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

ORDER MO-2522

Appeal MA09-75

Ottawa Police Services Board

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BACKGROUND:

The records at issue in this appeal are a letter that refers to the requester and related notes taken by a police officer employed by the Ottawa Police Services Board (the Police).

The requester filed three related requests for access to information. The requests were filed with the Police under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), the Ministry of Transportation under the *Freedom of Information and Protection of Privacy Act*, and the Ministry of Health and Long-Term Care under the *Personal Health Information Protection Act* (*PHIPA*).

Two of the requests described the letter in some detail, including information relating to the date, the alleged author, the contents the requester believes are contained in the letter, and the parties to whom it was addressed and copied. In each of the decisions issued in response to the requests, all of the institutions located a responsive record or records, and claimed that all or portions were exempt.

The requester appealed all three decisions to this office. This order involves the request made to the Police, and addresses Appeal MA09-75. Appeal files PA09-83 and PA09-197 were opened for the appeals involving the Ministry of Transportation and complaint file HA09-12 was opened to process the requester's *PHIPA* complaint involving the Ministry of Health and Long-Term Care. Order PO-2890, addressing Appeals PA09-83 and PA09-197, is being issued concurrently with this order.

NATURE OF THE APPEAL:

As noted above, this order addresses the request made to the Police under the *Act*. Amongst other records, the request specifically sought access to the letter and the police officer's notes.

The Police located responsive records and provided the appellant with partial access to them, citing sections 8(1)(l), 14(1)(f), 14(3)(b), 38(a) and (b) as the basis for withholding the remaining information. The Police contacted one affected party and attempted to obtain his consent to disclosure of his information, but the affected party did not consent.

The requester (now appellant) appealed the denial of access to this office.

During mediation, the appellant narrowed the scope of the appeal to the records mentioned above, namely a one-page letter and two pages of hand-written notes taken by a police officer.

Also during mediation, the Police clarified that the only exemption they are claiming for these pages is section 38(b) (personal privacy). Accordingly, sections 8(1)(l) and 38(a) are no longer at issue in this appeal.

No other mediation was possible and this file was moved to the adjudication stage of the appeal process. The appellant subsequently contacted this office to advise that, in her view, *PHIPA* applies to her health information in the responsive records, and that the Police have no right to

withhold this information from her. As a result, the possible application of *PHIPA* was made an issue in this appeal.

The adjudicator initially assigned to this appeal began the inquiry by issuing a Notice of Inquiry inviting the Police and the affected party who had been notified by the Police, as noted above, to submit representations. Both the Police and the affected party submitted representations.

The adjudicator then invited the appellant to submit representations by sending a Notice of Inquiry setting out the facts and issues in this appeal and enclosing a complete copy of the representations of the Police. As the affected party's representations met this office's confidentiality criteria, they were not shared with the appellant. However, in the notice, the adjudicator explained that the affected party's argument was that disclosure of the records would be an unjustified invasion of privacy and security. The appellant submitted representations in response.

Subsequently, this file was assigned to me to complete the inquiry and I decided that the appellant's representations raised issues to which the Police should be given an opportunity to reply. Consequently, I issued a Reply Notice of Inquiry inviting the Police to submit reply representations, enclosing a complete copy of the appellant's representations. The reply notice invited the Police to submit representations on a number of issues including the possible application of section 38(a) in conjunction with section 13 (danger to safety or health). I received reply representations from the Police, but the Police did not provide representations concerning this additional exemption.

During the inquiry, I also determined that the police officer's notes contained information relating to a second affected party (the second affected party) so I notified the second affected party and gave him an opportunity to submit representations on the issues related to the disclosure of his information. In response, the second affected party provided his consent to the disclosure of the information relating to him in the police officer's notes.

The appellant did not provide representations concerning the application of *PHIPA* and it is clear that it does not provide her with a right of access in the circumstances of this appeal. Section 52(1) of *PHIPA* provides a right of access by patients to records in the custody or under the control of a "health information custodian," a term which is defined in section 3 of that statute. The Police are not a health information custodian, and for that reason, *PHIPA* does not apply in this case. The appellant's request and appeal are governed by the *Act*.

Similarly, in her letter of appeal, the appellant had referred to the decision of the Supreme Court of Canada in *McInerney v. MacDonald*, [1992] 2 S.C.R. 138. *McInerney v. MacDonald* affirms the right of patients to examine and copy information in medical files held by their doctors in the absence of a legislative mechanism for such access. In my view, this decision does not extend to records such as those at issue here, which do not exist in the context of a doctor-patient relationship. In addition, patient access to records in the hands of Ontario physicians is now provided for by *PHIPA*.

Both the appellant and the affected party have expressed their desire that their representations not be shared with each other for reasons of confidentiality, and in the unique circumstances of this appeal, I will not make detailed reference to their representations in this order.

I now turn to consider whether the records at issue are exempt from disclosure under the *Act*.

DISCUSSION:

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1). The definition states, in part:

> "personal information" means recorded information about an identifiable individual, including,
>
> (e) the personal opinions or views of the individual except where they relate to another individual,
>
> (g) the views or opinions of another individual about the individual.…

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

The Police submit that the records at issue contain the personal information of the appellant and the affected party. The Police submit further that some of the information is the mixed personal information of the appellant and the affected party.

The appellant's representations do not address this issue except to argue that information pertaining to the affected party is a matter of public record, and therefore does not qualify as personal information.

I find that the records contain the appellant's personal information including the affected party's views or opinions about the appellant, her age, her medical history, and other information about her. Under subsection (e) and (g) of the definition, I note that the affected party's opinions or views about the appellant are not his personal information.

The records also contain the personal information of the affected party, consisting of his name, his home address and other personal contact details including his e-mail address, as well as other information about him.

I have concluded that the personal information in the records is primarily the personal information of the appellant only, and is severable from the remaining information. Disclosure

to the appellant of information that is solely her personal information could not possibly be an unjustified invasion of personal privacy and I find that it is not exempt under section 38(b). Only the personal information of other individuals may be exempt under this section, and I will review its possible application below.

The letter contains the affected person's professional title. Section 2(2.1) refers to that type of information. It states:

> Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

I find that this section applies to the affected person's title, which is therefore not personal information and not exempt under section 38(b).

I also find that the police officer's notes include a small amount of personal information of the second affected party, the police officer and one other individual.

I now turn to consider whether the personal information of individuals other than the appellant in the records is exempt under section 38(b).

PERSONAL PRIVACY

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 exemptions from this right.

Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. As both records contain the personal information of the appellant, I must consider whether the records are exempt under this section.

If the information falls within the scope of section 38(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

Sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold under section 38(b) is met. The circumstances of this appeal do not raise any issues about the application of sections 14(1) or 14(4).

Section 14(1)(a)

If any of subsections 14(1)(a) through (e) applies, disclosure is not an unjustified invasion of personal privacy. As noted, the second affected person provided his written consent to the disclosure of the information about him in the police officer's notes. Section 14(1)(a) permits

disclosure of personal information upon the prior written request or consent of the individual, and on this basis, I find that disclosure of the undisclosed information in the record about the second affected party is not an unjustified invasion of personal privacy. I also note that much of this information is of a professional nature and would not, in any event, qualify as the second affected party's personal information. For these reasons, I find that the information about the second affected party in the record is not exempt under section 38(b).

Section 14(3)(b)

If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 38(b). Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the "public interest override" at section 16 applies. [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div. Ct.)].

The Police rely on the presumption in section 14(3)(b), which 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;

Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law [Order P-242]. However, it does not apply if the records were created after the completion of an investigation into a possible violation of law [Orders M-734, M-841 and M-1086].

The Police submit that the personal information in the records was collected for the sole purpose of interviewing parties, ascertaining whether an offence had occurred and laying charges, if warranted. They describe what they view as the unique status of law enforcement institutions and the impact of that on access rights under the *Act*:

> Given the unique status of law enforcement institutions within the Act, and the unique status to authorize the collection of personal information, we generally view the spirit and content of the Act as placing a greater responsibility in safeguarding the privacy interests of individuals where personal information is collected.

In support of the claim that section 14(3)(b) applies, the Police state that the personal information in the records was compiled by members of the Police during an investigation into a complaint and was used to determine whether an offence had been committed.

The appellant submits that the presumption could not apply to her own personal information. I have found, above, that the personal information in the records is primarily that of the appellant and that this information is severable from the personal information of other individuals, and on that basis, I agree with the appellant that her personal information is not subject to section 14(3)(b), and because it is her personal information, it cannot be exempt under section 38(b).

As part of her argument concerning section 14(3)(b), the appellant also refers to section 51(1) of the *Act*. This section states:

> This Act does not impose any limitation on the information otherwise available by law to a party to litigation.

In Order MO-1109, former Assistant Commissioner Tom Mitchinson interprets section 51 as simply meaning that the rights of the parties to information available as part of the litigation process are not affected by exemptions from disclosure that could apply in an access request for the same information under the *Act*. Citing Order P-609, he expressly stated that "… [s]ection 51(1) does not confer a right of access to information under the *Act* (Order M-852), nor does it operate as an exemption from disclosure under the *Act*." I agree, and find that section 51(1) does not affect the operation of section 14(3)(b). Section 51(1) simply clarifies that information which is available in litigation remains so despite the passage of the *Act*, but this availability is in the context of the litigation itself, and not by means of an access request under the *Act*.

In the circumstances of this appeal, based on information provided by the Police, some of which is confidential, I am satisfied that the records were compiled and are identifiable as part of an investigation into a possible violation of law. The requirements for the application of section 14(3)(b) are, therefore, satisfied in relation to the personal information of individuals other than the appellant in the records. Accordingly, disclosure of this information is presumed to be an unjustified invasion of personal privacy.

Because of the application of section 14(3)(b), it is not necessary to review the factors and circumstances in section 14(2), to which the bulk of the affected party's submissions were directed. I have, however, read and considered the affected party's position in the broader context of deciding this appeal.
Based on the application of section 14(3)(b), the personal information of individuals other than the appellant in the records would be exempt from disclosure under section 38(b), subject to the application of the absurd result principle, discussed below. This includes information about the affected party. As already discussed, personal information pertaining only to the appellant is not exempt under section 38(b).

Absurd Result

Information may be found not to be exempt under section 38(b) where it would be absurd and inconsistent with the purpose of the exemption to find otherwise [Orders M-444 and MO-1323].

However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge [Orders M-757, MO-1323 and MO-1378].

In this case, the information I have found to qualify for exemption under section 38(b) consists of the affected party's name and contact information, other information about him, and a small amount of personal information pertaining to two other individuals.

The absurd result principle must be approached in a sensitive manner having regard to the fact that the Police are dependent on individuals who come forward with information in the law enforcement context who have an expectation of confidentiality. However, section 38(b) reflects these competing interests because it applies where records contain the personal information of the requester. In Order MO-1323, Adjudicator Laurel Cropley considered the rationale for the application of the absurd result principle:

> As noted above, one of the primary purposes of the Act is to allow individuals to have access to records containing their own personal information unless there is a compelling reason for non-disclosure (section 1(b)). Section 1(b) also establishes a competing purpose which is to protect the privacy of individuals with respect to personal information about themselves. Section 38(b) was introduced into the Act in recognition of these competing interests.
>
> …
>
> In my view, it is the "higher" right of an individual to obtain his or her own personal information that underlies the reasoning in Order M-444 which related to information actually supplied by the requester. Subsequent orders have expanded on the circumstances in which an absurdity may be found, for example, in a case where a requester was present while a statement was given by another individual to the Police (Order P-1414) or where information on a record would **clearly** be known to the individual, such as where the requester already had a copy of the record (Order PO-1679) or where the requester was an intended recipient of the record (PO-1708).

The Police submit that the absurd result principle does not apply.
Based on the unique circumstances of this appeal, including the confidential representations of the appellant, the contents of one of the records at issue, and information from one of the related matters before this office, which was passed on to the Police when I invited their reply representations, I conclude that there is persuasive evidence to support the application of the absurd result principle to the entire contents of the letter, except for the affected party's e-mail address. It is also clear that the affected party is aware of the basis for finding that this principle applies.

In addition, I find that this result is not inconsistent with the purpose of the section 38(b) exemption. In the unique circumstances of this case, denying access to the letter will not protect

the privacy of any individual. I am not able to elaborate further without disclosing confidential information.

I now turn to the application of the absurd result principle to the undisclosed personal information of individuals other than the appellant that appears in the police officer's notes. With one exception, the evidence before me does not support the application of this principle to that information.

The exception is a small severance in the officer's notes of a conversation he had with the appellant, which were otherwise disclosed. This information is clearly subject to the absurd result principle. In these circumstances, subject to the exception I have noted, I find that the absurd result principle does not apply to information relating to the affected party and other individuals in the police officer's notes, and the exemption in section 38(b) continues to apply to that information.

In applying the absurd result principle in this appeal, I am mindful of the fact that the Police rely on confidential information, the provision of which is protected in normal circumstances by section 14(3)(b), and also by section 8(1)(d) (which the Police did not claim here). In my view, because this finding is rooted in the unusual fact situation before me, it will not compromise the usual ability of the Police to receive confidential information and, where appropriate, to maintain its confidentiality.

To summarize: in the letter, I find that the affected party's e-mail address is exempt under section 38(b) but not the remainder of the letter; in the police officer's notes, the information of individuals other than the appellant, except the severance from the officer's notes of his conversation with the appellant, is exempt under section 38(b).

DANGER TO HEALTH AND SAFETY

Section 36(1) gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right.

Section 38(a) 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, 10, 11, 12, **13** or 15 would apply to the disclosure of that personal information. [Emphasis added.]

Section 13 states:

> A head may refuse to disclose a record whose disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

For this exemption to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the institution must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated [*Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.)].

This exemption was not claimed by the Police in this appeal, but in the circumstances, I invited them to provide representations on this issue at the reply stage. The Police did not provide representations on this issue.

Having carefully considered the affected party's representations, I find that the evidence does not support a finding that there is a reasonable basis for believing that a serious threat to the safety or health of the affected party will result from disclosure. The affected party's representations on this point amount to no more than unsupported assertions and do not provide a sufficient basis for applying this exemption. In the circumstances of this appeal, and taking into account the evidence that supports the application of the absurd result principle, there is no reasonable basis for believing that disclosure of the information that I have found not to be exempt under section 38(b) will result in a serious threat to the safety or health of any individual. Accordingly, I find that the exemption in section 38(a) in conjunction with section 13 does not apply.

EXERCISE OF DISCRETION

The section 38(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the 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 and/or it fails to take into account relevant considerations.

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

I need only consider the Police's exercise of discretion in relation to the information that I have found to be exempt under section 38(b), which is the e-mail address of the affected party in the letter and some personal information of the affected party and other individuals in the notes.

I have considered the circumstances surrounding this appeal and the parties' representations, and I am satisfied that the Police have not erred in the exercise of their discretion under section 38(b) in connection with the small amount of information that I have found to be exempt.

ORDER:

1. I order the Police to disclose the letter to the appellant, except the affected party's e-mail address.

2. I uphold the decision of the Police to withhold some of the undisclosed parts of the police officer's notes, and order them to disclose the information I have found not to be exempt. For the sake of clarity, I have highlighted the exempt portions of this record on the copy of the notes that is enclosed with this order. The highlighted information is *not* to be disclosed.

3. I order the Police to disclose the information referred to in paragraphs 1 and 2 of this order by sending a copy to the appellant no later than **June 23, 2010** and not earlier than **June 18, 2010.**

4. In order to verify compliance with provisions 1 and 2 of this order, I reserve the right to require the Police to provide me with a copy of the records as disclosed to the appellant.

Original signed by: May 19, 2010
John Higgins
Senior Adjudicator