹
- ensuring public confidence in an institution,³⁰
- personal information about a person who has died,³¹ or
- benefit to unknown heirs.³²

[46] The appellant argues that the audio recording should be disclosed to him as it may contain "evidence of a criminal offence" perpetrated against him. I have considered the appellant's argument and give it little weight. There are no fairness issues as the appellant already raised his allegations with the police who subsequently conducted an investigation which resulted in the record in question being created. The fact that the appellant was a complainant in a police matter does not diminish the privacy rights of another individual providing information to the police in the course of their investigation.

[47] In addition, I considered whether the absurd result principle could apply. 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. Based on the representations of the parties, I am satisfied that the appellant is not aware of the information at issue in the audio recording.

[48] Accordingly, I find that the absurd result principle could not apply.³³ As I have

²⁸ Section 14(2) lists several factors that may be relevant to determining whether disclosure of personal information would be an unjustified invasion of personal privacy. The first four factors, found in sections 14(2)(a) to (d), if established, would tend to support disclosure of the personal information in question. The appellant's submissions did not give rise to any of the listed factors identified in sections 14(2)(a) and (d).

²⁹ Orders M-82, PO-1731, PO-1750, PO-1767 and P-1014.

³⁰ Orders M-129, P-237, P-1014 and PO-2657.

³¹ Orders M-50, PO-1717, PO-1923, PO-1936 and PO-2012-R.

³² Orders P-1493, PO-1717 and PO-2012-R.

³³ For example, the IPC has applied the "absurd result" principle when:

- the requester sought access to their own witness statement (Orders M-444 and M-451),

found that the presumption in section 14(3)(b) applies and while an unlisted factor favouring disclosure of the information could apply, it applies with little weight. Accordingly, I find that the withheld information is exempt under section 38(b) of the *Act*.

[49] Finally, I considered the police's exercise of discretion in withholding the audio recording.

[50] The police says that they contacted the affected individual to determine their views regarding disclosing the audio recording to the appellant. The affected individual objected to a copy of the audio recording being disclosed to the appellant. I am satisfied that the police's evidence demonstrates that they took into account relevant considerations in exercising their discretion, such as the principle that the privacy of individuals should be protected and the wording of the exemption and the interests it seeks to protect. I am also satisfied that the police's efforts to contact the affected individual demonstrates that they did not exercise their discretion in bad faith or for an improper purpose.

[51] Having regard to the above, I uphold the police's decision to withhold the audio recording under section 38(b) from the appellant and dismiss the appeal.

ORDER:

I uphold the decision of the police and dismiss the appeal.

Original signed by: _____
Jennifer James
Adjudicator

_____ January 17, 2024

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- the requester was present when the information was provided to the institution (Orders M-444 and P-1414), or
 - the information was or is clearly within the requester's knowledge (Orders MO-1196, PO-1679 and MO-1755).