Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

INTERIM ORDER MO-1607-I

Appeal MA-020005-1

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NATURE OF THE APPEAL:

This appeal concerns a decision of the Perth Police Services (the Police) made pursuant to the provisions of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) had sought access to copies of police reports pertaining to her.

The Police issued a decision letter granting partial access to the records and waiving the fee for access.

The appellant appealed the Police's decision.

During the early stages of mediation, the Police issued a new decision letter in which it attached an index of records. The index refers to 14 records and provides a description of each record, whether access is being granted in full or in part, and the section of the *Act* claimed for any information being withheld. Three records were released to the appellant in their entirety (records 2, 6 and 8). The Police granted partial access to 11 records (records 1, 3, 4, 5, 7, 9, 10, 11, 12, 13 and 14). In withholding portions of the 11 records the Police relied upon sections 8(1)(c) (law enforcement investigative techniques and procedures) (records 1, 3, 4 and 13), 8(1)(d) (disclosure of the identity of a confidential source of information in respect of a law enforcement matter) (records 3, 4, 5, 7, 9, 10, 11, 12, 13 and 14), and 14 (personal privacy) (records 3, 4, 7, 14) of the *Act*.

During mediation, the appellant indicated that she was not interested in any severances that referred to a specified affected person. As a result, records 5, 11 and 13, with the exception of the final severance on record 13, which pertains to another affected person, were removed from the appeal. Also during mediation, the mediator raised the issue of the possible application of sections 38(a) and 38(b) to the records. The mediator then confirmed with the Police that it is also relying upon sections 38(a) and 38(b) of the *Act*.

At the conclusion of the mediation stage nine records, to which the Police had granted partial access, remained at issue. These records, with the exemptions claimed, are set out in the table below.

Mediation was not successful in resolving all of the issues in the appeal, so the matter was streamed to the adjudication stage of the process.

I initially sought representations from the Police and received representations in response. The Police's representations were shared in their entirety with the appellant. I then sought representations from the appellant who submitted representations in response.

RECORDS:

There are nine records at issue, as described in the following table:

Record #	Description	Exemption Claimed
1	Police report #45334-8 (August 3, 2000)	38(a)/8(1)(c)
3	Police Report #46170-7 (September 16, 2000)	38(a)/8(1)(c), (d) 38(b)/14

4	Police Report #46176-2 (September 17,2000)	38(a)/8(1)(c), (d) 38(b)/14
7	Police Report #46212-5 (September 19, 2000)	38(a)/8(1)(d) 38(b)/14
9	Police Report #46259-4 (September 22, 2000)	38(a)/8(1)(d)
10	Police Report #46261-8 (September 22, 2000)	38(a)/8(1)(d)
12	Police Report #46609-4 (October 12, 2000)	38(a)/8(1)(d)
13	Police Report #46621-8 (October 13, 2000)	38(a)/8(1)(c), (d)
14	Police Report #46625-2 (October 14, 2000)	38(a)/8(1)(d) 38(b)/14

As indicated above, the Police disclosed portions of each of these 9 records to the appellant.

CONCLUSION:

The withheld portions of records 3, 4, 9, 10, 12, 13 and 14 that are at issue are exempt. In addition, some of the withheld portions of record 7 are exempt, while others are not. However, the Police have not demonstrated that they properly exercised their discretion with respect to these records under sections 38(a) and 38(b) of the *Act* and so I will order the Police to re-exercise their discretion under sections 38(a) and 38(b). In addition, the withheld portion of record 1 is not exempt. I will order the Police to disclose record 1 in its entirety, and record 7 in part, to the appellant.

DISCUSSION:

PERSONAL INFORMATION

As I have indicated, the Police have relied on section 38(b) in conjunction with section 14(1) and/or section 38(a) in conjunction with section 8(1)(c) or (d) to deny access to the information at issue. In order to assess whether these provisions apply to these records it is, first, necessary to determine whether the records contain personal information, and to whom that personal information relates.

Under section 2(1) of the *Act*, "personal information" is defined, in part, as recorded information about an identifiable individual, including any identifying number assigned to the individual and the individual's name where 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 [paragraph (h)].

Based on my review of these records, it is clear that all nine of them contain the appellant's personal information in relation to various matters involving her and the Police.

In addition, I find that all of the information at issue in records 9, 10, 12 and 14 contains the personal information of other individuals, including the names and observations of these

individuals regarding various incidents relating to the appellant. In addition, some of the information at issue in records 3, 4 and 7 contains the personal information of other individuals. However, other information at issue in records 3, 4 and 7 does not qualify as personal information of other individuals. Also, none of the information at issue in records 1 and 13 contains the personal information of any other individual.

INVASION OF PRIVACY

Introduction

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 a number of exceptions to this general right of access.

Section 38(b) of the *Act* provides:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if the disclosure would constitute an unjustified invasion of another individual's personal privacy;

Under section 38(b) of the *Act*, where a record contains the personal information of both the requester and other individuals and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information.

Section 38(b) of the *Act* introduces a balancing principle. The institution must look at the information and weigh the requester's right of access to his or her own personal information against another individual's right to the protection of their privacy. If the institution determines that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 38(b) gives the institution the discretion to deny access to the personal information of the requester. On appeal, I must be satisfied that disclosure *would* constitute an unjustified invasion of another individual's personal privacy (see Order M-1146).

In determining whether section 38(b) applies, sections 14(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(2) provides some criteria for the head to consider in making a determination as to whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(3) lists the types of information whose disclosure is *presumed* to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

With respect to section 14(3), the Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. In other words, once section 14(3) is found to apply, the factors in section 14(2) cannot be resorted to in favour of disclosure.

As indicated above, the Police are relying upon section 38(b) in conjunction with section 14 to deny access to records 3, 4, 7 and 14. I have also found that the information at issue in records 9, 10 and 12 contains the personal information of other individuals. The Police have not raised the possible application of section 38(b)/14 to these latter three records. However, this appears to be an oversight on the part of the Police rather than a discretionary decision not to claim the exemption, and since the privacy of affected persons is at stake, I have decided to consider the application of section 38(b)/14 to these records. Accordingly, in this appeal, I will consider whether the personal information at issue in records 3, 4, 7, 9, 10, 12 and 14 is exempt under section 38(b)/14.

Since I have found that the information at issue in records 1 and 13 consists of the personal information of the appellant only, and not of other individuals, its disclosure would not result in an unjustified invasion of another individual's personal privacy, and section 38(b) cannot apply. In addition, I found above that certain withheld portions of records 3, 4 and 7 did not contain other individuals' personal information. Therefore, section 38(b) cannot apply to these portions. I will consider the application of section 38(a) in conjunction with section 8(1)(c) and/or (d) to the information at issue in records 1 and 13, and the portions of records 3, 4 and 7 to which section 38(b) does not apply (see discussion below).

Unjustified invasion of another individual's personal privacy

Introduction

As stated above, I will consider the application of section 38(b)/14 to records 3, 4, 7, 9, 10, 12 and 14.

The section 14(3)(b) presumption reads:

> 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;

Representations

The Police state in their representations:

> The record[s] contain[…] mixed personal information, that of the appellant and other individuals. [The Police] considered the factors as outlined in [section] 14(2) and [section] 14(3) of the Act. Namely, once a presumption has been established pursuant to [section] 14(3) it may only be rebutted by criteria set out in section 14(4) or by the compelling public interest addressed in section 16.
>
> . . . The personal information pertaining to the affected individuals was compiled as part of a law enforcement investigation and the record[s] consist[…] of the facts in this case. Therefore, since the personal information relates to records compiled as part of the investigation, the disclosure of the personal information is presumed to be an invasion of their personal privacy except as described in section 14(3)(b) of the Act.

The appellant provided extensive comments questioning the accuracy of the information contained within the disclosed portions of the records at issue. In response to the Police's submissions, she also provided a brief statement concerning her reasons for wanting unsevered copies of these records:

> These records are needed […] in my appeals and self defence on [two] separate legal matters presently in progress. I must have these full, complete [and] unaltered reports […] in order to provide those concerned with these reports as evidence.

Findings

Based on the submissions of the Police and my review of the records, I find that the personal information of other individuals in records 3, 4, 9, 10, 12 and 14 was compiled and is identifiable as part of an investigation into a possible violation of law, specifically certain provisions of the *Criminal Code*. Therefore, I find that the section 14(3)(b) presumption applies to this personal information, with one exception.

One of the withheld portions of record 7 consists of a statement the appellant made to the Police regarding two affected persons. Although this portion includes personal information of other individuals, it "came out of the appellant's mouth". On an application of the "absurd result" principle (see Orders PO-1708 and PO-1819), I find that this portion is not exempt under section 38(b). However, the remaining withheld portions of record 7 did not originate with the appellant and I find that section 14(3)(b) also applies for the reasons set out in the paragraph immediately above.

In my discussion above, I referred to the decision in *John Doe*. While the appellant has not specifically raised the application of any of the factors in section 14(2), she does allude to the application of section 14(2)(d), in the sense that she believes the information at issue is relevant to a fair determination of her rights. I am, however, precluded from considering any of the factors weighing for or against disclosure under section 14(2), because of the *John Doe* decision and having found that section 14(3)(b) applies.

Severance

Section 10(2) of the *Act* obliges institutions to disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt.

The key question raised by section 4(2) is one of reasonableness. Where a record contains exempt information, section 10(2) requires a head to disclose as much of the record as can reasonably be severed without disclosing the exempt information. A head will not be required to sever the record and disclose portions where to do so would reveal only "disconnected snippets", or "worthless", "meaningless" or "misleading" information. Further, severance will not be considered reasonable where an individual could ascertain the content of the withheld information from the information disclosed [Order PO-1663, *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner*) (1997), 102 O.A.C. 71 (Div. Ct.)].

Neither the Police nor the appellant have made representations regarding the reasonableness of the Police's severance exercise.

With the above principles in mind and on my review of the records, I find that the Police have acted reasonably in severing the records and providing the appellant with as much information as possible without unjustifiably invading the privacy of other individuals. The exceptions to this finding are the portions of record 7 to which the absurd result principle applies, as discussed above, as well as records 1 and 13 to which section 38(b) does not apply.

Conclusion

I find that all of the information at issue in records 9, 10, 12 and 14 is exempt under section 38(b). I also find that some of the withheld portions of records 3, 4 and 7 are exempt under section 38(b), while the other portions are not. I will consider the application of section 38(a) to these remaining portions of records 3, 4 and 7.

Finally, I find that none of the information at issue in records 1 and 13 is exempt under section 38(b).

LAW ENFORCEMENT

Introduction

In addition to section 38(b) of the *Act*, another exemption to the general right of access is found in section 38(a) of the *Act*, under which the institution has the discretion to deny an individual access to his or her own personal information in instances where the exemptions in sections 6, 7, **8**, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that information.

The only records containing information that remains at issue are records 1, 3, 4, 7 and 13.

In this case, the Police have relied on section 8(1)(c) with respect to records 1, 3, 4 and 13. The Police have claimed section 8(1)(d) for records 3, 4, 7 and 13 in exercising their discretion under section 38(a).

I note that the Police did not specifically raise the application of section 8(1)(c) to record 7 at any point prior to or during the appeal process. However, the information at issue in record 7 is identical in form and similar in content to that found in records 3, 4 and 13 and it would appear that the Police's failure to raise the application of section 8(1)(c) with respect to record 7 was an oversight. To ensure consistency in my analysis, and to avoid an absurd result, I have decided to consider the application of section 8(1)(c) to record 7.

Section 8(1)(c): Investigative techniques and procedures

Section 8(1)(c) reads:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

Previous orders of this office have established that in order to constitute an "investigative technique or procedure" it must be the case that disclosure of the technique or procedure to the public would hinder or compromise its effective utilization. The fact that a particular technique or procedure is generally known to the public would normally lead to the conclusion that such compromise would not be effected by disclosure and accordingly that the technique or procedure in question is not within the scope of section 8(1)(c). (Order P-170, see also Orders M-761 & P-963)

Neither party makes representations regarding the application of section 8(1)(c) in the circumstances of this case. The Police offer only a general statement that the records at issue in this appeal were prepared in the course of law enforcement and investigation by an institution having the function to ensure the safety and security of all persons and property in Ontario.

Record 1 is a Police incident report that pertains to a complaint filed with the Police by the appellant. The severed portion can be described generally as a statement regarding possible "incident hazards" that might bear some significance on the incident. In my view, this severed portion of record 1 does not contain any information that could be construed as an investigative technique or procedure. I find that section 8(1)(c) does not apply in the circumstances and this information should be released to the appellant.

The information at issue in records 3, 4, 7 and 13 concerns "linked incidents" and may reveal the methods used by the Police to conduct database searches for possible related information. I find that this information could reasonably be expected to reveal an investigative technique or procedure that is currently in use by the Police in conducting investigations. I also find that this

technique or procedure is not generally known to the public. In addition, I find that revealing this information could reasonably be expected to hinder or compromise the effective utilization of this technique or procedure and undermine the Police's effectiveness in conducting investigations. I, therefore, find that section 38(a)/8(1)(c) applies to the "linked incidents" portions of records 3, 4, 7 and 13.

The remaining portion of record 7 contains a statement made by the appellant about other individuals. I have found above that this information was not exempt under section 38(b)/14 due to the "absurd result" principle. Again, based on the same principle, I find that section 8(1)(c) in conjunction with section 38(a) does not apply to this record. For the same reasons, section 8(1)(d) also does not apply to this portion of record 7.

Conclusion

The "linked incidents" information in records 3, 4, 7 and 13 is exempt under section 38(a)/8(1)(c). The information at issue in record 1 and the statement from the appellant in record 7 is not exempt under section 38(a) in conjunction with section 8(1)(c) or (d).

EXERCISE OF DISCRETION

As indicated above, sections 38(a) and (b) are discretionary exemptions. Therefore, once it is determined that a record qualifies for exemption under sections 38(a) or (b), the Police must exercise their discretion in deciding whether or not to disclose it.

On appeal, the Commissioner may review the institution's exercise of discretion, to determine whether or not it has erred in doing so, but this office may not substitute its own discretion for that of the institution (see section 43(2)). An institution will be found to have erred in the exercise of discretion, for example, where it does so in bad faith, for an improper purpose, or takes into account irrelevant considerations, or fails to consider relevant considerations. In that event, this office may send the matter back to the institution for a re-exercise of discretion, based on proper considerations.

In Order PO-2022-I, Assistant Commissioner Tom Mitchinson reviewed the steps required for institutions in exercising their discretion to disclose information when a record is subject to a discretionary exemption. He stated:

> In Order MO-1277-I, I outlined in some detail the steps required by an institution in properly exercising discretion. I stated:
>
> > In Order 58, former Commissioner Sidney B. Linden found that a head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. He stated that, while the Commissioner may not have the authority to substitute his discretion for that of the head, he could and, in the appropriate circumstances, he would order the

> head to reconsider the exercise of his or her discretion if he feels it has not been done properly. Former Commissioner Linden concluded that it is the responsibility of the Commissioner's office, as the reviewing agency, to ensure that the concepts of fairness and natural justice are followed.
>
> In Order P-344, I considered the question of the proper exercise of discretion as follows:
>
> > ... In order to preserve the discretionary aspect of a decision ... the head must take into consideration factors personal to the requester, and must ensure that the decision conforms to the policies, objects and provisions of the *Act*.
> >
> > In considering whether or not to apply [certain discretionary exemptions], a head must be governed by the principles that information should be available to the public; that individuals should have access to their own personal information; and that exemptions to access should be limited and specific. Further, the head must consider the individual circumstances of the request.
>
> In considering the representations provided by the institution in Order MO-1277-I, I found that all relevant circumstances had not been considered, and I returned the matter to the institution for a proper exercise of discretion. [See also Orders MO-1287-I and MO-1318-I]
>
> Similarly in this appeal, the representations of the Ministry clearly do not constitute a proper exercise of discretion. There is no indication that the particular circumstances of the appellant's request or the contents of the record itself were taken into account by the Ministry in reaching its section 49(a) decision. The *Act* recognizes a higher right of access to records containing a requester's personal information, and it is not acceptable for an institution, such as the Ministry in this case, to simply establish the requirements of an exemption claim without taking the additional step of deciding whether or not it will disclose the record despite the fact that it qualifies for exemption.

I adopt the Assistant Commissioner's analysis regarding the obligations of institutions when exercising their discretion and find that they are equally applicable under both the municipal *Act* and provincial *Act*.

The Police have made representations that allude to their reasons for protecting personal information contained in the records at issue.

The Police state:

> It is [the Police's] opinion that the name of an individual on a police report implies sensitivity and dictates privacy, unless consent [to] disclosure is sought. The related incidents were reported to the [P]olice with the understanding of confidentiality. Therefore, enhancing the sensitivity of the record[s] when dealing with disclosure. If the public were to learn that the [P]olice released their information, they would be apprehensive to call us again. The [P]olice always guarantee the protection of this information. Only with written consent would [the Police] choose to release any type of third party information.
>
> . . . . .
>
> Section 38(a) introduces a balancing principle. [The Police] examined the appellant['s] right to access against the affected parties['] right to privacy protection. We believe that the rights of victims [and] complainants […] should not be compromised through disclosure which would constitute an unjustified invasion of an individual['s] personal privacy. […T]he practice of [the Police] with respect to the release of similar documents does not occur without consent. Accordingly one could ask whether the disclosure would affect the public's confidence regarding the operation of the [Police], it is our opinion that it would decrease confidence.

In my view, the representations of the Police clearly do not constitute a proper exercise of discretion. There is no indication that the particular circumstances of the appellant's request or the contents of the record itself were taken into account by the Police in reaching its section 38(a) and 38(b) decisions. The Police have simply stated their general view that the rights of victims and complainants should not be compromised through disclosure which would constitute an unjustified invasion of an individual's personal privacy and their policy that they will only release the personal information of other individuals with "written consent". The *Act* recognizes a higher right of access to records containing a requester's personal information, and it is not acceptable for an institution, such as the Police in this case, to simply establish the requirements of an exemption claim without taking the additional step of deciding whether or not it will disclose the record despite the fact that it qualifies for exemption.

Accordingly, I will include a provision in this interim order returning the matter to the Police for a proper exercise of discretion under sections 38(a) and 38(b) of the *Act* with respect to all of the withheld personal information in records 3, 4, 9, 10, 12, 13 and 14 and to a portion of the withheld personal information in record 7.

ORDER:

1. I uphold the Police's decision that the severed portions of records 3, 4, 9, 10, 12, 13 and 14 that are at issue in this appeal and a severed portion of record 7 qualify for exemption under the *Act*.

2. I order the Police to re-exercise their discretion under sections 38(a) and 38(b) of the *Act*, in respect of the information described in provision 1 of this order, taking into account all relevant factors and circumstances of this case and using the above principles as a guide.

3. I order the Police to provide me and the appellant with representations on their exercise of discretion no later than **February 18, 2003**.

4. The appellant may submit responding representations on the exercise of discretion issue no later than **March 4, 2003**.

5. I order the Police to disclose a portion of record 7 no later than **February 18, 2003**, in accordance with the highlighted version of this record included with the Police's copy of this order. To be clear, the Police should not disclose the highlighted portions of this record.

6. I order the Police to disclose record 1 in its entirety.

7. In order to verify compliance with provisions 5 and 6 of this order, I reserve the right to require the Police to provide me with a copy of the records they disclose to the appellant.

8. I remain seized of this appeal in order to deal with the exercise of discretion issue, and any other issues that may be outstanding.

Original signed by: January 28, 2003
Bernard Morrow
Adjudicator