

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4517

Appeal MA22-00317

Waterloo Regional Police Services Board

April 29, 2024

Summary: The appellant sought access under the *Act* to a police report about an incident he was involved in. The police granted partial access to the report, citing section 38(b) (personal privacy) of the *Act* to deny access to the remaining information. In this order, the adjudicator finds that disclosure of the withheld information would constitute an unjustified invasion of personal privacy and therefore, this information is exempt under section 38(b). She 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(2)(d), 14(2)(h), 14(2)(f), 14(3)(b), and 38(b).

OVERVIEW:

[1] This order determines whether the disclosure of personal information that was withheld from a police report would constitute an unjustified invasion of personal privacy under section 38(b) of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

[2] The Waterloo Regional Police Services Board (the police) received an access request pursuant to the *Act* for a police report relating to a specified occurrence involving the requester.

[3] Following notification of affected parties¹, the police granted partial access to the responsive record, citing section 38(b) (personal privacy) to deny access to the remaining information.

[4] The requester, now the appellant, appealed the police's decision to the Information and Privacy Commissioner of Ontario (IPC).

[5] As mediation did not resolve the appeal, the file was transferred to the adjudication stage of the appeal process, where the adjudicator may conduct an inquiry under the *Act*.

[6] The adjudicator originally assigned to the appeal sought and received representations from the police and the appellant. The adjudicator also sought representations from two affected parties, neither of whom provided representations. The appeal was subsequently transferred to me to complete the inquiry and issue a decision. After reviewing the parties' representations, I determined that I did not need to hear from the parties further before issuing this decision.

[7] For the reasons that follow, I uphold the police's decision to withhold portions of the record under section 38(b) and dismiss the appeal.

RECORDS:

[8] The record at issue consists of a four-page occurrence report.

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?
- C. Did the police properly exercise their discretion in withholding the information in the record?

DISCUSSION:

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

[9] Before I consider whether section 38(b) applies, I must first determine whether

¹ The affected parties did not consent to the disclosure of their information.

the record contains "personal information". If it does, I must determine whether the personal information belongs to the appellant, the affected parties, or both.

[10] 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] Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual". Recorded information is information recorded in any form, including paper and electronic records.⁴

[12] Information is "about" an individual when it refers to them in their personal capacity, meaning that it reveals something of a personal nature about that 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.⁵ Section 2(1) of the *Act* contains some examples of personal information.

[13] The police submit that the record relates to a police investigation and contains the personal information of both the appellant and other individuals (the affected parties), including names, dates of birth, addresses, and statements. The police submit that the disclosure of this information would certainly cause these individuals to be identified.

[14] The appellant does not specifically address whether the record contains personal information but mentions that the information he is seeking access to includes the addresses of named individuals. The appellant also states that he already knows some of the withheld information, including certain names and addresses.

[15] I have reviewed the record and find that it contains both the appellant's and the affected parties' personal information as defined by section 2(1) of the *Act*, including names, dates of birth, addresses, telephone numbers, other demographic information, and statements made to police officers. This information qualifies as personal information as defined at paragraphs (a), (d), (e), (g) and (h) of section 2(1) of the *Act*. The affected parties are identifiable from the information in the report, and this information is personal in nature.

[16] Having found that the record contains the personal information of both the appellant and the affected parties, I will consider the application of the personal privacy

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 See sections 14(1) and 38(b).

⁴ See the definition of "record" in section 2(1) of the *Act*.

⁵ Order PO-1880, upheld on judicial review in Ontario (Attorney General) v. Pascoe, [2002] O.J. No. 4300 (C.A.).

exemption at section 38(b).

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 the other individual's personal information to the 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 determining whether the disclosure would be an unjustified invasion of the other individual's personal privacy:

- If any of the section 14(1)(a) to (e) exceptions apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt from disclosure under section 38(b).
- Section 14(2) contains a non-exhaustive list of factors that may be relevant in determining whether the disclosure of personal information would be an unjustified invasion of personal privacy. Some of the factors weigh in favour of disclosure, while others weigh against disclosure.
- Section 14(3) lists circumstances where disclosure of personal information is presumed to be an unjustified invasion of personal privacy.
- Section 14(4) lists circumstances where disclosure of personal information is not an unjustified invasion of personal privacy, even if one of the section 14(3) presumptions exists.

[22] The parties do not rely on any of the section 14(1)(a) to (e) exceptions or on section 14(4) and I find that they do not apply in this appeal.

[23] To determine whether disclosure of the withheld information in the record would be an unjustified invasion of personal privacy under section 38(b), I must therefore consider and weigh the relevant factors and presumptions in sections 14(2) and (3) and

balance the interests of the parties.⁶

Representations

[24] The police submit that the information in the record was compiled as part of an investigation into a possible violation of law, engaging the presumption in section 14(3)(b). Referring to Order P-242, the police submit that although no criminal proceedings were commenced, the presumption only requires that there be an investigation into a possible violation of law.

[25] The police also submit that the factor at section 14(2)(h) (supplied in confidence) applies and weighs against disclosure of the withheld information. The police state that when victims, witnesses, and individuals under investigation provide information to them, there is an expectation that the police will maintain the confidentiality of that information. The police argue that the public's trust is essential to the operation of the police service and that without it, members of the public would be wary of providing information to the police. The police submit that the attending officer would have made explicit or non-explicit assurances to the affected parties that the information would be collected, retained, and used only for the purpose for which it was collected: furthering an investigation into a possible violation of law.

[26] The appellant does not provide substantive representations on the application of the exemption at section 38(b), including the section 14(2) factors or section 14(3) presumptions, but submits generally that he is seeking access to the entirety of the report. The appellant argues that he is attempting to initiate a legal proceeding against some of the affected parties, but that it is difficult to determine the relevant court and to serve the relevant parties without knowing the affected parties' address. This raises the possible application of section 14(2)(d) (fair determination of rights). Finally, the appellant indicates that he is already aware of some of the withheld information and also questions whether the report was filed fraudulently.

Analysis and findings

[27] For the reasons below, I find that disclosure of the information that has been withheld from the report would constitute an unjustified invasion of the affected parties' personal privacy and therefore, this information is exempt under section 38(b).

Do any of the presumptions listed in 14(3) apply?

[28] As stated above, the police claim that the section 14(3)(b) presumption against disclosure applies to the information at issue. Section 14(3)(b) states:

⁶ Order MO-2954.

(3) A disclosure of personal information is presumed to constitute an unjustified violation of personal privacy if the personal information,

(b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation[.]

[29] Even if no criminal proceedings were commenced against an 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 law.⁷

[30] I have reviewed the report and find that the withheld personal information was compiled and is identifiable as part of an investigation into a possible violation of law. The report is about the police's investigation into the reported presence of an individual at a residential property. The police's investigation into this incident gave rise to the possibility of criminal charges being laid. As the presumption only requires that there be an investigation into a possible violation of law, the fact that no criminal proceedings were initiated does not alter my finding. Furthermore, although the appellant alluded to concerns about whether the report was file fraudulently, there is no basis for me to find that the information itself was not compiled as part of a police investigation.

[31] As a result, I am satisfied that section 14(3)(b) applies and that disclosure of the personal information in the record is presumed to be an unjustified invasion of the affected parties' personal privacy.

[32] Under section 38(b), the section 14(3)(b) presumption must be weighed and balanced with any other factors in section 14(2) that apply in the circumstances.

Do any of the factors listed in section 14(2) apply?

[33] Section 14(2) lists factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.

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

[34] The police submit that section 14(2)(h) (supplied in confidence) applies to the withheld information. This factor requires an institution to consider whether "the personal information has been supplied by the individual to whom the information relates in confidence".⁸ This factor weighs against disclosure.

[35] For this factor to apply, I must be satisfied that both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that this expectation is reasonable in the circumstances. Section

⁷ Orders P-242 and MO-2235.

⁸ Section 14(2)(h) of the *Act*.

14(2)(h) requires an objective assessment of “reasonableness”.⁹

[36] In the circumstances, I find that it was reasonable for the affected parties to expect that they provided their personal information to the police in confidence. I accept the police’s argument that the affected parties, in providing information to further an investigation, had an expectation of confidentiality, and that this expectation was shared by the recipient of that information (i.e. the attending officer). My conclusion is supported by the fact that the affected parties explicitly did not consent to the disclosure of the information relating to them in the record, when asked at the request stage.

[37] As a result, I find that the factor at section 14(2)(h) applies to the withheld information and weighs against disclosure.

Section 14(2)(d): Fair determination of rights

[38] While the appellant did not explicitly cite this factor, he states that he is attempting to initiate a legal proceeding for grandparents’ rights. The appellant submits that he requires the affected parties’ address in order to determine the court where this matter should be heard, as well as to serve the relevant parties. In making these arguments, I understand the appellant to be engaging section 14(2)(d) (fair determination of rights).

[39] This section requires an institution to consider whether “the personal information is relevant to a fair determination of rights affecting the person who made the request”.¹⁰ This factor weighs in favour of disclosure if it is found to apply.

[40] 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.¹¹

⁹ Order PO-1670.

¹⁰ Section 14(2)(d) of the *Act*.

¹¹ See 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.).

[41] The appellant did not address the four-part test in his representations. However, the appellant explains the basis for his belief that he should be granted grandparents' rights. He also indicates that he has attempted to file documents with the court and that he has contacted legal aid for assistance. Based on the limited information before me, I am willing to accept that the appellant is contemplating a proceeding for grandparents' rights and that the affected parties' address may have some bearing on the determination of the right in question.

[42] While the appellant characterizes the affected parties' address as "imperative" to his legal case, his representations suggest that he has some existing knowledge about the affected parties, including their general whereabouts. The appellant has not clearly explained why the information he has is not sufficient for the purposes of preparing for the proceeding.

[43] As a result, while I am willing to accept that the factor at section 14(2)(d) is relevant and applies in favour of disclosure of the affected parties' address, I assign it reduced weight given the limited nature of the appellant's representations. I am not convinced that any other part of the withheld information is relevant to a fair determination of rights affecting the appellant. Therefore, I find that the factor at section 14(2)(d) applies only to the affected parties' address, where it carries moderate weight, and does not apply to any of the remaining information.

Other factors

[44] I have also considered whether any other factors apply to weigh in favour of or against disclosure.

[45] The section 14(2)(f) factor is intended to weigh against disclosure where the evidence shows that the personal information is highly sensitive. To be considered "highly sensitive", there must be a reasonable expectation of significant personal distress if the information is disclosed.¹²

[46] Considering the nature of the record, the nature of the information at issue, and the alleged incident that the police were called to investigate, I find that disclosure of the personal information that the affected parties provided to the police could reasonably be expected to cause the affected parties significant personal distress. Relevant to this finding is the fact that the affected parties did not consent to the disclosure of their information.

[47] In the circumstances, I find that the information at issue is highly sensitive and the factor at section 14(2)(f) applies to the withheld information and weighs against disclosure.

[48] Finally, I have considered whether any unlisted factors apply to weigh in favour of

¹² Orders PO-2518, PO-2617, MO-2262 and MO-2344.

disclosure and find that none do.

Balancing the relevant presumption and factors

[49] I have found that disclosure of the affected parties' information would result in a presumed unjustified invasion of their personal privacy under section 14(3)(b). I have also found that the section 14(2)(h) and 14(2)(f) factors weigh against the disclosure of the affected parties' personal information, while the section 14(2)(d) factor carries moderate weight in favour of disclosure of the affected parties' address only.

[50] Overall, I find that the balance weighs in favour of protecting the affected parties' personal privacy, rather than the appellant's access rights. As a result, I find that the information at issue is exempt from disclosure under section 38(b) of the *Act*.

Absurd result

[51] An institution may not be able to rely on the section 38(b) exemption where the requester originally supplied the information in the record, or is otherwise aware of the information contained in the record. In these cases, withholding the information might be absurd and inconsistent with the purpose of the exemption.¹³ This is referred to as the absurd result principle.

[52] The police submit that the absurd result principle does not apply in this case as the appellant neither provided the information, nor was he present when it was provided. The police argue that while the appellant may be aware of the information on a very general level, there are specific details within the record that are not known to him. The appellant argues that he is already aware of some of the withheld information, such as the address and date of birth of a named individual.

[53] Based on my review of the record, I find that the absurd result principle does not apply. Previous IPC orders have found that the absurd result principle may not apply if disclosure is inconsistent with the purpose of the exemption, even if the information is otherwise known to the requester.¹⁴

[54] While the record contains some information that the appellant may have knowledge of, it also includes information provided by the affected parties that the appellant likely does not know. Given my earlier finding that disclosure would be an unjustified invasion of personal privacy, I find that to apply the absurd result principle would be inconsistent with the purpose of the section 38(b) exemption.

[55] As a result, I find that it would not be absurd to withhold the personal information of the affected parties in the circumstances of this appeal.

¹³ Orders M-444 and MO-1323.

¹⁴ Orders M-757, MO-1323 and MO-1378.

Issue C: Did the police properly exercise their discretion in withholding the information in the record?

[56] 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 record are exempt from disclosure 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 an institution has failed to do so.

[57] 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.

[58] 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

[59] The police submit that they relied on a number of factors when exercising their discretion to withhold the information from the report, including but not limited to the purposes of the *Act*, the wording of the exemption and the interests it seeks to protect, the nature of the information, the relationship between the appellant and any affected persons, and whether the appellant has a sympathetic or compelling need to receive the information.

[60] The police submit that they sought to grant access to as much of the record as possible, including to the appellant's own personal information. The police argue that disclosing any further information would represent a breach of trust and bring the police service into disrepute. The appellant did not address the police's exercise of discretion in his representations.

[61] I have reviewed the considerations relied upon by the police and find that they properly exercised their discretion in withholding portions of the report under section 38(b). Based on the police's representations, it is clear that they considered the purposes of the *Act* and sought to balance the appellant's interest in accessing the entire record

¹⁵ Order MO-1573.

¹⁶ Section 43(2) of the *Act*.

with the protection of the affected parties' privacy when making their decision.

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

ORDER:

I uphold the police's decision and dismiss the appeal.

Original signed by: _____
Anda Wang
Adjudicator

_____ April 29, 2024